BREACHES OF THE N. B. MOTOR VEHICLE ACT AS GROUNDS FOR ACTIONS OF NEGLIGENCE.

Introduction

The statutory requirements of the Motor Vehicle Act do not limit or interfere with the common law remedy for negligence, but they give other remedies directed to other ends. (1) Although it has been said that the Act is passed to insure the safety and protection of persons riding or driving upon the highway, and gives a right of action to any such person who is injured by reason of the non-observance of the requirements of the statute, (2) it is submitted that this statement should be qualified somewhat.

The driver or rider of a vehicle on the road may have observed the Motor Vehicle Act and all statutory regulations and still be guilty of negligence. Again, although it is not quite clear, regarding the provisions relating to pedestrians, (3) it cannot be supposed that the Act intended to make so important a change as to alter the common law, and make non-observance of these evidence of negligence. Further it should not be necessary to show that failure to hold a license is not grounds for an action of negligence. (4)

The law relating to motor vehicles is largely an application of the common law principles of negligence to conditions created by the motor vehicle. There is no doubt that a motor vehicle is essentially a machine that requires care in its operation if the rights of others are not to be invaded. The primary duty of every user is therefore to exercise reasonable care. Reasonable care in this connection means the care which an ordinary skillful driver or rider would have exercised under the circumstances. "The law does not require a supernatural poise or self control on the part of the driver of a motor vehicle; and if some unforseen emergency occurs which would naturally overpower the judgement of an ordinary careful driver, so that he fails to adopt the best course possible, he may not be negligent." (5)

No rule is more frequently overlooked than the rule that the conduct of the person whose conduct is in question must be measured with regard to the circumstances as they existed at the time. "No case is to be treated as if the person whose conduct is under consideration were a Judge or juror sitting safely and comfortably in Court calmly exercising his mind with the inquiry.....how the accident might have been avoided; the difficulties of the situation in all respects must have due consideration. (6)

(1) *See Sec. 48 of the New Brunswick Motor Vehicle Act, c. 20 of 24 Geo. V, 1934.*
(2) *Stewart v. Steel 6 D.L.R. 1*
(3) *See Sec. 40A and 40B, ibid.*
(4) *Such provisions are regulated by penalties.*
(5) *per Masten J., in Foster v. Zavitz, 24 O.W.N. 127 at 128.*
(6) *per Meredith, C.J.C.P. in Blair v. G.T.R. 1924, 1 D.L.R. 353 at 354.*

Where a situation of danger arises the person in charge of a vehicle is called upon to (a) realize the danger, (b) determine upon a course of action, and, (c) act. Since the law does not require supernatural poise or self-control, it is obvious that the length of time between the apprehension of danger and the physical action taken to avert injury is a very important element in the inquiry, was due care exercised? (7) It is stated that the time reaction of the average driver is 2/5 second. When it is realized that a car travelling at 35 m.p.h. covers about 20.5 feet in that time, it follows that the failure to avoid a danger which first appears at that distance ahead cannot be attributed to negligence. The Court of Appeal has placed the interval of time reaction at 1 to 2 seconds. This time element often plays an important part as evidence to prove breaches of the Motor Vehicle Act.

Breach of Statutory Duties

The cases of liability arising out of a breach of statutory duty were classified by Willes, J. (8) as follows: "There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of case is, where the statute merely gives the right to sue, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it."

There is no doubt that the Motor Vehicle Act creates a duty. The duty of a person who drives or rides a vehicle on the highway is to use reasonable care to avoid causing damage to persons, vehicles or property of any kind on or adjoining the highway. Reasonable care in this connection means the care which an ordinarily skilful driver or rider would have exercised under the circumstances. The steps to be taken to perform this duty of taking reasonable care have been laid down in a more detailed form in several sets of circumstances which are of constant occurrence.

The violation of or non-compliance with the provisions of the Motor Vehicle Act are deemed an offence and penalties are provided. (9) If the Act was to provide these penalties and these alone, it might be that this would be the only remedy under the third class of liability stated by Willes J. But by Section 48 of the New Brunswick Act, common law rights are not affected.

(7) *See Claxton v. H.G. & B. Elec. Ry.*, 32 O.W.N. 256 at 257.

(8) *Wolverhampton New Waterworks Co. v. Hawkesford* 1859, 6 C.B. (n.s.) 336, 356

(9) *See Sec. 65-75, Motor Vehicle Act of N.B.*

> "Sec. 48. Nothing in this act shall be construed to affect the common law right of any person to prosecute or defend a civil action for damages by reason of injuries to person or property resulting from the negligent use of a public highway by any person operating a motor vehicle.

