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THE USE OF CRIMINAL LAW AS A STANDARD OF CIVIL RESPONSIBILITY IN INDIANA

Cleon H. Foust†

One intriguing aspect of the day to day application of legal principles to litigated cases is the persistent search for techniques which will produce specific and accurate answers to liability problems. If a more or less fixed measuring device can be contrived which applied to varying fact situations will produce reliable answers, the uncertainty of legal responsibility is removed that much. Whether certainty in law is an unmixed boon is debatable but certainly it may be a comfortable boon for at least one party to each dispute. One of the many such techniques is the use of a safety regulation with a criminal penalty attached either to suggest or to mandate the answer to one question in a civil case: Was defendant (or plaintiff) negligent? This article will deal with the development of the statutory negligence formula in Indiana and an examination of its present status.¹

I. General Background

A. Negligence. It is undoubtedly true that the Anglo-American law of negligence, if not a product, was at least a contemporary of the industrial revolution.² With “the machine” providing its general impetus, the two-stage propulsions which pushed negligence into the position of the champion liability producer of the later 19th and 20th centuries were apparently provided by two methods of motive power, the steam engine and the gasoline engine.

It is not extraordinary that the first reported Indiana case utilizing unmistakable negligence terminology such as the prudent man, foresight and degree of probability of injury, occurred in 1827.³ The date accords generally with the earliest recognition of negligence as a basis of civil responsibility in other Anglo-American jurisdictions.⁴ It is somewhat unexpected that this, the first Indiana case speaking in terms of care and

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¹ The development of safety regulations and their effect upon civil liability should be typical in Indiana because that state has passed through the dominantly agricultural phase and is now preponderately industrial, and because it has always possessed many transportation facilities due to geographical location.
² 2 Harper & James, Torts 752 (1956). In Indiana industrialization lagged behind the East. There was no important industrialization until the 1850’s. 2 Barnhart & Carmody, Indiana from Frontier to Industrial Commonwealth 226 (1954).
³ Durham v. Musselman, 2 Blackf. 96 (Ind. 1827).
⁴ Prosser, Torts 117 (2d ed. 1955).
diligence involved neither a machine nor personal injury but injury by
dogs to a trespassing horse. Likewise the next case—procedurally re-
solved—involved property damage. With negligence established as a
basis of responsibility, the Indiana court soon settled two pleading prob-
lems: first, that trespass on the case was a proper action for a direct but
unintentional injury, and second, that plaintiff must allege his own free-
dom from negligence in actions on the case for negligence.

In the hands of one Wright, who apparently had a penchant for
charging his boat about the waters of the Ohio under a full head of steam,
the steam engine began to show its liability potential. In 1853 the
locomotive appeared in the reports almost simultaneously answerable for
both property damage and personal injury. “Negligence” as a digest
heading first appeared in the Indiana Supreme Court Reports in 1851. However, the “reasonable man” standard was not officially enunciated
until 1861.

B. Statutory negligence. The origin of statutory negligence is not
clear. In 1285 the Statute of Westminster provided an action on
the case to all aggrieved by the neglect of any duty created by that stat-
ute. In 1762, Comyn’s Digest enlarged upon this foundation:

So in every Case where a Statute enacts, or prohibits a Thing
for the Benefit of a Person, he shall have a Remedy upon the
same Statute for the Thing enacted for his Advantage, or for

