West Virginia Negligence Cases and Legislative Standards of Conduct

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JUDICIAL compensation for accidental injuries is grounded upon legal fault. Assessment of fault involves not only finding the facts concerning actions of the parties, but also evaluation of their conduct. Determination is made whether the behavior is justified and, consequently, does not give rise to recovery, or whether it should be condemned, thus serving as a basis for compensation. This, the ethical portion of the problem of negligence liability, is performed by comparing the actions of a party with those of a hypothetical person, the reasonable man of ordinary prudence, acting under similar circumstances. The infinite variety of fact patterns that may arise dooms efforts in any single lawsuit to do much more than give particularized content to this vague standard. But, through use of standards of conduct established by legislative enactment, more stable measures of the character of behavior are made available.

The expansion in the volume of statutes has increased the importance in negligence litigation in West Virginia courts of legislative provisions. In civil actions legislation is being used both by plaintiffs and by defendants as a source for standards of conduct.

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1 See Chapter IV of Pound, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 144-90 (1932), for a discussion of the philosophical basis of tort liability.
3 PROSSER, TORTS § 31 (2d ed. 1955).
4 RESTATEMENT, TORTS § 285 (1934).
This paper will examine some of those cases. Discussed herein will be: (1) the effect of violation of legislative standards upon primary negligence, (2) the impact of statutory nonobservance upon contributory negligence, and (3) the relevance in private litigation of compliance with legislative provisions.

1. Statutory Violations and Primary Negligence

Legislatures are competent to establish by statute standards of conduct and to provide civil remedies for their violation. Only in a limited number of instances has the legislative assembly of West Virginia exercised this power. Therefore there are but few local cases dealing with disobedience of such enactments. These are numerous enough, however, to establish that when such statutes are sought to be relied upon several defenses might be employed. The defendant may assert that he did not in fact ignore the statutory standard. For example, in Krodel v. Baltimore & Ohio R.R., a parade of nineteen witnesses was used to establish the fact that the engineer of a train which struck the plaintiff's automobile had complied with a law requiring warning signals to be given for grade crossings and providing liability to parties injured by neglect to give them. Also the defendant might concede disobedience of the legislative mandate and still defeat the action, if he can convince the court that the statute does not conform with some state or federal constitutional provision. In Prager v. W. H. Chapman & Sons Co., an employer successfully attacked a statutory provision which

See, e.g., W. Va. Code ch. 31, art. 2, § 8 (Michie 1955) (civil liability for injuries caused by railroads through failure to give warning signals at grade crossings); cf. id. ch. 17, art. 10, § 17 (person injured because street out of repair can sue city); id. ch. 17, art. 17, § 13 (highway officials can sue for damages for injuries caused by violation of maximum load limits).

In Virginia the motor vehicle law specifically creates civil liability for violations of the criminal statutes contained therein. Va. Code ch. 29, art. 5, § 8-646.3 (Michie 1950). This provision was applied in Kidd v. Little, 194 Va. 692, 74 S.E.2d 787 (1953).

The bulk of these cases are cited in the annotations to the code provisions cited in note 5 supra.

For a discussion of statutes where a civil remedy is expressly provided see, 2 Harper & James, Torts § 17.5 (1956). This section and the following one are adopted from James, Statutory Standards and Negligence in Accident Cases, 11 La. L. Rev. 95 (1950). Therefore any citations to those sections of the treatise may also be found in the article.


Restatement, Torts § 286, comment h (1934). For cases from other jurisdictions, see 2 Harper & James, Torts § 17.5.

122 W. Va. 428, 9 S.E.2d 890 (1940).
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created a standard of liability without fault in common law negligence actions against nonsubscribers to the workmen's compensation fund. The court found that the statute deprived him of due process of law. Furthermore the person who has not obeyed the statute may challenge the applicability of the civil remedy provisions by proving either that the resulting injury caused by his conduct was not to a plaintiff within the class of persons protected by the statute or that it was not produced by a hazard at which the enactment was aimed. Thus it has been held that the railroad warning signal law was not intended for the protection of railroad employees, trespassers upon railway property, or cattle, but only of highway travelers and perhaps of passengers and nontrespassing strangers.

A comparatively rare type of legislation brands as criminal departures from standards established by it, and in addition makes the penalty payable to the person injured by the breach. A provision of the West Virginia Code stipulates that such a person is entitled just to the penalty if it is “expressly mentioned to be in lieu of . . . damages.”