This seems to answer that pertinent question, is the person bringing the action one whom the statute desired to protect? The statute may have been designed to protect a particular class of persons, but this is not essential in order to give a right of action. "The question is not to be solved by considering whether or not the person aggrieved can bring himself within some special class of the community or whether he is some designated individual. The duty may be of such paramount importance that it is owed to all the public. It would be strange if a less important duty, which is owed to a section of the public, may be enforced by an action, while a more important duty owed to the public at large cannot. The right of action does not depend on whether a statutory commandment or prohibition is pronounced for the benefit of a class." (10) Section 48 provides that the common law right applies to any person notwithstanding a penalty for violation of the provisions, as provided by sections 65 to 75 of the New Brunswick Motor Vehicle Act.

The Extent of Statutory Duty Under Motor Vehicle Act

Salmond on Torts (11) says with regard to the breach of statutory duties, that the breach of a duty created by a statute, if it results in damage to an individual, is prima facie a tort for which an action for damages will lie, but the question in every case is one as to the intention of the Legislature in creating the duty. Prima facie, persons for whose benefit an Act is passed, have a right of action for damages for its breach causing them injury, but on the true construction the Act may not intend a remedy to the individual or it may provide a special remedy, the nature of which indicates that no right to the individual was intended. And then the learned author said that it also is a question of construction whether liability is absolute or depends on wrongful intent or negligence, and he quotes Brett L.J. as follows: (12)

> "Where the language used is inconsistent with either view, it ought not to be so construed as to inflict a liability unless the party sought to be charged has been wanting in the exercise of due and reasonable care in the per formance of the duty imposed.,,

(10) *per Atkin L.J., in Phillips v. Britannic Hygenic Laundry Co., 1923, 2 K.B. 832*
(11) *7th edit. at p. 635.*
(12) *Hammond v. Vestry of St. Pancras, 1874 L.R. 9 C.P. 316.*

Other authors have said that the breach of a statutory regulation is usually prima facie evidence of negligence. (13) Shearman and Redfield on Negligence (6th edition), referring to American decisions stated:

> "It seems to us that the true rule is, in all such cases, that the violation of such a statute or ordinance should always be deemed presumptive evidence of negligence which if not excused by other evidence including all the surrounding circumstances should be deemed conclusive."

Charlesworth in his book on Negligence (14) refers to what Greer L. J. said about the English Road Traffic Act, 1930: "The code is not binding as a statutory regulation; it is only something which may be regarded as information and advice to drivers. It does not follow that, if they fail to carry out that which is provided for by the code, they are necessarily negligent. It only provides that they may be found negligent if they do not carry out the provisions of the code. Nor is it sufficient excuse for them to say, in answer to a claim for negligence: "We did everything that is provided for in the code."

McCardie J. delivering a judgment in the case of Phillips v. Britainia Hygienic Laundry Company Limited (15) stated:

> "I agree, however, that the breach of a statutory regulation will usually afford prima facie evidence of negligence. The view I am now expressing seems to accord with the opinion of the Divisional Court and the Court of Appeal in Wintle v. Bristol Tramways and Carriage Co. (16) namely that the Motor Car Acts and Regulations do not in themselves set the standard of care required for the purpose of civil actions. If we were to approve the plaintiff's submission here that the defendant's duty is absolute, a stranger would possess a greater right to care than is possessed by a passenger for reward against a person driving him.....It must be remembered that the common law gives a person injured an ample measure of protection by virtue of the legal rules as to negligence and nuisance. A high degree of care is required from those who drive motor cars. I respectfully agree with the view expressed by the late Mr. Beven in his well-known work on Negligence. (17) He there says (after referring to the Motor Car Acts and Regulations): "'These alterations in the law, while they permit the use of motor cars and regulate their uses, are directed to the public and police aspects of the case, and do not affect individual rights or remedies.".....In every case, I be-

(13) *Pollock, Gibbs.*
(14) *At page 68, 1938.*
(15) *1933, 1 K.B. 539.*
(16) *1916, 166 L.T. 125; 1917, 117 L.T. 238*
(17) *3rd edit. vol. 1, p. 110.*

> lieve the allegation has been that of negligence, and the breach of a statutory regulation has been alleged not as a cause of action in itself, but as evidence of a breach of the common law duty to take due care. . . . If the legislature desires to cast an absolute duty on motor car owners the purpose should be affected by plain words in an Act of Parliament, and not by a somewhat obscure regulation of a police character."