5. Amick v. O’Hara, 6 Blackf. 258 (Ind. 1842).
6. Schuer v. Vender, 7 Blackf. 342 (Ind. 1845). This date corresponds roughly
with the leading American case of Brown v. Kendall, 60 Mass. 292 (1850) which established the corollary that direct injury was no longer the touchstone of liability. If unintentional, fault had to be proved.
7. Mount Vernon v. Duschett, 2 Ind. 586 (1851).
8. Wright v. Gaff, 6 Ind. 416 (1855); Wright v. Brown, 4 Ind. 95 (1853).
9. Gillenwater v. Indianapolis and Madison R. R., 5 Ind. 339 (1854) (first Indi-
a case allowing recovery for negligently produced personal injury, although the action was in trespass); Shelbyville Lateral Branch R. R. v. Lewark, 4 Ind. 471 (1853) (property
damage). The fact that the State of Indiana had invested about a million and a
half in the Madison railroad line made no difference in establishing the standard of
care. The court said the duty of the carrier was that of utmost care. See Esary, Internal Improvements in Early Indiana 115-116 (Ind. Hist. Soc., No. V, 1912). It is interesting to note that in 1845 there were only 30 miles of railroad in Indiana. But eight years later, by the time of the Gillenwater case, there were 1209 miles. The rail-
road from Madison to Indianapolis which appears in that case was first in the state.
The Shelbyville Lateral Branch Line was probably a branch of the main road to Madi-
son. 2 Barnhart & Carmony, op. cit. supra n. 2 at 29.
10. The heading began to appear in the English abridgements in 1843. Winfield,
History of Negligence, 42 L.Q. Rev. 184, 195 (1926).
11. Howe v. Young, 16 Ind. 312 (1861).
12. 13 Edw. 1, Stat. 1, c. 50 (repealed); See 2 Holdsworth’s History of English
Law 300 (1936).
13. At least Lord Campbell so interpreted it in Couch v. Steel, 3 E. & B. 402, 118
Both of these authorities antedate negligence as a source of responsibility. In 1854 the precedent establishing English case of *Couch v. Steel* relied upon these two authorities in imposing civil responsibility for injury resulting from a violation of a statute. This apparently was the origin of a prolific species of liability the main branch of which is now statutory negligence. In short, the original bloodline of statutory negligence seems not to have been negligence at all. It was strict liability based upon the violation of a statute. Responsibility automatically followed the violation with the emphasis upon cause rather than the defendant's fault. This is a possible explanation of the negligence per se formula. As cases of statutory responsibility were, in terms, assimilated into the law of negligence, liability for breach of the statute could remain strict by treating the breach as negligence as a matter of law. Results consistent with the earlier cases were thus achieved and furthermore, the formula had one great advantage—it provided a quick answer to the responsibility inquiry.

If it can be said that the first English case of statutory negligence appeared in 1854, then the appearance of the same formula for responsibility followed closely thereafter in this country. In 1865 the New York court, citing no authority, said one violating a speed ordinance was necessarily negligent in the eyes of the law.

16. *E.g.*, Groves v. Winborn [1898] 2 Q.B. 402; Gorris v. Scott L. R. 9 Exch. 125 (1874). The later English cases consistently followed the formula laid down in *Couch v. Steel*, viz., that if the statute imposed a duty redounding to the benefit of a particular class of the public anyone injured by the breach of duty might bring an action upon the statute. While the results were thus consistent courts were apparently not very sure of the rationale. In addition to the reasons for liability adduced in *Couch v. Steel*, Baron Pollock, who participated in the decision of *Gorris v. Scott*, took the position in his book on *Torts* (p. 17, Am. ed. 1887) that failure to perform a statutory duty was "generally equivalent to an act done with intent to cause wrongful injury." Also frequently encountered as in Groves v. Winborn, (pp. 410, 418) is the language of "absolute" and "unqualified" duties which enabled the courts to obviate excuses for breach of the statute. See also, *I Addison, Torts* 65 (1876); *Salmond, Torts* § 159 (1907); *Winfield, Torts* § 38 (4th ed. 1948); *Thayer, Public Wrong and Private Action*, 27 Harv. L. Rev. 317 (1914). Nor should the similarity between the formula for recovery in these cases and that for private recovery for injuries caused by a public nuisance be overlooked. See *Thayer, op. cit. supra* at 326. In later English cases involving breaches of statutory duties the solution is more frequently in terms of negligence. *E.g.*, Lochgelly Iron & Coal Co. v. M'Mullan [1934] A. C. 1 (1933). Compare Groves v. Winborn, *supra*. See *Salmond, Torts* §§ 173-75 (11th ed. 1953); 2 *Street, Foundations of Legal Liability* 172 (1906).

rationale of responsibility remained uncertain. In 1913 Professor Thayer began his classic discussion of Public Wrong and Private Action with the inquiry, "When does the violation of a criminal statute or ordinance make the wrongdoer civilly responsible?" On this question, he said, "the law is in some confusion." It is apparent that even then the confusion pertained not so much to what criminal regulations affected civil liability as it did to the weight to be given to a breach of a regulation—whether, as Professor Thayer said, the breach was "negligence per se," "prima facie evidence of negligence" or only "evidence of negligence."