By far the greatest number of statutes considered by the courts in negligence cases are exclusively criminal in nature. They provide a penalty for breach of the stipulated standard of conduct; they contain no express civil liability provision. On its face that would seem to indicate that only criminal liability should ensue from violation of such provisions. That, however, is not the case. In spite of the

13 This is a question of statutory construction. For Restatement provisions concerning such construction, see Restatement, Torts §§ 286 (a), (c), and comment b (1934). For cases from other jurisdictions, see 2 Harper & James, Torts § 17.5.
14 Jones v. Virginian Ry., 74 W. Va. 666, 83 S.E. 54 (1914).
18 See, e.g., W. Va. Code ch. 37, art. 5, § 1 (Michie 1955). For application of this provision, see Beuke v. Boggs Run Mining & Mfg. Co., 100 W. Va. 141, 130 S.E. 182 (1925); Mapel v. John, 42 W. Va. 30, 24 S.E. 608 (1896). See also the cases cited in the annotations to this provision.
fact that a penalty or forfeiture might be imposed against the defendant in a criminal proceeding, according to our code:

"Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation . . . ." 21

This West Virginia law is based on a similar Virginia provision. 22 The courts of Virginia have held that their enactment merely saves any common law rights in tort that might otherwise be considered lost by virtue of imposition of criminal sanctions for commission of the same deeds. 23 In the language of a federal court case considering the provision

"It cannot be supposed that in enacting . . . [the statute] the legislature had the remotest idea of creating any new ground for bringing an action for damages. It was only intended to keep the subject just where it was under the common law before the enactment of . . . [the criminal provision.]" 24

States in the union, other than the Virginias, have enacted interpretative provisions in their codes which state that criminal statutes do not deny right to recover civil claims. 25 Our provision is more than a negative statement; it appears affirmatively to grant civil rights. Nevertheless the court of appeals has followed the Virginia interpretation. 26 It merely prevents criminal laws from barring civil rights;

21 W. VA. CODE ch. 55, art. 7, § 9 (Michie 1955).

22 Va. CODE ch. 29, art. 6, § 8-652 (Michie Supp. 1954).


25 See, e.g., ARIZ. REV. STAT. § 1-253 (1956); ORE. REV. STAT. § 161.060 (1957); PA. STAT. ANN. tit. 46, § 559 (1954). But see OHIO REV. CODE § 1.16 (1958); Ky. REV. STAT. § 446.070 (1955).

it grants no such rights. Thus in England v. Central Pocahontas Coal Co.,\textsuperscript{27} the court upheld recovery not on the basis of violation of a statute making disinterment a felony, but on the basis of a pre-existing common law right to preserve the remains of a relative.

Although the state supreme court has not fully articulated the reasons for its stand that disobedience of the criminal law might produce civil liability, there are several artful explanations which have been advanced from other quarters to explain this phenomenon.\textsuperscript{28} One approach, which apparently is still fashionable in England, is to construe the enactment to find an unexpressed intent to impose civil liability.\textsuperscript{29} This is wholly fictional, for had the legislature had civil consequences in mind, it could have provided for them.\textsuperscript{30} Perhaps re-enactment of a provision which has been judicially utilized to impose civil liability might indicate an intent to establish private rights.\textsuperscript{31} But even in that instance it is rather speculative to make an effort to uncover such an intent.

Professor Thayer's classic article on this subject explained that a reasonable man certainly would obey the law, and that one who fails to do so is not conducting himself as a reasonable man. Therefore he must be negligent.\textsuperscript{32} This explanation overlooks the fact that while in general reasonable men do conform to the criminal law, there are instances in which they quite justifiably do not.\textsuperscript{33} Nevertheless Thayer's approach has the virtue of tying what courts are doing in this area to the usual negligence standard of the reasonable man of ordinary prudence.

If the legislature has not expressed an intent to create private liability, then an order for compensation by a court must rest on

\textsuperscript{27} 50 W. Va. 575, 577, 104 S.E. 46, 47 (1920).
\textsuperscript{28} See, e.g., 2 Harper & James, Torts § 17.6; Prosser, Torts § 84; Lowndes, Civil Liability by Criminal Legislation, 16 Minn. L. Rev. 361 (1931); Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317 (1913).
\textsuperscript{30} For condemnation of this approach, see Lowndes, supra note 28, at 363; Thayer, supra note 28, at 320.
\textsuperscript{31} Perhaps some such reasoning underlies the approach of the court to the legislative intent in re-enactment of the child labor law. Pitzer v. M. D. Tomkies & Sons, 186 W. Va. 268, 274, 67 S.E.2d 437, 442 (1951).
\textsuperscript{32} Thayer, supra note 28, at 322.
\textsuperscript{33} See, e.g., instances commented upon in the text at notes 50-62, infra.
some species of judicial legislation. The West Virginia court has recognized this in the leading case of Norman v. Virginia-Pocahontas Coal Co., in which Judge Robinson stated:

"A civil action does not get its force from . . . [the criminal] statute. It only looks to the violation of the statute for evidence to support the action."\(^{34}\)

The courts in these negligence cases are seeking to effectuate the underlying policy for protection of certain persons which they believe to be expressed in the criminal legislation.\(^{35}\)

Statutory purpose doctrine. In order to give effect to statutory policy it is necessary for judges to determine the applicability of the facts to the enactment under consideration. For that reason the supreme court has dictated that plaintiffs must plead sufficiently definite facts to establish violation of the provision they are asking a judge to invoke.\(^{36}\) Also injured parties must prove by a preponderance of the evidence that the statute was in fact violated.\(^{37}\)

On the basis of the facts it is up to the court to determine whether the injured party has brought himself within the scope of the enactment. An effort should be made to ascertain its purpose, the object as well as the import.\(^{38}\) This involves more than merely looking at the face of the provision; it means judicially determining the basic policy underlying the law.\(^{39}\) Here judges are in the business of defining the scope of protection given by the rule invoked by

\(^{34}\) 68 W. Va. 405, 412, 69 S.E. 857, 860 (1910).