We should not lose touch with the New Brunswick Motor Vehicle Act. The latest decision on the subject (18) makes it clear that a breach of the statutory regulations is only prima facie evidence of negligence and "unless such negligence was an effective cause of the damage., it would not create liability on the part of the defendant." (19) The learned judge said that the rule governing the case is clearly stated by Viscount Hailsham in the Swadling v. Cooper, (20) where he says:

> My Lords, the law in these collision cases has long been settled. In order to succeed the plaintiff must establish the defendant was negligent and that that negligence caused the collision of which he complains. If it is established from his own evidence, or by evidence adduced on behalf of the defendent that the plaintiff could have avoided the collision by the exercise of reasonable care, then the plaintiff fails, because his injury is due to his own negligence in failing to take reasonable care."

Then quoting from Gibbs, (21) the learned judge goes on to say that although by statute, road users may be enjoined or forbidden to do certain acts, it does not follow that they will be civilly liable for a collision resulting from a breach of such statutory duty.

At this point then, we have arrived at the crux of the matter. As the trial judge remarked in the case of Chapman v. Wilson (22) referring to the provisions of a Motor Vehicle Act: "A breach of a by-law of a statutory provision does not of itself constitute negligence. It is evidence of negligence – it is only evidence of negligence –and it is prima facie evidence of negligence which casts upon the person who has been shown to have violated the by-law, the onus of satisfying you that notwithstanding that the conditions were such that the non-observance of the by-law or of the statute was not in point of fact negligence." Again in Webster v. Gelinas, (23) Hogg J. quoting from Mr. Justice Davis in his decision in Falsetto v. Brown, (24) where he said:

(18) *Leblanc v. S.M.T. 23 M.P.R. 145.*
(19) *per Harrison J. at p. 155.*
(20) *1931 A.C. 1 at p. 8.*
(21) *Collisions on Land, 5th edit. p. 6.*
(22) *1930 1 M.P.R. at p.*
(23) *1941 4D.L.R. 495 at 496 - 7*

> "The plaintiff, then, in an action such as the present where there is no statutory onus upon the owner or driver, must allege and prove negligence in the operation of the motor vehicle that caused the loss or damage sustained, and it is not sufficient merely to set up and rely upon a breach of a statutory duty.....it was not the intention of the Legislature that everyone injured through a breach of any statutory requirement should have a right of civil action against the owner for damages."

Hogg J. goes on to say that "the Act establishes very many rules of the road to be observed by the drivers of motor vehicles. But a breach of the Act must be a proximate cause of the injury complained of to render a person liable for damages." In other words the defendant may be responsible in damages because of a violation of a section of the statute, if there is negligence, and the violation causes or partially causes the accident.

Thus where A occasions damages to B in a motor vehicle collision. The plaintiff B in his action for damages for negligence must (a) prove the facts, (b) showing a breach of the statute (25) and (c) damages resulting as proximate cause of such breach. Then the onus of explanation is cast on the defendant A, who in the absence of explanation shall be held negligent.

Following two Canadian cases, (26) it was held that such onus of explanation is merely to give an explanation which is consistent either with negligence or with no negligence, and if he gives such an explanation, the onus is on those who assert that he was negligent to establish the fact. However the defendent must give an explanation, for prima facie evidence, if there is no evidence to meet it, becomes conclusive evidence and justifies a finding of guilt or a verdict for the plaintiff, when the accused or defendant offers no evidence to meet it.

Causa Causans

Negligence, to give rise to a cause of action, must be the real or proximate cause of the damage complained of.

A car carrying a quantity of liquor came into contact with a motor truck driven by an unlicensed driver. "The illegality of the conduct of both parties was not the cause of the accident," but as both were driving negligently, neither could recover. (27) "The cardinal principle in the law must be causa causans of the loss or damage suffered by the claimant. The mere fact of negligence of a person does not

(24) *1933, 3 D.L.R. 547.*

(25) *A breach of this duty occasioning damage will establish a prima facie case of negligence.*

(26) *Gauthier & Co. v. The King, 1915 S.C.R. 113; Motorways Ltd. v. Simpson, 1948 O.R. 360.*

(27) *Honor v. Bangle 19 O.W.N. 380.*

necessarily result in liability in law on the part of that person." (28) Thus, if the negligence of the defendant did not cause or contribute to the cause of the plaintiff's damage, but such damage was in fact caused solely by the plaintiff, there would be no liability in law on the part of the defendant for such damages. Conversely, if the negligence of the defendant was the sole cause of the plaintiff's damage, the fact that there was some negligent act or omission on the part of the plaintiff is not sufficient in law to impose on the plaintiff any part of the responsibility or liability for the accident or damages resulting therefrom. (29)