The latter divergence of opinion remains largely unresolved. The American Law Institute suggested in 1934 that if the criminal regulation were a safety regulation, i.e., designed to protect a class of people from certain hazards, its violation should produce civil liability to those who were members of the class and whose injuries resulted from the hazard. This result assumes, of course, that a causal relationship exists between the violation and the harm and that there are no defenses of contributory fault. While, generally speaking, all authorities would agree concerning the necessity of a causal relationship and the applicability of the latter defenses, not all would agree with the restatement position concerning the weight to be given the violation of a safety regulation. Probably the majority of the courts in this country treat the violation as negligence per se.

II. IND HoA Cases On Statutory Negligence

The first Indiana case of statutory negligence like the first New York case involved a speed ordinance and contained no authority but, unlike the New York pronouncement, said the ordinance was admissible rather than conclusive on the question of negligence. This view by the Indiana court seemed to treat a statute or ordinance, like evidence of custom, as circumstantial evidence of negligence. It was, however, short lived. In 1880 the leading Indiana case of Pennsylvania Company v. Hensil, citing no cases, held, that failure to perform a duty imposed by

injured by the act which constitutes the violation of the statute is entitled to a civil remedy for such injury notwithstanding any redress the public may also have."

18. 27 HARV. L. Rev. 317 (1914).
19. 2 RESTATEMENT, TORTS § 286 (1934); RESTATEMENT (SECOND), TORTS § 286 (TENT. DRAFT No. 4, 1959).
20. 2 RESTATEMENT, TORTS § 286 Comment D (1934); RESTATEMENT (SECOND) TORTS §§ 288A, 288B (TENT. DRAFT No. 4, 1959).
21. 2 HARPER & JAMES, TORTS § 17.6 (1956); PROSSER, TORTS § 34 (2d ed. 1955).
23. 70 Ind. 569, 574 (1880). This result was said to coincide with the "overwhelming" weight of authority citing only THOMPSON, NEGLIGENCE, and SHERMAN & REDFIELD, NEGLIGENCE.
a statute was negligence per se "and entitles an injured party to recover, provided the failure was a proximate cause of the injury." Why at that time the court chose to ignore the only previous Indiana authority can only be pondered. The assurance with which the Indiana court announced the negligence per se formula was belied by the then existing authorities. There was no clear weight of American authority. Nevertheless, Indiana became one of the pioneers in the application of the strict doctrine that breach of a penal safety regulation compels civil liability as a matter of law.

Shortly after the turn of the century Indiana civil cases involving violations of criminal statutes had established an analytical pattern consistent with other states as follows:

a. If the statute violated specifically provided for civil recovery by an injured party, liability followed breach as a matter of law but the tendency of the courts in many instances was to cast the results in these cases in the statutory negligence framework.

b. Even if no civil recovery was specified, the breach of a criminal law was pertinent on the issue of negligence if it appeared the enactment was primarily a safety regulation designed (1) to protect a class of people of whom plaintiff was a member and (2) to prevent the type of injury which had occurred in the case presented. The latter determinations were then and are now ones of law. It makes little difference whether the issue is negligence or contributory negligence since in either event the extraction of a legal duty from the safety regulation is resolved by the same considerations.

24. Sherman & Redfield, Negligence 484 (1869); Smith, Negligence 29 (2nd Am. ed. 1896). The arrangement of the treatises of this time is functional; e.g., liability of employers, railways etc., rather than analytical.

25. 1 Thompson, Negligence § 419, at 402 (2nd ed. 1901).


28. Heiny, Adm'r x. v. Pennsylvania R. R., 221 Ind. 367, 47 N.E.2d 145 (1943); 2 Harper & James, Torts 1228 (1956); Harper, Development of the Law of Torts in Indiana, 21 Ind. L. J. 447, 462 (1946). While acknowledging the rule, in many cases the court rescues the plaintiff on the
Once the court has decided that the regulation was designed to protect the plaintiff from the kind of injury which occurred there still remains the question of the optimum effect to be given to the violation; *i.e.*, whether it is persuasive or presumptive or conclusive of negligence. Typically, as in the *Hensil* case, this inquiry into the procedural effect of the violation received very little consideration in the early cases. Thus, while the fundamentals of civil duty imposed by a safety regulation had been laid down at the turn of the century, analysis of statutory negligence was admittedly incomplete.