\(^{35}\) The attitude of the West Virginia Supreme Court of Appeals in this regard has been expressed in Pitzer v. M. D. Tomkies & Sons, 136 W. Va. 268, 274, 67 S.E.2d 437, 442 (1951) (overrules prior position that contributory negligence of a child is a defense in child labor cases on the ground that to permit such a defense "virtually emasculates" the intent of the legislature); Bobbs v. Morgantown Press Co., 89 W. Va. 206, 209, 108 S.E. 879, 880 (1921) ("It is the duty of the courts to effectuate its beneficent purpose"). See also Prosser, Torts § 84.


\(^{38}\) Thayer, supra note 28, at 319.

\(^{39}\) Cf. Lowndes, supra note 28, at 362-64.
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the complainant.\textsuperscript{40} This is particularly true where the legislative standard is vaguely expressed.\textsuperscript{41}

Sometimes the plaintiff has quite clearly not brought himself within the reach of the legislative rule he seeks to employ. No recovery would be given, for example, to child laborers who have not demonstrated that they were “employees” of the defendant,\textsuperscript{42} or to administrators, claiming that a speeding defendant has not slowed for decedents while they were walking on a “travelled portion” of the highway, who have not tried to show that they were in fact on such part of the road.\textsuperscript{43} And in other instances the applicable statute indicates an intent to exclude a certain situation from its scope. Thus the provision of the motor vehicle code requiring travel on the right side of the road has several well-defined exceptions. A plaintiff injured by a defendant who is within one of them cannot recover.\textsuperscript{44}

There are instances in which a law appears to include the conduct of the defendant and yet a court “interprets” the statute not to do so. In the leading case of {\textit{Tedla v. Ellman}}\textsuperscript{45} the New York Court of Appeals considered a traffic law which apparently had been disobeyed. It rejected the notion that the legislature had required adherence to the letter of the provision when it would be unreasonable to follow it. Therefore an exception to permit reasonable deviations was manufactured. The courts of West Virginia have accomplished the same thing by permitting disabled automobiles\textsuperscript{46} and wreckers\textsuperscript{47}

\textsuperscript{40} Cf. Green, \textit{Contributory Negligence and Proximate Cause}, 6 N.C.L. Rev. 8, 8 (1927).

\textsuperscript{41} The statute applied in {\textit{Tarr v. Keller Lumber & Constr. Co., 108 W. Va. 99, 144 S.E. 881 (1928),} created a duty to guard power-driven saws “if possible to do so.” This vague provision was interpreted by the court to mean that such saws must be guarded if doing so did not unreasonably interfere with their operation. \textit{Id.} at 101, 144 S.E. at 882.

For illustrations of indefinite legislative standards, see \textit{Restatement, Torts} § 285, illustrations 4, 5 (1934).

\textsuperscript{42} Harper v. Cook, 189 W. Va. 917, 82 S.E.2d 427 (1954).

\textsuperscript{43} Fleming v. McMillan, 125 W. Va. 356, 26 S.E.2d 8 (1948).

\textsuperscript{44} Compare Vance v. L. D. Logan Co., 131 W. Va. 296, 46 S.E.2d 765 (1944); Ewing v. Charleston Transit Co., 138 W. Va. 251, 14 S.E.2d 419 (1941); W. W. Wall v. Ewing, 111 W. Va. 441, 114 S.E. 158 (1922), with Parks v. Tillis, 112 W. Va. 205, 164 S.E. 797 (1932).

\textsuperscript{45} 280 N.Y. 424, 19 N.E.2d 987 (1939).

\textsuperscript{46} Miller v. Douglas, 121 W. Va. 638, 5 S.E.2d 799 (1939); Comment, 48 W. Va. L.Q. 57 (1941).

\textsuperscript{47} Cooper v. Teter, 123 W. Va. 372, 15 S.E.2d 152, 48 W. Va. L.Q. 57 (1941).
to park on a road if doing so is reasonable. That action, which normally would violate the criminal law, is by means of "interpretation" here held not to.48 This construction is in line with a policy of strict interpretation of criminal statutes.49

Excused violations. While the statutory purpose doctrine proceeds on the assumption that in legal contemplation there has not been a breach of law,50 the excused violation doctrine recognizes that there has been disobedience of a criminal statute, but states that the circumstances were such that the rigor of the civil law should not apply.

When a defendant is guilty of a crime he may be relieved of negligence liability on the ground that conformity to the criminal law was impossible under the circumstances involved.51 Unless such persons were freed of civil consequences here there would result negligence without fault.52 That runs contrary to the basic reason for negligence liability. Impossibility in an absolute sense is rare. But the extreme difficulty of obeying a statute might lead a court to absolve the disobedient party in a civil case. For example, in a case from the District Court for the Southern District of West Virginia a gasoline truck, which was required by state law to stop at all railway crossings, failed to stop. A collision with a train resulted. The court decided, however, that the violation should be excused because it was so difficult to detect the presence of the crossing. The federal appeals court accepted that ruling.53 Of course customary noncompliance is not the same thing as impossibility of compliance. It is negligence.54 Also noncompliance by other persons subject to the

48 Prosser, Torts § 34.
50 Restatement, Torts § 286, comment c (1934).
52 Morris, Torts 157-58 (1952). Chapter IV of this treatise is a reprint of Morris, The Role of Criminal Statutes in Negligence Actions, 49 Colum. L. Rev. 21 (1949). The citations herein to the treatise may also be found in the article.
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same law is no defense, nor is the fact that an official inspector excused the violation.