The recent case of Fuller v. Nickle (30) illustrates the principle of causa causans. In this case, there was a collision at night between the appellants' truck and a car driven by the respondent. The whole left side of the car was practically ripped off by contact with the overhanging box of the truck. The truck was not equipped with the clearance lights required by the law and was 3½ inches wider than the legal width. The trial judge found that the respondent had not discharged the onus of showing that the infraction of the law contributed to the accident or that the appellant was otherwise guilty of negligence which was the causa causans. The Court of Appeal reversed this judgment and found that the probable cause of the accident was the absence of clearance lights, coupled with the illegal width of the truck. In the Supreme Court of Canada, the decision of the trial judge was restored. "The appellants' infractions of the Vehicles and Highways Traffic Act, both in failing to display clearance lights and having upon his truck 3½ inches extra width, may justify the imposition of penalties, but in fixing the responsibility for a collision in an action between parties they are important only if they constitute a direct cause of that action." (31)

There are many cases on this point of law which show that a violation of a specific provision of the Motor Vehicle Act does not necessarily constitute an act of negligence. It would be absurd to hold that the breach by a motorist of a statutory duty to have a red light in the rear of his motor vehicle would be a ground for an action for damages by a person who collided with the front of the car. In the case of Godfrey v. Cooper, (32) the plaintiffs were passengers in a jitney driven by F and injured in a collision with the defendant's motor car, negligently. F had no license to drive his car, although he was required to have one by the Act. The defendants claimed F was illegally on the highway, and the plaintiffs had no cause of action. Held that F's failure to procure the license was not shown to have caused the accident, and the plaintiffs were entitled to succeed. In

(28) *Smith Transport Ltd. v. Shurtleff, 1948 O.W.N. 412.*
(29) *See Andreas v. C.P.R. Ry. 1905, 37 S.C.R. 450.*
(30) *1949, S.C.R. 450.*
(31) *per Estey J. See also City of Vancouver v. Burchill, 1932 S.C.R. 620. Forbes v. Coca Cola Co. of Can. & Guiteau 1941 3 W.W.R. 909.*
(32) *51 D.L.R. 455.*

another case, (33) failure to sound the horn in breach of the Act was not the cause of the accident, when the plaintiff driving a team saw the motor car approaching, and the horn, if sounded could have done no more than warn plaintiff of the approach. If it is the proximate cause however, as where the plaintiff's car was not equipped with an adequate mirror, and that absence of the mirror was not only contributing, but a proximate cause of the collision, judgement must be for the defendant. (34)

In all actions of this type, it is the proper question for the jury whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to his misfortune by his own want of ordinary care that but for such want of care the misfortune would not have happened. It must be remembered that as in the case of negligence, a cause which is merely a sine qua non does not establish contributory negligence. (35)

Contributory negligence does not apply where there is ultimate negligence. This conclusion is supported by very high authority in an Admiralty case, where it is said per Viscount Birkenhead, L. C. Admiralty Commissioners v. S. S. Volute (1922) 1 A.C. 129 at p. 136: "A is suing for damage....He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B (the defendant) had not been subsequently and severably negligent. A recovers in full."

It is at this point then that we must deal with the question of ultimate negligence. Where both are negligent, the vital question is, whose negligence is last in point of time. In the case of Hanley v. Hayes, (36) where two vehicles were coming to an intersection, it was pointed out by Masten J. A. (37):- "If he had exercised reasonable precaution as to speed and observation, he could have checked his car, or have swung to the left, in time to have averted the accident. Instead.....he veered to the right. He was, therefore.....guilty of ultimate negligence."

When an emergency arises by reason of the negligence of one party, a new duty is cast upon the other to do his best to avoid the consequences of the initial negligence. If there is a breach of that duty, and disaster results, it is attributed solely to his failure His ultimate negligence is the sole cause of the disaster, and he must assume the whole responsibility. But it is only where a clear line can be

(34) *Forbes v. Coca-Cola Co., 1941, 3 W.W.R. 909; also Martin v. Ralph, 57 D.L.R. 588. These cases are authority for the principle that a defendent cannot rely upon a breach of the provisions of the Vehicles Act on the part of the plaintiff unless the breach can be shown to be the proximate cause of the accident.*

(35) *McLaughlin v. Long, 1927, 2 D.L.R. 186; see also the various Contributory Negligence Acts for the appotionment of loss according to degree of fault.*

(36) *1925, 3 D.L.R. 782.*

(37) *Ibid p. 785.*

(38) *Engel v. T.T.C. 1926 1 D.L.R. 986.*

drawn that the subsequent negligence depends upon the fact that one party had a chance (the last clear chance) to avoid the injurious consequences, and failed to make use of it, either due to further negligence at the moment, or to the operation of an act of negligence already committed, but the effect of which was continuing.

