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Torts -- Statutes -- Tort Liability for Breach of Automobile Lighting Legislation

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TORTS—STATUTES—TORT LIABILITY FOR BREACH OF AUTOMOBILE LIGHTING LEGISLATION.—Throughout Canada complex and detailed legislation regulates the flow of automobile traffic, the licensing of vehicles, and drivers, the type of equipment required and other such matters. As one might expect, nearly three million summary convictions are recorded each year for violations of these statutes and almost one million of them arise out of moving offences. Fortunately, all of these violations do not result in collision, nor do all of the collisions produce lawsuits; nevertheless, a substantial number of automobile accident actions are concerned with situations where there has been a breach of some criminal or quasi-criminal legislation. In these circumstances tort courts are faced with difficult doctrinal problems in their treatment of the fact of a criminal violation.\(^2\)

The judiciary encountered no apparent difficulty in holding that evidence of a prior criminal conviction for the infraction of a statute was inadmissible in a later civil case;\(^2\) however, the courts did not go so far as to prohibit the introduction of all evidence of a breach of one of these statutes. Both the circumstances under

\(^1\) The Canada Year Book, 1963-64, p. 396, indicates that in 1961, there were 2,779,000 summary convictions, 1,822,405 of which were parking violations.


which this evidence will be admitted and the procedural effect that it will be accorded have been left unresolved. Canadian judges seem to have held that they would rely on criminal legislation if necessary, but that they would not necessarily do so. In other words, manifesting their characteristic ambivalence, our courts will sometimes consider evidence of a breach of criminal legislation and sometimes they will not.  

In deciding what, if any, effect to give criminal statutes, Canadian courts universally proclaim that they are only heeding the intention of the enacting legislature, despite the fact that numerous authors and some judges have exposed the fallacy of this hypocritical quest. Nevertheless, because of the inexplicable reluctance of Canadian judges to discuss policy issues candidly, the true reasons for utilizing penal legislation are normally withheld from our view.

Despite this cover-up, under careful scrutiny one may dimly perceive that the civil courts in these cases are, in reality, advancing the policies enshrined in the criminal law; through the imposition of tort liability, they are encouraging stricter compliance with penal legislation and affording better protection to society.

On a few rare occasions judicial statements have disclosed this, as when Justice Idington declared that to permit a breach of statute to go unrecompensed makes a “hollow mockery” of the legislation and when Justice Rand protested that if an infringement did “not call down accountability, the regulation might almost as well be abolished”. It may be that improved enforcement of automobile legislation may be encouraged by dangling the carrot of a tort judgment before would-be informers. The profit motive may operate here as it does elsewhere in society to spur activity that might otherwise not have been undertaken. Justice Adamson envisioned a kind of partnership between penal sanctions and tort

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4 See Alexander, loc. cit., footnote 2.
11 Fricke, loc. cit., footnote 2.
liability in the enforcement of automobile regulations when he stated that: \(^{12}\) "Unless judges and juries in both criminal and civil cases lay more stress on the duty of the motorists and the danger to themselves and others by the breach of those regulations, and strictly enforce their observance in the interests of public safety, serious accidents and loss of life will continue." Thus, tort courts are, to some extent at least, reasoning by analogy to penal legislation and are applying the "indirect pressure of civil liability . . . to compel conformance to the legislative rule". \(^{13}\)

Another policy rationale favouring the use of criminal statutes in tort cases is that it simplifies the administration \(^{14}\) of tort law by particularizing the "featureless generality" of jury verdicts. \(^{15}\) In their fearsome task of crystallizing the vague reasonable care standard, the judiciary welcomes the aid of detailed statutory commands and relies upon them to determine what is reasonable in the circumstances. \(^{16}\) Indeed, some have suggested that this was the main reason for this course of conduct \(^{17}\) and others have admonished courts to rely upon legislation only in this way, \(^{18}\) but the courts have refused to be thus confined, indicating that other policy factors have entered. Not only should a legislative standard be more precise, but it should incorporate superior expertise \(^{19}\) since legislatures have at their disposal more extensive resources than do judges and juries. A statutory determination should be better informed than a spur-of-the-moment jury verdict.

Moreover, reliance upon legislative provisions assists the judiciary in controlling the jury, \(^{20}\) a goal that appears to be gaining favour these days. \(^{21}\) By instructing the jury to find for the plaintiff if there has been a breach of statute, the judge is able to guide the jury more effectively than if his charge merely tells the jury to decide if there has been unreasonable conduct. Even though the judiciary may be abdicating some of its own authority in this process, the legislative branch of government, the democratic one,

\(^{14}\) Foust, loc. cit., footnote 2.
\(^{16}\) Thayer, loc. cit., footnote 2.
\(^{17}\) Foust, loc. cit., ibid.
\(^{18}\) Thayer, Gregory and Williams, loc. cit., ibid. See also Fleming, op. cit., footnote 8, p. 130.
\(^{19}\) Fleming, op. cit., ibid., p. 135; Morris, loc. cit., footnote 2, at p. 48.
\(^{20}\) Fleming, ibid., p. 135.
\(^{21}\) The use of the jury has been almost eclipsed recently in England, see Denning M. R. in Ward v. James, [1965] 1 All E.R. 563 (C.A.), Full Court Special Hearing; See also Sims v. William Howard, [1964] 2 W.L.R. 794 (C.A.), noted in (1965), 78 Harv. L. Rev. 676.
expands its influence accordingly, which is desirable. Some theorists have contended that this device may be used to thwart the improper refusal of juries to invoke the defence of contributory negligence to deprive a negligent plaintiff of tort recovery in accordance with the law. In Canada, however, this result would not follow since comparative negligence legislation permits a reduction, rather than a deprivation, of damages where a plaintiff contributes to his own injury. In point of fact, the incidence of recovery is probably enlarged in this way since most Canadian courts do not permit a set-off in these cases.