Courts also recognize that breaches of the criminal law resulting from an emergency over which the defendant has no control are not negligent. He must demonstrate, though, that the emergency was really the cause of the accident. Furthermore, in words of the West Virginia court:

"A driver may not violate the law of the road, and then invoke the doctrine of sudden emergency to relieve himself from liability to another who is injured as a result of his violation. Such rule is applicable to those who are themselves without fault, not those who are at the time committing a wrong."

If, in order to avoid creating liability without fault, emergency violators are excused, then other nonfaulty lawbreakers also should not be held. Violations other than those which are beyond the defendant's control and those which are caused by emergencies may also be justified. Thus in Morris v. Wheeling operators of a gasoline station were excused from noncompliance with a legislative rule requiring removal of snow and ice on a sidewalk abutting the property leased by them. The oil company men had removed the snow and thrice had had a go at getting off the ice. The court found that there was sufficient evidence from which a jury could find they had made a "reasonable effort" to comply with the provision. In other words their disobedience was justifiable. Not every lame excuse, however, should satisfy a court of justification for a statutory breach. After all the defendant in these cases is guilty of criminal conduct. "Thayer's statement that reasonable men do not violate the criminal law is usually true—in most cases the tort litigant who has broken a penal statute is clearly negligent."

Class of persons protected. In cases involving breach of statutes of an exclusively criminal character, as well as in those applying laws

56 Ibid.
57 Morus, Torts 157-58.
60 Morus, Torts 158.
61 140 W. Va. 78, 82 S.E.2d 536 (1954).
62 Morus, Torts 160.
containing specific civil remedies, a defendant might urge that the plaintiff was not within the class of persons protected by the enactment. The court has said that:

"In order for a statute to apply and to be a protection to persons seeking to avail themselves of its terms, those invoking it must be within the class of persons that it is intended to embrace."  

Therefore a statute designed for the protection of persons lawfully on a highway may not be invoked by a plaintiff who was not lawfully there. On the other hand a child injured by someone illegally passing a school bus may recover. So too might an industrial laborer whose injury was brought about by his employer's violation of a factory act which was passed for the benefit of workers in factories. In these instances the legislature sought merely to protect a limited class of individuals. It could also strive in other legislation to prevent injuries to very broad groups. Thus pure food acts, statutes requiring labelling of poisons, and laws forbidding sale of firearms to minors are designed to benefit any member of the public who may be injured by the forbidden act.

Some statutes are intended exclusively to protect state or city interests, or merely to secure to individuals the enjoyment of privileges or rights to which they are entitled only as members of the public. Since that sort of legislation does not establish any standard of conduct for individuals toward each other, violations do not make the actor liable for an invasion of the interest of another caused thereby. Thus laws inhibiting various Sunday activities are devised to protect general community interests, rather than any partic-

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63 See cases cited in notes 14-17, supra.
64 1 SHEARMAN & REDFIELD, NEGLIGENCE § 11 (rev. ed. 1941); RESTATEMENT, TORTS § 286 (a) (1934).
66 Not only must the interest invaded be one of a person included in the class protected by the statute, but also it must be the sort of interest the enactment is intended to protect. RESTATEMENT, TORTS § 286 (b) (1934). See also id. at § 286, comment g and illustration 2.
69 Cf. RESTATEMENT, TORTS § 286, illustration 1 (1934).
70 See cases cited in PROSSER, TORTS § 84 notes 20-22.
71 1 SHEARMAN & REDFIELD, NEGLIGENCE § 12; RESTATEMENT, TORTS § 288 (1934).
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ular class of persons. The licensing and registration provisions create only a public duty. The same is true of duties imposed upon public officials by statute. In these instances the person disobeying the enactment will prevail.

Provisions requiring removal of snow and ice from sidewalks by owners and tenants of abutting property are usually considered merely to create an obligation to the municipality. Under the West Virginia Code the cities themselves might be liable to the persons injured by failure to clear streets and sidewalks. Furthermore the judges have decided that ordinances requiring owners or occupiers to remove snow when violated can serve as a basis for negligence recovery. This does not square with the notion of allowing recovery only where interests of the specific class protected are invaded.