However, no matter what it is called, "efficient" or "effective cause," "real cause," "proximate cause," "decisive cause," "immediate cause," "causa causans,".....the object of the inquiry of the accident is a search to find the responsible agent. (39) Very often it is more convenient to begin at the accident, and work back along the line of events which led up to it in order to fix upon some wrong doer the responsibility for the wrongful act which has caused the damage.

It is submitted that the statutory requirements of the Motor Vehicle Acts do not limit or interfere with the common law remedy for negligence. Also that the Motor Vehicle Acts simply regulate the standard of care at any given time. Thus the Acts impose a duty on the driver of a motor vehicle to comply with the regulations laid down, but this still leaves upon every driver a common law duty of taking appropriate action outside the Motor Vehicle Act in circumstances where it becomes essential in the interest of safety. In such circumstances where it may be reasonable to depart from the ordinary rule of the road, it will throw the burden of proving such circumstances upon him, the driver who has departed from the ordinary rule. For example, where vehicles A and B approach each other from opposite directions on the same side of the road, A on its proper side and B on the wrong side, and when collision is imminent, A swerves to its wrong side, B at the same time swerving to its right side causing a collision, B is liable to A. (40)

If the driver of a motor vehicle fails to observe the provisions of the Motor Vehicle Act relating to the standard of care in driving, (41) or equipment requirements, (42) and is involved in an accident while such violation of the Act is continuing, can it be said that the breach or breaches of the Act is ground for an action of negligence? We have found that such breach is prima facie evidence of negligence. Prima facie evidence is sufficient to establish a fact, or to raise a presumption of fact until rebutted. It must be remembered however that three things are necessary in order that the plaintiff should recover, and it is necessary for the judge or jury to decide: (1) Whether the defendant has failed to observe the duty imposed on him by the statute. (2) Whether such failure was the direct cause of the injury of which the plaintiff complains. (3) The damages resulting from such injury suffered by the plaintiff.

(39) *B.C. Electric Ry. C. Ltd. v. Loach (1916) 1 A.C. 719 P.C. per. cur. 725–6–7*
(40) *Wallace v. Bergins 1915 S.C. 205.*
(41) *Sections 37, 38, 39, 42 of N.B. Motor Vehicles Act c. 20 of 24 Geo. V.*
(43) *McPhee v. Lalonde 1946 O.W.N. 373 per LeBel J.*

It is reasonable to believe that a breach of the Motor Vehicle Act in no way related to a collision will not be grounds for an action of negligence. For if there is no causal connection between the negligence and the damage there is no evidence of negligence to go to the jury. Here it should be noted that when there is a violation of the Motor Vehicle Act in the "agony of collision, the motorist is not liable even though there is a causal connection in the breach of the Act and the damage. "The plaintiff has no right to complain if in agony of the collision the defendant fails to take some step which might have prevented a collision unless the step is one which a reasonably careful man would fairly be expected to take in the circumstances. (43) This is also true in the case of pure accidents, where for example, a car driver suddenly becomes unconscious and falls down on the floor of the car, and the car, left without any guidance runs over the sidewalk and injures a pedestrian. (44) Except for these two cases, it may be said that if the driver of a motor vehicle violates the provisions of the Motor Vehicle Act relating to the rules of the road and equipment requirements, and such breach of duty is the direct cause of the damages to the plaintiff, then the plaintiff has a good ground or basis of action for damages in negligence. If there is no causal connection between the breach of the Motor Vehicle Act and the damage there is no evidence of negligence to go to the jury.

It would seem therefore, that the law has worked out definite rules which must be complied with, and these rules represent the legal standard of care. These rules vary from time time as social conditions and habits of life vary. (45)

The reasonable man who drives a motor vehicle has the skill of a competent driver, has complete knowledge of the Motor Vehicle Act and the various statutory regulations dealing with the driving of motor cars, and complies with them. He knows that such rules are for his own benefit and the benefit of the general public. If the motorist violates them he will be penalized by the State, and if his violation causes injury to another person or person's property, he will be liable unless he can explain the prima facie evidence of negligence. Any such negligence will be determined by an action in torts for damages, with the standard of care laid down by the Motor Vehicle Acts.

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(44) *Goolson v. R. 1947 Ex. C.R. 513. See also Buckley and Toronto Transport Comm. v. Smith Transport 1946 Q.R. 798.*

(45) *Although breaches of the Motor Vehicle Act do not in themselves create grounds for an action of negligence, yet those provisions of the Act which deal with rules of the road, and vary from time to time, may create liability where none existed at common law. That is to say they enlarge the field of reasonable care.*