Lastly, the use of penal legislation moves tort law closer to strict liability by supplying an additional arrow for the plaintiff's bow. Not only can he plead common law negligence, but he may contend that a breach of statute, which may be negligent or not, caused his injury. This will normally not weaken the plaintiff's case since, if he fails to prove the violation, he can always revert to an ordinary negligence theory. In addition, the adoption of penal standards in negligence cases may encourage prompter settlement of claims. Uncertainty surrounding law or fact impedes negotiation and generates litigation; the diminution of this uncertainty with more precise standards facilitates the settlement process, which normally redounds to the claimants' favour.

Not all the policy arguments point toward reliance upon penal legislation in civil cases; some militate against their use. It is contended that courts ought not to enter where legislators have failed to tread. If the legislature did not impose civil liability expressly, as they could and have done, it is improper for a court to do so. It may be that some criminal regulations are hurriedly passed, ill-considered, badly-outdated, extremely harsh, or politically motivated. This argument is particularly apt when one considers the dozens of inferior legislative bodies disgorging regulations, orders-in-council, ordinances, by-laws, rulings and the like by the thousands. The purity of the common law ought to be protected from

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22 Malone, loc. cit., footnote 6, at p. 783.
21 The Negligence Act, R.S.O., 1960, c. 261, s. 4.
25 See, for example, s. 105(1) of the Highway Traffic Act, R.S.O., 1960, c. 172, as am.
26 Thayer, loc. cit., footnote 2, at p. 290.
27 Morris, loc. cit., footnote 2, at p. 23.
pollution by these frequently uncommon enactments. This argument, however, assumes that once a court relies upon a penal provision it will be compelled to follow every relevant criminal statute in every tort case. This just is not so. The court is always free to choose when it will accept a statutory standard and when it will refuse to do so.\textsuperscript{30} Another policy reason fettering judicial acceptance of legislative provisions is the desire to restrain the undue spread of tort liability.\textsuperscript{31} Implicit in this attitude is the respect for the idea of no liability without fault. Unless a defendant is to blame for an accident, he should not have to respond in damages, whether or not his conduct violated a statute. These are the contrary policy arguments.

All of these policy objectives must be balanced by the courts in deciding whether they will rely on a statute. Yet, once they do opt for the legislation, the problem does not evaporate, there still remains for determination the procedural effect to be accorded the fact of the breach, which may be the most difficult task of all. Judicial discussion of this issue has also been marked by indecision and lack of candour. Sometimes it is said that there is an action for breach of the statute,\textsuperscript{32} or the violation is negligence \textit{per se},\textsuperscript{33} or \textit{prima facie} evidence of negligence,\textsuperscript{34} or just some evidence of negligence\textsuperscript{35} or it may even raise a presumption of negligence.\textsuperscript{36} There has been no consistency in the treatment of these statutes in Canada; one day the infraction of a certain statute may be treated as negligence \textit{per se} and another day it may be considered only as \textit{prima facie} evidence of negligence.\textsuperscript{37} Nor has there been any explanation of the reasons for this disparate treatment. The English courts tend to take an “all-or-nothing-at-all” approach to statutes; either they declare that the legislature intended to confer a cause of action for a breach of statute\textsuperscript{38} or they hold that, since only a public duty was created, there was no intention to impose civil

\textsuperscript{30} Malone, \textit{loc. cit.}, footnote 6, at p. 785.
\textsuperscript{31} Fleming, \textit{op. cit.}, footnote 8, p. 135, and p. 308; See also \textit{Maharsky v. C.P.R.} (1904), 15 Man. R. 53, at p. 80 (C.A.); \textit{Maitland v. Raisbeck}, [1944] 1 K.B. 689, 2 All E.R. 272 (C.A.), where the court expressed a reluctance to make the driver an insurer of defects in a motor vehicle.
\textsuperscript{34} \textit{MacInnis v. Bolduc} (1960), 45 M.P.R. 21, 24 D.L.R. 661 (N.S. S. C.).
\textsuperscript{38} \textit{Lochgelly Iron & Coal Co. Ltd. v. McMullan}, \textit{supra}, footnote 33.
responsibility. In the former case there is no room for excused violations, while in the latter, evidence of excuse becomes superfluous.

The American courts have developed a rich array of varying weights that can be given to statutes. The most common treatment employed by American courts is that evidence of a violation amounts to negligence per se, although some courts hold that it gives rise to a presumption of negligence, prima facie evidence of negligence, or even some evidence of negligence. In most cases they permit violations to be excused in proper circumstances.