Type of risk covered. A similar limitation upon recoveries to that of restriction to the legislatively protected class is provided by the rule limiting recovery "where the enactment is intended to protect an interest from a particular hazard [to cases where] the invasion of the interest results from that hazard . . . ." The English case of Gorris v. Scott is the leading illustration of this principle. There the defendant violated a provision requiring water carriers to provide pens for animals shipped with them. This law obviously was designed to prevent contagion due to overcrowding, and had disease broken out the plaintiff could have recovered. The failure to comply

71 The West Virginia Sunday "Blue Laws" are at W. Va. Code ch. 61, art. 8, §§ 17, 18 (Michie 1955).


73 See, e.g., State Road Comm'n v. Ball, 133 W. Va. 349, 76 S.E.2d 55 (1953).

74 Prosser, Torts § 84. See also Morris, supra note 2, at 468; Thayer, supra note 28, at 329.


77 RESTATEMENT, TORTS § 256 (c) (1934). SHEARMAN & REDFIELD, NEGLIGENCE § 12.

78 L.R. 9 Ex. 125 (1874).
with the statute, however, led to washing the plaintiff's sheep overboard. The court refused to grant recovery for the loss because the damage was not of the sort contemplated.

In a Virginia case compensation was denied to a plaintiff whose animals escaped him because of an unlawful obstruction of a street by the defendant railway.\(^{(79)}\) The law was devised to prevent delays in traffic along the street, not to protect against losses of livestock caused by the position of the train.

The West Virginia court has not been very illuminating concerning this rule. In one case by inference it cast doubt on allowing a farmer to recover for losses brought about by his inability to work fields on the other side of a track which was unfenced in violation of a legislative command.\(^{(80)}\) The enactment intended to prevent collisions. The plaintiff's loss did not result from that hazard. In Oldfield v. Woodall\(^{(81)}\) the court permitted a plaintiff colliding with an illegally parked vehicle to recover. Other courts have held that parking ordinances are not intended to prevent collisions but are designed to regulate parking.\(^{(82)}\) Persons who are unable to park because of the illegal parking are those who come within the risk at which the law was aimed.

Causation. Commission of an act prohibited by legislation makes the actor liable in tort only if the violation is the legal cause of the invasion of the plaintiff's interest.\(^{(83)}\) "Illegality" is an abstract term which itself causes nothing. The acts characterized as the breach are what might be causal in nature.\(^{(84)}\) In West Virginia those acts which constitute violation of a statute are considered causal in a negligence case if there would have been no accident had the defendant adhered to the legislative command. If the injury would have taken place even had there been no criminal violation, then


\(^{(80)}\) Clark v. Ohio R.R.R., 84 W. Va. 200, 12 S.E. 505 (1890).

\(^{(81)}\) 113 W. Va. 35, 166 S.E. 691 (1932).

\(^{(82)}\) See cases cited in Prosser, Torts § 34 nn.38, 39.

\(^{(83)}\) RESTATEMENT, Torts § 286 (d) (1934). See generally, Green, supra note 40, at 3.

\(^{(84)}\) Davis, Plaintiff's Illegal Act as a Defense in Actions of Tort, 18 HARV. L. REV. 505, 507 (1905).
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the defendant's acts are not viewed as the proximate cause. For example, in a case dealing with breach of a command to trolley operators to install a certain type of fender the court stated:

"If it can be shown that the accident would not have occurred if the car had been equipped with such fender ... and that the car was not equipped with such fender, then this would be negligence sufficient to charge the company. But, upon the other hand, if it could be shown that the accident would have happened if the car had been equipped with such fender, the same as it did when no so equipped, then the omission to provide such fender would not be the proximate cause of the injury."

Intervening acts can, of course, isolate the defendant's criminal acts from being considered causative. Should an expansive view of causation be taken the requirement would become virtually meaningless. When a court imputes or infers a causal connection merely because of the fact of violation, causation would follow in most statutory breach cases. When judges go that far they are really making a policy determination favoring automatic liability. A code provision in West Virginia checks that tendency in motor vehicle speeding cases. It states that speed laws "... shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence on the part of the defendant as the proximate cause of an accident."

Causation in most instances is considered a question for determination by a jury acting under proper instructions. Reasonable

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88 Shearman & Redfield, NEGLIGENCE § 11.
89 This is done in some jurisdictions in licensing statute cases. Gregory, supra note 71, at 622.
90 Green, supra note 40, at 15.
91 In West Virginia some child labor cases indicate adoption of such a policy. See, e.g., Thompson v. Turkey Gap Coal & Coke Co., 104 W. Va. 134, 139 S.E. 642 (1927); Daniel v. Big Sandy Coal & Coke Co., 68 W. Va. 450, 69 S.E. 993 (1910).
findings will not be upset.\textsuperscript{83} Too often courts abdicate their functions to juries in so-called proximate cause cases which really involve issues of statutory construction. Lack of causal relation is not a proper factor in many cases that turn on it.\textsuperscript{84}

The court of appeals has at various times made proximate cause sounds instead of plainly articulating its views concerning statutory interpretation. Thus it has noted lack of causation where it has found the statute inapplicable to the acts done, that they did not constitute criminal conduct.\textsuperscript{85} It has permitted juries to excuse violations through use of the proximate cause rubric.\textsuperscript{86} Sometimes when the court has found that the plaintiff's class was not covered by an enactment it has expressed that conclusion in proximate cause language.\textsuperscript{87} Also there has been a tendency to mix questions of proximate causation with those of contributory negligence.\textsuperscript{88} While it is true that to defeat a cause of action contributory negligence must be a proximate cause in the same manner that a defendant's illegal acts must be causal, beyond this the two doctrines are distinct. Certainly contributory negligence does not have to be the sole cause to bar recovery, so presence of other causal factors does not necessarily determine the case.\textsuperscript{89}

\textit{Effect of legislative violation.} Once it has been established that there has been statutory disobedience and that none of the mitigating qualifications previously discussed work against the plaintiff, the

\textsuperscript{83} Cf. Baltimore & O.R.R. v. Green, 136 F.2d 88 (4th Cir. 1943) (failure to provide signal required by law may well have been found by jury to be the cause).