The Indiana cases dealing with statutory negligence are in many instances unconnected by citation. However, four major chains of authorities are recognizable. They will be discussed briefly in the following paragraphs.

A. The locomotive signal cases. Two years after the pronouncement in the *Hensil* case that the breach of an ordinance generated responsibility as a matter of law there began a long series of cases under an 1879 act regulating locomotive signals at street and highway intersections.29 Section 2 of the act specifically provided for a civil recovery by "any person . . . who may be injured" by failure or neglect to comply with the signal requirements. The statutory imposition of civil responsibility was clear and unambiguous. Liability should have followed from (1) a breach of the statute which (2) caused plaintiff's injury. Whether by undue emphasis on the term "neglect" in the statute, by resort subconsciously to a familiar legal technique or by a conscious desire to soften the blow upon the railway enterprise, the Indiana court led by Judge Elliott promptly assimilated Section 2 into the negligence complex.30 So long as Indiana adhered to the rule that breach of a safety regulation was negligence as a matter of law, Judge Elliott's interpretation did not affect the finding of primary liability. But his interpreta-


29. Ind. Acts 1879, Ch. 77, at 173.

30. In the same year in a case involving another statute, Judge Elliott had suggested there might be an excuse for violation of the safety regulation. Binford v. Johnston, 82 Ind. 426, 434 (1882).

31. Cincinnati W. & M. Ry. v. Hiltzauer, 99 Ind. 486 (1884). The Indiana court engaged in the same assimilative process under two separate statutes granting civil recoveries for injuries "occasioned by violations" of mining safety acts. Ind. Acts 1891, Ch. 40, § 13; Ind. Acts 1905, Ch. 50 § 27; Davis Coal Co. v. Polland, 158 Ind. 607, 62 N.E. 492 (1902); Princeton Coal Co. v. Lawrence, 176 Ind. 469, 95 N.E. 423 (1911). The compensatory nature of the acts actually was weakened by the introduction of the contributory negligence defense. See Foster, *Statutory Strict Liability*, 39 A.B.A.J. 1015 (1958); 2 RESTATEMENT, TORTS, § 285, at 753 (1934).
tion did make possible the defense of contributory negligence—a defense which the legislature may not have intended. There were seventeen cases appearing in the appellate courts under this statute and its amendment. Thus, by 1900, largely as a result of the doubtful construction of a locomotive signals act, there were multiple precedents in Indiana for the negligence "per se" doctrine.

B. The factory act cases. The next major series of statutory negligence cases arose out of the famous Factory Act of 1899. Section 9 which required the employer to undertake that "all vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws and machinery of every description therein shall be properly guarded, . . ." was the major battleground. Violation of the act was a misdemeanor. The first and second cases to reach the appellate courts under the Factory Act held that violation of the act was negligence "per se" but in so doing both of them relied upon a leading case decided under the Coal Mine Safety Act without noting that the latter act specifically provided for a civil recovery.

The Factory Act accounted for more than half of the statutory negligence cases to reach the Indiana appellate courts in the period between 1900 and 1920. Notwithstanding lip service to the negligence per se pattern established by the two early cases, beginning about 1905 the act underwent a versatile attack by the Indiana courts. Three weapons were used: (1) A strict interpretation of the act which narrowed its scope solely to machines ordinarily encountered in the course of the employee’s duties and which limited the phrase "machinery of every description" to machinery of the same class mentioned such as vats, pans, saws,


33. The Act was amended by Ind. Acts 1881 (spec. sess.) Ch. 85, at 590, Ind. Ann. Stat. § 55-1243 (Burns 1951). Actually between 1882 and 1902, 56% of the cases in the Indiana appellate courts involved this statute and 87% of the cases in the Indiana appellate courts involved railways. Steam and electricity continued to be the major tort litigation producers until the Factory Act took over in 1902.

34. § 40-901 et seq. Ind Ann Stat. (Burns’ 1952). In 1860 there were 21,295 workers in industrial pursuits in Indiana. By 1900 there were 155,956. During the same period the value of manufactured goods multiplied almost 9 times. Among the principal industries were lumber manufacture and heavy industry. The age of wood was rapidly coming to an end. 2 Barnhart & Carmony op. cit. supra n. 2 at 226-52. By 1920 the two leading industries were steel and motor vehicles. Id. at 440. Mechanization of the manufacturing process was marked after 1900. Id. at 443. By 1947 in Indiana the value added by the manufacturing process to raw materials was over three times as much as the value of all agricultural products. Id. at 544.