Canadian courts appear to oscillate between the English and American positions without even recognizing this fact. Part of the problem is that Canadian judges do not admit that it is the court, not the legislature, that decides when a penal statute will be used in a civil case. Consequently, they do not realize that some applicable statutes may be relied upon and others rejected for proper reasons. Furthermore, once a court invokes a statute, it may give it great weight or only slight weight for proper reasons. And evidence of excuse may be admitted or not for proper reasons. This failure to use discrimination and candour has produced an almost impenetrable fog in the Canadian cases.

Because of the confusion that abounds in the cases, the recent decision of the Supreme Court of Canada in Sterling Trusts Corporation v. Postma and Little merits consideration. The plaintiff Brown was severely injured and his wife killed when their vehicle, which was proceeding reasonably on its own side of the highway, was struck head-on by that of Postma, one of the defendants. Postma alleged that he had been forced to pull his vehicle over to his left in order to avoid a collision with the vehicle of the other defendants, the Littles, which was proceeding in the same direction as he was. Postma claimed that the Littles' vehicle, inter alia, had no rear lamps lit in contravention of the Ontario Highway Traffic Act. The trial judge held both defendants liable, Postma for two-thirds of the damages and the Littles for one-third. The Littles appealed successfully to the Court of Appeal of Ontario but the judgment against Postma remained undisturbed. The Brown's appeal against the Littles to the Supreme Court of Canada was allowed in a three-two decision and the case was sent back for a new trial to determine whether the Littles' rear lights were illum-

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40 See Prosser, op. cit., footnote 8, p. 202 et seq.
41 Ibid., at p. 198 et seq.
inated, and if not, whether this was a cause of the accident and for a re-assessment of the damages.

Justice Cartwright, who was among the majority and with whom Justice Hall agreed, declared that once it was proved that the tail-light was unlit and that this was an "effective cause" of the accident the defendants were "prima facie liable" for the damages suffered. He reasoned that the purpose of the legislation was "the protection of other users of the highway, particularly the drivers of overtaking vehicles. Its primary purpose is to prevent the occurrence of such a disaster as that out of which this case arises". His Lordship avoided the theoretical clash over whether this was a species of negligence action or whether it was a separate cause of action on a statute.

Justice Cartwright also felt that it was unnecessary to decide whether the duty was an absolute one and under what circumstances, if any, a defendant could absolve himself of liability when he has violated a statute. He did, however, give notice that, in his view, it would be insufficient for the defendant to show that he did not intend nor know of the breach because, if this would suffice to exculpate him, "the protection which it is the purpose of the statute to afford would in most cases prove illusory." He avoided the theoretical clash over whether this was a species of negligence action or whether it was a separate cause of action on a statute.

Justice Cartwright then purported to resolve the apparent conflict in two cases decided by the Ontario Court of Appeal in the same year. In Falsetto v. Brown the Court of Appeal refused to rely on evidence of a statutory violation while in Irvine v. Metropolitan Transport Co., Ltd it did invoke the legislative breach in imposing liability. Justice Cartwright said that Irvine "is to be preferred" but he did not go so far as to reverse the Falsetto case, preferring to distinguish it on the basis of causation. The strange thing is, however, that Irvine did not hold that a statutory violation amounted to prima facie negligence, but rather held that the statute created a cause of action.

Justice Spence, who was also among the majority, echoed the word formula used by Justice Cartwright when he stated that "if the tail-light were unlit and such unlit condition was an effective

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43 Ibid., at p. 330 (S.C.R.).
44 Ibid., at p. 329 (S.C.R.).
45 Ibid., at p. 329 (S.C.R.), he discussed the Upson case.
46 Ibid., at p. 331 (S.C.R.).
49 He accepted the treatment of the Falsetto case made by Masten J.A. in Irvine where he said that in Falsetto the breach did not cause the accident.
50 See Masten J.A. in Irvine, supra, footnote 48. There was also a holding of common law negligence in the case.
cause of the collision, there is *prima facie* liability upon the defendants . . .". However, there was less accord over excused violations; Justice Spence declared that he was "not prepared to say that that liability is an absolute one and that the said defendants would be unable to discharge it by showing that such condition occurred without negligence for which they are in law responsible . . .".

Justice Ritchie and Justice Judson, dissenting, felt that since the plaintiff failed to discharge the onus of proof resting upon him with regard to the evidence of improper lighting, his action must fail for lack of proof. Although they said that it was unnecessary to decide the other points, if it were necessary, they would accept the analysis of Justice Cartwright.

The Supreme Court of Canada has supplied the nation with a formula to use in these cases, but it has not succeeded in solving the problem for all time. Although *Falsetto* may not be dead, it is certainly in its last coma. In future, breach of vehicular lighting legislation will undoubtedly be used in negligence cases to offer *prima facie* evidence of negligence across Canada, but the meaning of this phrase is shadowy. It is clear that it is not an absolute duty; what remains unclear is the nature of the excuses the court will accept to relieve the violator from liability and upon whom the onus of proof will rest. Justice Cartwright put very little flesh on the bones when he suggested that mere evidence of lack of intent or knowledge would not exculpate the defendant, and Justice Spence did not help much by withholding comment on whether evidence of no negligence would spare the defendant. Implicit in both their reasons, however, was the notion that it was the violator of the legislation that had the burden of convincing the court that he had a valid excuse. The only policy discussion in the case related to affording better protection for society by more diligent enforcement of highway legislation; the other relevant policy issues were ignored by the court, yet they need airing. Lastly, there was no hint of whether the Supreme Court would follow a consistent line with all other statutes, or any other legislation, or whether this decision would be limited to lighting regulations.