\textsuperscript{84} Green, supra note 40, at 15.


\textsuperscript{87} See, e.g., Rich v. Roshenhine, 131 W. Va. 30, 45 S.E.2d 499 (1947); Steiner v. Muldrew, 114 W. Va. 801, 173 S.E. 91 (1934). See also State Road Comm'n v. Ball, 138 W. Va. 949, 76 S.E.2d 55 (1953) (actor excused because of proximate cause when real basis was fact statute imposed duty on public official).


\textsuperscript{89} Green, supra note 40, at 11, 12.
question of the procedural effect of such proof arises. Three main views have been advanced. The negligence per se approach treats the violation as establishing negligence; the jury is instructed that, if the violation is found, they are to hold for the plaintiff. The evidence of negligence view treats a showing of statutory breach as evidence that the defendant has not acted as a reasonable, prudent man; the court instructs the jury that it can consider the violation in connection with its determination of whether the defendant's acts were reasonable. The prima facie evidence of negligence variation on that approach considers proof of violation evidence which, unless rebutted by the defendant, will establish that the defendant has not acted reasonably and hence must compensate the plaintiff.  

There is no reason why in any jurisdiction all legislation must be treated one way or the other. But there does not seem to be any valid reason for giving different procedural effects to the same sort of statute at different times. The West Virginia court has held consistently that breach of the child labor laws is prima facie evidence of negligence. In consideration of other statutes, however, it has at times used the negligence per se method, sometimes relied upon evidence of negligence, and in still other instances preferred prima

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100 For further explanation of the meaning of the prima facie evidence rule, see Morris v. Wheeling, 140 W. Va. 78, 93, 82 S.E.2d 536, 544 (1954). In that case it was explained that a "prima facie case of actionable negligence is that state of facts which will support a jury finding that the defendant was guilty of negligence" and that it is a "case which has proceeded upon sufficient proof to the stage where it must be submitted to a jury and not decided against the plaintiff as a matter of law."

101 In the same jurisdiction there might be some statutes which, upon construction, seem to call for one rule, say the prima facie evidence of negligence rule, while other enactments might be construed to more logically call for another approach, such as the negligence per se rule.


facie evidence of negligence. The court recognized that inconsistency and in Oldfield v. Woodall firmly committed this jurisdiction to the prima facie evidence of negligence rule. In a recent pronouncement it stated that "...the rule prevailing in this jurisdiction considers... violation of a statute or ordinance only as prima facie evidence of negligence."  

In its swings back and forth between these rules the court has not been very explicit about the reasons for using one approach instead of another. Each method, though, has had very articulate proponents. Professor Thayer in his discussion of the subject stated the usual reasoning upon which the negligence per se rule is founded. According to him a man who is not reasonably prudent is negligent, and a reasonably prudent man would not violate the criminal law, so therefore, if the civil courts find for defendants who have committed crimes, they are finding for negligent defendants, which is contrary to the fundamentals of the law of negligence and should not be tolerated. This approach neatly fits into the reasons for adopting legislative standards and provides a measure of stability by keeping the question of setting the standard of conduct out of the uncertainty of the jury room.

An article by Professor Lowndes pumped for the evidence of negligence rule. He reasoned that since application of the standard of conduct, a jury function, is so subjective, the determination of it

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105 Probably the earliest case so holding was Tompkins v. Kanawha Board, 21 W. Va. 224 (1882).
109 For other cases applying the prima facie rule, see Pitzer v. M. D. Tomkies & Sons, 136 W. Va. 268, 67 S.E.2d 437 (1951) (trial court correctly denied instruction saying violation "merely a circumstance to be considered"); Moore v. Skyline Cab, Inc., 134 W. Va. 121, 59 S.E.2d 437 (1950) (lower court reversed because gave instruction saying negligence as a matter of law); Somerville v. Dellosa, 133 W. Va. 435, 56 S.E.2d 758 (1949) (instruction erroneous which led judge to believe could find negligence per se).
   For earlier cases in which defendants lost who did not rebut prima facie cases, see Bowling v. Guyan Lumber Co., 105 W. Va. 309, 148 S.E. 96 (1928); Wills v. Montfair Gas Coal Co., 104 W. Va. 12, 138 S.E. 749 (1927).  
109 Thayer, supra note 28, at 317.
110 Id. at 322; Gregory, supra note 71, at 627.
is really in the hands of the jury, unless the legislature takes it away. He then argued that the per se view was merely a round about way of saying violation of legislation creates civil liability when the legislature did not so provide. Lowndes believed that failure to conform to a statutory standard constitutes carelessness and, consequently, it is fair to submit that to a jury.\textsuperscript{111} This approach is open to the serious objection that it leads to jury lawlessness.\textsuperscript{112} To get around that it has been argued that varying the rule to make proof of violation prima facie evidence, rather than ordinary evidence, mitigates this.\textsuperscript{113} Be that as it may, Thayer's objection still stands: the prima facie evidence rule means that a prima facie impropriety can be rebutted.\textsuperscript{114}