One of the major difficulties with these cases may very well be that the courts seem to feel compelled to treat breaches of all legislation in a consistent fashion. This need not be the case. It might be preferable on some occasions to ignore a breach of statute, on

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52 Ibid., at p. 348 (S.C.R.).
53 Ibid., at p. 341 (S.C.R.).
other occasions to impose liability strictly and on still other occasions to permit certain excuses to absolve the defendant. However, it is not the varying intentions of the legislatures that dictate how the statute is to be treated; rather it is the courts’ assessment of the importance of the policies embodied in these statutes that produces these different results. Nowhere in the Supreme Court decision, however, is this fact recognized.

An attempt will now be made to analyze the Canadian cases that involved the breach of lighting regulations to see if any pattern emerges. An attempt will be made to portray the present posture of the law, how it arrived there, and to prophesy the road it will travel in the future.

Our task would be easier if there were express terms in legislation dealing with civil liability, but unfortunately these occasions are extremely rare. One earlier version of the Ontario Highway Traffic Act was interpreted in such a way that any breach thereof imposed civil liability upon the violator. Since the statute read that an owner “shall be responsible for any breach of this act”, the Supreme Court of Canada in *Hall v. Guelph Toronto Express* felt justified in so holding. The legislation was amended soon thereafter to state that the owner would “incur the penalties” provided, which event was used by the Ontario Court of Appeal to aid it in distinguishing the *Hall* decision, although some other provinces continued to apply it. In the vast majority of penal statutes there appear no express provisions on civil liability. When tort lawyers search the enactments for clues, they rarely discover any. In the light of this sphinx-like response, one might have thought that the courts would ignore these statutes in civil cases, since one might fairly say that the legislators evinced no intention that their product be used by tort courts. Nevertheless, judges have relied on penal legislation in the past and will continue to do so in the future in certain limited circumstances.

First, in order for a tort court to rely upon a criminal statute in imposing civil liability, there must be conduct that violates the

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57 Ibid.
58 *Falsetto v. Brown*, supra, footnote 47, relying on 19 Geo. V, c. 69, s. 9, assented to March 28th, 1929.
provision in question. Where there is no violation, the statute will not normally be used in affixing civil liability, but liability may still be imposed for negligence at common law. Section 33 of the Ontario Highway Traffic Act stipulates that "at any time from one-half hour after sunset to one-half hour before sunrise, and any other time when, due to insufficient light or unfavourable atmospheric conditions . . . every motor vehicle shall carry three lighted lamps in a conspicuous position, one on each side of the front of the vehicle which shall display a white or amber light only, and one on the rear of the vehicle which shall display a red light only . . . and any lamp so used shall be clearly visible at a distance of at least 500 feet from the front or rear, as the case may be". The front lamps must produce "a driving light sufficient to render clearly discernible . . . any person or vehicle on the highway within a distance of 350 feet". Certain regulations are set out with regard to clearance lamps on wide vehicles and side marker lamps for long vehicles. Small fines of five dollars and up are stipulated for any infraction. This sort of legislation is mirrored across Canada and the United States.

The person who is alleging that there has been a breach of a lighting requirement bears the onus of proving this fact on the balance of probabilities since there is a presumption that people obey the law. If the evidence discloses that the lights were constructed in accordance with the statute, were actually lit and were visible from the required distance, the tort court will dismiss the claim, unless, of course, there is some other evidence of

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60 McKee v. Malenfant, [1954] S.C.R. 651 (Vehicle not "parked" on highway as required by statute); Mamezas v. Bruns (1964), 43 D.L.R. (2d) 707 (S.C.C.), (Act applied only to moving vehicles and here vehicle stationery); McLeod v. Dockendorf (1955), 36 M.P.R. 284 (P.E.I.), (Lights were in fact lit).

61 On rare occasions legislation is relied upon as evidence of negligence although there has been no breach because of technical grounds, see Littley & Brooks v. C.N.R., [1930] S.C.R. 416, 4 D.L.R. 1.


63 Supra, footnote 28, as amended by S.O., 1965, c. 46, requiring two rear lights on new vehicles instead of only one.

64 Ibid., s. 33(3).

65 Ibid., s. 33(6).

66 Ibid., s. 33(8) and (11).

67 See, for example, the Motor-vehicle Act, B.S.C., 1960, c. 253 and regulations pursuant thereto (4.01-4.22) and California Vehicle Code (1959), § 24400 et seq., § 24600 et seq.


69 Kuline v. Ottawa Electric Railway, ibid., at p. 688.


72 Gillies v. Lye (1926), 58 O.L.R. 560.
negligence. Where the statute was directed at moving vehicles, a stationary vehicle was not in violation thereof\(^{74}\) and, similarly, legislation aimed at vehicles parked on a highway was not breached when someone stopped momentarily to pick up something.\(^{75}\) On one occasion there was held to be no legislative infraction because the statute did not govern the highway in question.\(^{76}\) Moreover, no tort court would hold culpable any one who failed to have his headlights burning on a clear, sunny afternoon, or prior to sunset or after sunrise, unless, of course, the weather was foul. Although the courts have construed these statutes rather broadly,\(^{77}\) there are limits beyond which they cannot fairly go. In one case a court did deny a motorcyclist recovery for not having on his headlight even though the statute did not apply to motorcycles, but it apparently believed that this may have been a *casus omisus*.\(^{78}\)

Second, the conduct violating the lighting regulation must be the *cause* of the accident being complained of.\(^{79}\) If the proscribed conduct did not contribute to the accident or if the accident would have transpired even if the statute had been obeyed, the court will not utilize the legislative standard. The onus of proving the causal connection between the offender's conduct and the injury lies upon the plaintiff as well.\(^{80}\) The cases have not remained without conflict over the type of proof of causation necessary. Most judges believe that the mere proof of an infraction will not suffice; something more than that is required.\(^{81}\) Evidence is needed that "but for" the conduct of the defendant this accident would not have occurred.\(^{82}\) Other judges\(^{83}\) are more prepared to invoke "common experience" and to assume that, if there had been no violation, the light would in all probability have been seen and the accident avoided.\(^{84}\)

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\(^{74}\) *Mamezas v. Bruens*, supra, footnote 60.

\(^{75}\) *McKee v. Maleafort*, supra, footnote 60.


\(^{82}\) *Roach J.A. in Ritchie v. Ptaff*, supra, footnote 32; See also *Henley v. Cameron* (1948), 118 L.J.R. 989 (C.A.).

Causation doctrine has been relied upon in a few cases to relieve a violator of legislation from civil responsibility. Where the person alleging that another person breached a statute has failed to keep a proper lookout himself, he was held to be the cause of the accident and not the offender. So too, where someone stopped "for the purpose of relieving nature" and left his vehicle with a brighter light burning than the required reflector, his breach was not the cause of the collision. Moreover, where the accident occurred at a well-lighted intersection or street or where the offender's vehicle was actually seen or should have been seen, no civil liability flowed. Some of the older cases, decided prior to the passage of comparative negligence legislation, held that some accidents were caused solely by the persons complaining of a breach and frequently rested on ultimate negligence and last clear chance theories. The more recent cases have wisely tended to apportion liability in these situations where both absence of lights and someone else's negligence contribute to collisions. Nevertheless, anyone planning to rely on a violation of a lighting statute should lead evidence not only of a breach but of a causal connection between that breach and the accident and should be prepared to refute evidence that he alone caused the accident.

Third, the person relying on the statutory infraction must be among the class that the legislature sought to protect and must have been injured in the sort of accident the statute was designed to prevent. Thus if a pedestrian walked into, or a low-flying aircraft flew into, the rear of an unlit automobile on a highway, the court might well deny liability to these claimants since they would not be among the group of persons that the legislation was supposed to benefit. Similarly, it is doubtful that someone injured in a head-on collision with a vehicle that had no tail-lights would recover since the section was aimed at reducing rear-end collisions

90 Ibid.
91 Ibid.
96 See, for example, Peacock v. Stephens, supra, footnote 89, and Collins v. General Service Transport, supra, footnote 88.
97 See for example Underwood v. Rayner Construction, supra, footnote 80.
98 See generally, Fleming, op. cit., footnote 8, p. 133; Prosser, op. cit., footnote 8, p. 193 et seq.
not head-on ones. In short, the normal limitation of proximateness applies here as it does elsewhere.

Whenever a claimant is able to prove that the defendant was in breach of a tail-light statute which proximately caused him injury, he is virtually assured of some tort recovery. This does not mean, however, that the court will always hold the defendant absolutely liable for a violation; true, in some cases statutory liability or negligence per se language is employed, but in others the courts speak of prima facie liability or they merely assume that the breach of statute is negligence without explaining or particularizing. There are apparently no tail-light cases where a court has held that proof of an infraction was merely evidence of negligence for the judge or jury to consider. In a large number of cases the person in breach of statute was held only partially to blame and a few violations were excused.

These variations in wording are by no means inconsequential; they reflect differences of some substance in the use made of legislative infractions, although occasionally they are produced by carelessness of judicial expression. As Fleming has said of res ipsa loquitur, a statutory violation may whisper negligence or it may shout it aloud. In other words, the fact of a breach may be given more or less weight depending on the circumstances and the statute. Although the differences in procedural effect given to this evidence is sometimes scoffed at, trial lawyers recognize the value of having the burden of proof on the other side and take advantage of this in their settlement negotiations which, after all, is the ultimate destination of the vast majority of the automobile cases that are commenced. Another advantage of having different effects given to different statutory infractions is that the court will thereby secure more maneuverability. A judge will be free to decide himself that negligence has been proved, he may put the entire question to the jury or he may seek the jury's assistance only on the question of excused violation.