Although the negligence per se position still is the majority rule in the country, there is a growing number of jurisdictions that have adopted the same rule as has West Virginia.\textsuperscript{115} This is due to the flexibility that it affords. In some instances there are excellent reasons for not mounting civil liability on the framework of criminal disobedience. There are administrative methods to temper the possible miscarriages of justice in the criminal field that are not available in the civil courts. Also certain petty crimes under the negligence per se rule might lead to massive civil liability.\textsuperscript{116} Prima facie negligence is not so procrustean as negligence per se.

Perhaps correct application of the negligence per se view and proper use of prima facie negligence might both tend to achieve in the same case the same justifiable result.\textsuperscript{117} The most serious objections to negligence per se can be overcome by reliance upon the statutory purpose and excused violation doctrines, and by restricting recovery to instances where the plaintiff is of the class protected and the injury is caused by the risk sought to be prevented.\textsuperscript{118} Jury lawlessness in prima facie evidence of negligence cases can be pre-

\textsuperscript{111} Lowndes, supra note 28, at 367-69.
\textsuperscript{112} For expression of that objection, see Gregory, supra note 71, at 627; Thayer, supra note 28, at 322-23.
\textsuperscript{113} Comment, 39 W. Va. L.Q. 268, 270 (1933).
\textsuperscript{114} Thayer, supra note 28, at 324.
\textsuperscript{115} 2 Harper & James, Torts § 17.6.
\textsuperscript{116} Ibid. See also Morris, Torts 144.
\textsuperscript{117} Oldfield v. Woodall, 118 W. Va. 55, 42, 166 S.E. 691, 694 (1932); 2 Harper & James, Torts § 17.6; Morris, Torts 162.
\textsuperscript{118} 2 Harper & James, Torts § 17.6.
vented by keeping cases from jurymen when no reasonable jury could find other than as the court would.\(^\text{119}\)

Delegated legislation, that is lawmaking by city councils and administrative agencies, raises the question whether such rules should be given the same effect as statutes.\(^\text{120}\) As to ordinances, the West Virginia court has, but for one noticable slip,\(^\text{121}\) answered yes.\(^\text{122}\) If the municipalities are acting within the power given them, their legislation is every bit as much an expression of the sovereign will as are the contents of the state code. As to administrative regulations, in *Rinehart v. Woodford Flying Service*,\(^\text{123}\) probably through inadvertence, the court implied by its actions that violation was negligence per se. This cannot be. If administrative legislation is to have a different procedural effect than statutes enacted by the state legislature, that impact must be less, not greater. Probably today the court would adopt the approach that it uses in the ordinance cases—violation of administrative quasi-legislation is prima facie evidence of negligence.\(^\text{124}\)

2. **Statutory Violations and Contributory Negligence**

*Violations by the defendant.* A party who has broken the criminal law is liable in a negligence action only when "the other has not so conducted himself as to disable himself from maintaining an action."\(^\text{125}\) The defense of contributory negligence is open to the defendant. While it is true that a plaintiff has a right to assume that


\(^{120}\) The Restatement notes that they should be treated the same. *Restatement, Torts* § 285, comment b (1934). See also 1 *Shearman & Redfield, Negligence* §§ 17, 18.


\(^{123}\) 122 W. Va. 392, 9 S.E.2d 521 (1940).


\(^{125}\) *Restatement, Torts* § 286 (d) (1934).
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others will obey the law,126 still he must act as a reasonable man127 and a man of reasonable prudence knows that the time might come when he will have to act in the face of lawbreaking. Furthermore even a defendant who has violated a statute is entitled to assume that the plaintiff will not only obey the law but also will act reasonably.128

As the result of application of these doctrines plaintiffs who have possessed the right of way at intersections or on the highways have been denied recovery; they have not acted reasonably.129 Persons struck by nonsignalling trains have been refused compensation on the ground that it is unreasonable for them merely to rely on the signals required by law; they also must look and listen for trains.130 Also drivers must keep a weather eye out for illegally parked vehicles. It has been held that inattention by a plaintiff and his failure to turn out to dodge an unlawfully parked truck constituted contributory negligence.131

Where the defendant disobeys a child labor act132 a somewhat different problem arises. In Norman v. Virginia-Pocahontas Coal Co.,133 the West Virginia court noted that a guilty employer could use the defense of contributory negligence if he was able to demonstrate that the child contributing to his own injury possessed extraordinary wisdom and full appreciation of his danger. That ruling

132 W. VA. CODE ch. 21, art. 6, §§ 1-10 (Michie 1955).
133 68 W. Va. 405, 69 S.E. 857 (1910).
was followed\textsuperscript{134} until \textit{Pitzer v. M. D. Tomkies \& Sons},\textsuperscript{135} which expressly overruled it. There in a holding which placed West Virginia in line with the weight of authority\textsuperscript{136} the court decided that contributory negligence of a child employed contrary to the child labor law was not available as a defense to employers in suits based on such violations. The court reasoned that application of the principle of contributory negligence "virtually emasculates the provisions of the statute...\textsuperscript{137}" This it was no longer willing to do.