There are four alternative procedural results possible when a legislative infraction is relied on in a civil case. The first, and least

94 Prosser, op. cit., ibid., p. 202 "... precisely the same result ..." appears to be reached in presumption States as in negligence per se States.
96 See Foust, loc. cit., footnote 2, at p. 60, for an excellent discussion of this problem.
effective one, is that the fact may be treated as some evidence of negligence that the jury may, if it so wishes, assess in deciding the negligence question. At the least, this approach gets the claimant to the jury and avoids a non-suit. The second way of handling this evidence is to hold that it entitles the plaintiff to judgment, if the defendant offers no evidence to explain his breach or if he fails to raise a reasonable doubt. If the defendant explains his conduct so as to create a reasonable doubt; he is entitled to the verdict.99 The third method that may be utilized is that the evidence of breach entitles the plaintiff to a judgment unless the defendant convinces the court that he was not negligent. This result shifts the onus of proof to the defendant and he must go farther than merely raise a reasonable doubt; he must tip the scales in his favour before he may succeed.100 The last way of using a breach of a statute is to hold that it is conclusive of negligence and to reject all evidence to the contrary, which is the traditional negligence per se approach.101 The picture is, unfortunately, even more complex than this, because the evidence of excused violation may or may not be admitted for jury consideration in each of the above situations. One might conclude that the judge must preside over the trial like an orchestra conductor conducts a symphony concert. He may call upon one technique or another, a flute or a trumpet, depending on the type of legislation and the circumstances of the breach. Seldom, however, have our courts been successful in producing music; instead discordant sounds have rent the air and filled the law reports. Let us now examine the weight that Canadian courts have given to statutory infractions in the lighting cases to see if any trend can be discerned.

At one time evidence of a violation of the tail-light section was said to impose “unrestricted and absolute liability on the owner”.102 When the legislation upon which this decision was amended, the Ontario courts faltered,103 but the seed found fertile ground in the West. In Manitoba it was proclaimed104 that “the statutory duty was

99 This is called a “presumption” or a “rebuttable presumption” by some evidence scholars. See Morgan, Some Observations Concerning Presumptions (1931). 44 Harv. L. Rev. 906; Thayer, A Preliminary Treatise on Evidence at Common Law (1898), p. 336.

100 Compare with s. 106 of the Highway Traffic Act, supra, footnote 28. See also Winnipeg Electric v. Geel, [1932] A.C. 690, per Lord Wright.

101 Foust, loc.cit., footnote 2, at p. 59 et seq.

102 Hall v. Toronto Guelph Express, supra, footnote 55, at p. 389, per Anglin C.J.C.; see also Fralick v. Grand Trunk Railway, supra, footnote 9.

103 Falsetto v. Brown, supra, footnote 47.

104 Connell v. Olson, supra, footnote 58.
absolute" and an Alberta court declared\textsuperscript{106} that there was "a very
definite duty to ensure their vehicles shall be visible to other drivers
on the highway". The Ontario courts soon recovered and stated\textsuperscript{106} that breach of the lighting section was "\textit{per se} evidence of negligence" and that a violation of a "statutory duty"\textsuperscript{107} created a cause
of action.\textsuperscript{106} Often courts impose liability in statutory violation
cases without articulating the persuasive value given to this fact\textsuperscript{109}
or stating that it is unnecessary to do so.\textsuperscript{110} Frequently the judge
merely states that the breach of the statute amounted to negligence
without disclosing whether the breach alone was conclusive or
whether he was relying upon the breach as well as other evidence
in deciding the negligence issue.\textsuperscript{111} There was little policy discus-
sion until Justice Rand\textsuperscript{112} explained that "the scandal of the ravages
of our holidays . . . is more than sufficient justification for the in-
sistence on the drastic measures to which our highway authorities
have been aroused". In one case\textsuperscript{113} the court declared that "the act
was passed for the purpose of preventing exactly what happened
in this case", and in another,\textsuperscript{114} where vehicles were customarily
being parked on the side of snow-covered highways, a judge re-
monstrated that the "highways were never intended to be used for,
garages". It is relatively clear that the civil courts were influenced
in these cases by the compelling policy of accident prevention to
accord great weight to the infractions of the rear-light section, the
effect of which was a tendency to use the fourth method of statu-
tory treatment, the negligence \textit{per se} approach.

There is another group of cases where courts have stated that
violation of a tail-light statute is \textit{prima facie} evidence of negligence\textsuperscript{115}

\begin{footnotesize}
\textsuperscript{105} Western Canadian Greyhound v. Trans-Canada Auto Transport, ibid.,
at p. 697, per Egbert J.
\textsuperscript{106} McCannell v. McLean, supra, footnote 37, at p. 641.
\textsuperscript{107} Ritchie v. Pttaf, supra, footnote 32.
\textsuperscript{108} Irvine v. Metropolitan Transport Co., supra, footnote 48, at p. 694.
\textsuperscript{109} Jackson v. Joel, [1948] 1 W.W.R. 156; Meth v. Melinsky, [1941]
\textsuperscript{111} Fellows v. Majeau, [1945] 2 W.W.R. 113 (Alta S.C.); Rubin v.
Steeves (1951) 28 M.P.R. 421 (N.B.C.A.); The King v. Demers, [1935]
3 D.L.R. 561 (S.C.C.); Billings v. Mooers, [1937] 4 D.L.R. 518 (N.B.C.A.);
\textsuperscript{112} Bruce v. McIntyre, supra, footnote 10, at p. 254.
\textsuperscript{113} Atwood v. Lubotina (1928), 40 B.C.R. 446, at p. 447, per Macdonald
C.J.A.
\textsuperscript{114} Drewry v. Towns, [1951] 2 W.W.R. (N.S.) 217, at p. 221, per Kelly J.
\textsuperscript{115} Keays v. Parks, supra, footnote 37; Ward v. Regina, [1954] Ex. C.R.
\end{footnotesize}
or *prima facie* a tort.\textsuperscript{116} In this series of cases, now brought to prominence by the *Sterling Trusts Corporation* decision, a finding of negligence is not conclusive and evidence of justification or absence of negligence will be admitted, although it remains unclear whether, in order to succeed, the defendant must balance the scales or tip them in his favour. These latter choices are the second and third methods of handling an infraction. The debate in the years to come is destined to focus on the relative merits and demerits of these techniques.

There do not appear to be any cases where breach of a tail-light provision was relied upon only as some evidence of negligence, indicating that Canadian courts have accorded this legislation substantial respect. On occasion, however, the issue of negligence appears to have been put to the jury for decision.\textsuperscript{117} In these cases there is presently a distinct trend toward splitting liability between the violator and the other person\textsuperscript{118} who may not be looking,\textsuperscript{119} driving too fast\textsuperscript{120} or in breach of some statute as well.\textsuperscript{121}

A similar pattern of handling violations is discernible in the cases where the claimant established the breach of a headlight provision. Whatever treatment is given to the infraction procedurally, the violator rarely escapes civil liability, although frequently responsibility is divided between him and the other person.\textsuperscript{122} The cases involving breach of headlight sections are richly varied. Since headlights permit a driver both to see and to be seen, the accidents generated will include those where others collided head-on with an offending vehicle, where the driver was unable to see adequately into the distance and where dazzling lights blinded one of the parties to a collision.

Here, too, in most of the cases the violation of a statute is given great weight. Typical of the strict view is the case of *Wilkins v. Weyer*\textsuperscript{123} where the court held that a person who violated the statute by having only one headlight burning was negligent *per se*. In *Nest...
hitt v. Carney,124 Justice Martin declared that “It is negligence per se to operate an automobile without complying with the statutory requirements as to lights . . .” since to do so was a “menace”.125

In Voth v. Friesen128 a defendant, who continued to drive while being unable to see two hundred feet in front of him because of blinding lights, was held liable for breach of statutory duty. Justice Adamson revealed the attitude of the court when he stated: “The many deaths and the great damage caused by motor traffic can only be minimized by motorists recognizing the necessity of strictly discharging their duty in driving motor cars. This they will not do unless the courts insist on strict compliance with the duty which is on every motorist to take care and to comply with the regulations”.127

A small cluster of cases have held that driving with “bum” headlights,129 with low beam instead of high,129 without any headlights on at all130 was negligent without particularizing the procedural effect granted the violation.131 There do not appear to be any cases where the breach of a headlight statute amounted merely to prima facie evidence of negligence or some evidence of negligence,132 indicating once more that courts pay heed to the policy of accident prevention enshrined in these statutes. Headlight infractions seem to be treated even more stringently than do tail-light ones, perhaps because the driver is more likely to have knowledge of a defective headlight than a tail-light. It may also be that, because head-on collisions are potentially more serious, the court is imposing a heavier obligation upon the driver as is customary in situations of grave risk of harm. Whether this will persist after Sterling Trusts Corporation is as yet unsettled.

It now appears as though certain excuses will be available to anyone who violates a lighting statute in most situations. Even in the cases that held breach of statute conclusive of negligence, it was recognized that it was possible to excuse a violation. For example, in Hall133 the court recognized that if the breach were

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125 Ibid., at p. 509.
126 Supra, footnote 12.
127 Ibid., at p. 628.
129 Casselman v. Sawyer, supra, footnote 122.
130 Fellows v. Majeau, supra, footnote 111.
132 In Bennett v. Gardewine, [1948] 2 W.W.R. 474 (Man. K.B.) Justice Adamson only made a slip of the tongue, it is submitted, when he stated that a breach is “evidence of negligence” since this result would be inconsistent with the rest of his reasons and his later reasons in Voth v. Friesen, supra, footnote 12.
133 Hall v. Toronto Guelph Express, supra, footnote 55.
brought about by an Act of God it might be excused. This should not surprise us for even in *Rylands v. Fletcher* cases, various defences like act of third party, *vis major*, consent, legislative authority and others were available. The courts have, however, limited the scope of these excuses providing relief only in rare cases. It may become even more difficult in the future for an offender to satisfy a court that he has a justifiable excuse for the violation and with some statutes this opportunity may be precluded altogether. For example, it would be impossible to excuse the presence of badly worn tires on a vehicle. In one case an offender who had been injured and one whose vehicle had become disabled were not excused from complying with the dictates of the lighting legislation. Moreover, this decided reluctance of courts to permit excuses has led to the view that the offender is the one who must adduce the evidence of excuse, although it is still uncertain what strength that evidence must have.