**Violations by the plaintiff.** The plaintiff's contributory negligence might consist of his violation of a legislative enactment. If lawbreaking by defendants is prima facie evidence of negligence, then criminal disobedience by plaintiffs should amount to prima facie evidence of contributory negligence.\textsuperscript{138} Thus where a claimant against a railroad drove onto its tracks without looking, a violation of a stop-for-trains law, that act was held to be prima facie evidence of contributory negligence.\textsuperscript{139} Jaywalking plaintiffs\textsuperscript{140} and those in the street outside of designated crosswalks\textsuperscript{141} should be similarly treated. They have broken the law.

In Myers \textit{v. Charleston Transit Co.},\textsuperscript{142} a bus line was sued by a pedestrian who had been sideswiped by one of its vehicles. Its

\textsuperscript{134} See, \textit{e.g.}, Wills \textit{v. Montfair Gas Coal Co.}, 104 W. Va. 12, 138 S.E. 749 (1927); Griffith \textit{v. American Coal Co.}, 75 W. Va. 686, 84 S.E. 621 (1915); Honaker \textit{v. New River \& Pocahontas Consol. Coal Co.}, 71 W. Va. 177, 76 S.E. 180 (1912); Blankenship \textit{v. Ethel Coal Co.}, 69 W. Va. 74, 70 S.E. 863 (1911); Burke \textit{v. Big Sandy Coal \& Coke Co.}, 68 W. Va. 421, 69 S.E. 992 (1910).

For cases concerning the special problem created by allegations that the parent of a child killed consented to his unlawful employment, see Irvine \textit{v. Union Tanning Co.}, 97 W. Va. 388, 125 S.E. 110 (1924); Waldron \textit{v. Garland Pocahontas Coal Co.}, 89 W. Va. 428, 109 S.E. 729 (1921); Dickinson \textit{v. Stuart Colliery Co.}, 71 W. Va. 325, 76 S.E. 654 (1912); Daniel \textit{v. Big Sandy Coal \& Coke Co.}, 68 W. Va. 430, 69 S.E. 993 (1910).


\textsuperscript{136} \textit{Restatement, Torts} § 483 (1934).


\textsuperscript{138} For discussions of violations by the plaintiff, see 2 \textit{Harper \& James, Torts} § 17.6; \textit{Prosser, Torts} § 34.

For general discussions of contributory negligence, see Green, \textit{supra} note 40, at 3; Thayer, \textit{supra} note 28, at 338; Davis, \textit{supra} note 84, at 505.

\textsuperscript{139} New Y.C.R.R. \textit{v. Casto}, 216 F.2d 504 (4th Cir. 1954).

\textsuperscript{140} Walker \textit{v. Robertson}, 91 S.E.2d 468 (W. Va. 1956).

\textsuperscript{141} Skaff \textit{v. Dodd}, 130 W. Va. 540, 44 S.E.2d 621 (1947).

\textsuperscript{142} 128 W. Va. 584, 37 S.E.2d 281 (1948).
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defense was the violation by the plaintiff of the law against public intoxication. It sought an unqualified instruction based on drunkenness under all circumstances. The trial judge and the appellate court agreed that such was an improper instruction. A defendant who uses statutory violation as the basis for his defense has to combat the statutory purpose and reasonable violation doctrines, he must show that the acts constituting the violation proximately caused the accident, and he should demonstrate that the regulation was for the protection of his class. Here at least the last mentioned of these limitations would have prevented use of the defense attempted.

3. Statutory Compliance

Related to the question of the relationship of a breach of a criminal statute to liability in a tort suit is the problem of the effect of conformity. In some jurisdictions in the past there was authority for the proposition that conformity did establish freedom from negligence. If statutes establish standards of conduct, then those adhering to them do come up to officially accepted standards. But legislation usually gives only a minimum gauge for conduct and that does not necessarily preclude a finding that the actor was negligent in failing to take additional care. The requirement of driving at a posted speed does not mean that one who is otherwise negligent because of failure to keep his car under control is immunized from tort liability by legislative action. Nor is a defendant who brings himself within a statutory exception relieved of his common law duty to act as a prudent man. In fact in the courts of West Virginia it has been held that refusal of an instruction mentioning only the statutory liability for driving without lights was correct. Such an instruction was incomplete in that it did not also mention the possibility of violation of a nonstatutory duty to avoid endangering highway travellers.

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143 Prosser, Torts § 94 nn.96-99.
144 See cases cited in Morris, Torts 174 n.73.
145 Id. at 173. As to administrative legislation, see Morris, The Role of Administrative Safety Measures in Negligence Actions, 28 Tex. L. Rev. 143 (1949).
146 Prosser, Torts § 94.