One obviously permissible excuse is where the violator of a lighting statute has substituted equally effective or superior lighting equipment. Here the statutory purpose is not subverted by the breach but reinforced. The authority to the contrary should be limited to the situation where the replacement is less effective than the legislative equipment. Therefore, where a white, but more powerful rear light was used instead of a red one as required, where clearance lights with equivalent brightness to the absent tail-lights were on, and where a bright light was burning at the back of a vehicle instead of the reflectors prescribed, violations were excused.

The excuse of ignorance of the violation is not as easily disposed of. It is clear that there need be no *mens rea* or wilful breach

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134 See Fleming, *op. cit.*, footnote 8, p. 299 *et seq.*
138 The cases on this appear to conflict, cf. *Irvine v. Metropolitan Transport Co. Ltd.*, *supra*, footnote 48, and *Sterling Trusts Corporation*, *supra*, footnote 42.
139 *Fralick v. Grand Trunk Railway*, *supra*, footnote 9, where the court stated that the offender who substitutes "takes the risk of all injuries which observance of the statute would probably have prevented", per Anglin J.
141 *Tinling v. Bauch* (1952), 59 Man. R. 310, per Kelley J.
142 *Schwartz et al. v. Mystruk et al.*, *supra*, footnote 86 (not cause).
nor is it necessary to prove an intentional violation¹⁴⁴ to secure the benefit of the infraction in a tort case. But the more common question of mere lack of knowledge poses more difficulty, since courts understandably have manifested a suspicion toward such a defence. Proof that the violator was unaware of a breach has been rejected as a valid excuse,¹⁴⁵ and the decisions to the contrary¹⁴⁶ are probably no longer trustworthy.¹⁴⁷ It may be, however, that if the defendant convinced the court that he reasonably believed that the light was burning¹⁴⁸ or that it had just gone out prior to the accident¹⁴⁹ and he was doing everything in his power to repair it,¹⁵⁰ he may be exonerated from civil liability. A fine distinction may be drawn here between the positive proof of belief, on the one hand, and the negative evidence of unawareness on the other hand. Moreover, sudden lamp failures resemble somewhat the Act of God notion that might be acceptable as an excuse.¹⁵¹ The court wisely requires more of the defendant that a shrug of the shoulders and a statement that he did not know the light was out. Further details of the circumstances in which this defence and others will be permitted await clarification.

In conclusion, it cannot be denied that the Sterling Trusts Corporation¹⁵² decision is a landmark case in the march toward a more sensible approach to criminal legislation in tort litigation. In eclipsing the Falsetto v. Brown¹⁵³ decision, the Supreme Court of Canada has committed itself to relying on penal statutes to some extent in civil cases. It has openly lent its weight to the advancement of the policy of accident prevention embodied in highway traffic legislation. It has not so openly broadened the incidence of tort recovery and simplified to some degree the administration of tort trials. There has been no departure from the normal requirements of proof of breach, causation and proximate cause as prerequisites of adopting statutory standards. With regard to the

¹⁴⁴ Sterling Trusts Corporation v. Postma and Little, supra, footnote 42, per Cartwright J.
¹⁴⁵ Connell v. Olson, supra, footnote 58, at p. 656, per Richards J.A.; Nesbitt v. Carney, supra, footnote 124, at p. 509.
¹⁴⁶ Falsetto v. Brown, supra, footnote 47; McLeod v. Lee, supra, footnote 60; Currie v. Nilson, supra, footnote 79 (Judicial notice taken that could drive without headlight without knowing and three month old truck involved).
¹⁴⁷ Since the decision in Sterling Trusts Corporation v. Postma and Little, supra, footnote 42.
¹⁴⁹ Maitland v. Raisbeck, supra, footnote 31.
¹⁵¹ See Hall v. Toronto Guelph Express, supra, footnote 55.
¹⁵² Supra, footnote 42. ¹⁵³ Supra, footnote 47.
procedural effect to be given to a violation, the court did not commit the error of adopting too rigid an approach but rather preferred flexibility. The word formula enunciated, *prima facie* evidence of negligence, is both familiar and workable.

Nevertheless the *Sterling Trusts Corporation* decision left many questions unanswered. The Supreme Court did not explain what it meant by *prima facie* evidence of negligence nor what procedural effect it would have. It did not clearly define which excuses would be tolerated nor who had the onus of proof with regard to them. Neither did the court fully discuss all of the policy issues inherent in their choice and the priorities accorded them. Nor did the Supreme Court indicate how far their decision would extend, whether to tail-light cases alone, to all lighting cases, to all equipment cases or to all violations of statutes. All of these questions were left for the future. The *Sterling Trusts Corporation* decision is, therefore, extremely significant for what it has decided; however, it may be even more significant because of the gaps that remain unfilled.

**Allen M. Linden***

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The 1857 Matrimonial Causes Act, 20 & 21 Vict., c. 85, which bestowed upon an English court the power to dissolve marriages made no express provision as to what marriages it could dissolve.