36. Buehner Chair Co. v. Feulner, 28 Ind. App. 479, 63 N.E. 239 (1902); Monteith v. Kokomo Wood Enameling Co., 159 Ind. 149, 64 N.E. 610 (1902).

37. Davis Coal Co. v. Poland, 158 Ind. 607, 62 N.E. 492 (1902).

38. E.g., Robertson v. Ford, 164 Ind. 538, 74 N.E. 1 (1905).
planers, cogs etc.; (2) manipulation of proximate cause, sometimes ridiculously limiting the employer’s liability, and (3) application of foresight of harm as the criterion of “properly” guarded machinery.

For the purpose of symmetry one would like to conclude that this changed judicial attitude toward Factory Act violations during the first decade of this century was typically cyclical: a general relaxation from initial zeal in enforcing new social legislation. Unfortunately there is not sufficient evidence to support this conclusion. Whatever may have been the actual reason for the lack of consistency in the Indiana decisions it may or may not be significant that contemporary American authorities were about evenly split between two alternatives: (1) violation was negligence per se and (2) violation was only evidence of negligence.

In any event, from this assault the act emerged bruised and scarcely breathing—but alive. Apparently this is one of those instances wherein the judicial attitude had not, for a short time, reckoned with the economic and social pressures afoot. The great increase in numbers of factory workers and the shift from processing lumber and farm products to heavy industry sharpened the need for safe working conditions and compensation for industrial accidents. These needs were not only reflected in the legislation of the following years but also in the judicial remorse vis-à-vis the Factory Act. The Workmen’s Compensation Act was about to take over as the employee’s best friend, but nevertheless, the Factory Act was nursed back to vigorous health by the courts just in


40. This was particularly apparent in the Supreme Court. Two examples are Crawford & McRimmon v. Gose, 172 Ind. 81, 87 N.E. 711 (1909), (plaintiff’s hand slipped and was caught in machinery cogs) and; P.H. & F.M. Roots Co. v. Meeker, 165 Ind. 132, 73 N.E. 253 (1905), (plaintiff slipped on a loose rod left on the floor and fell into machinery cogs). In both cases the court said the proximate cause of the injury was the slip and not defendant’s failure to guard the cogs. Compare Cook v. Ormsby, 45 Ind. App. 352, 89 N.E. 525 (1909).


42. Shearman & Redfield, NEGLIGENCE, § 13 (5th ed. 1898); 2 Jaggar, TORTS § 263 (1895). Compare 1 Thompson, NEGLIGENCE §§ 10, 11 (1901).

43. Supra n. 34.


45. In Cincinnati H. & D. Ry. v. Armuth, 180 Ind. 673, 103 N.E. 738 (1913), the supreme court criticized the Meeker, supra note 40, and Sullender, supra note 39, cases but over-compensated with some unnecessarily loose cause talk: “That the accident could not have happened without the offending cause is sufficient to constitute it the proximate cause.” 180 Ind. at 678, 103 N.E. at 740. In Illinois Car Co. v. Brown, 67
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time to sicken with creeping obsolence. 46

Moreover, the cozening attitude toward the negligence per se doctrine apparent in the later cases under the Factory Act probably reflected the general trend in statutory negligence cases. In 1914, Professor Thayer, whose widely read discussion of the problem has been previously mentioned, wrote, "to invite the jury to consider when and to what extent it is reasonable to break the law is a strange thing." 47

C. The steam and electric railway cases. Prior to the turn of the century there had been several Indiana negligence cases involving steam railways but which did not involve the crossing signal acts. For the most part they concerned city ordinances and uniformly held breach of a criminal regulation to be negligence per se. 48 By 1900 the steam railway had become by far the principle means of transportation in Indiana 49 and in the early 1900's Indiana had a more extensive system of electric railways than any other state. 50 Inevitably the increased mileage, speed and efficiency had its counterpart in accident litigation. Except for what appears to be an occasional aberration 51 there was little indication of any desire to restrict the liability of the railways whether the violation was of a statute, ordinance or administrative regulation. 52 Consistently with

Ind. App. 315, 116 N.E. 4 (1917) the court criticized the previous application of ejusdem generis to "machinery of every kind" and said the act applied to all machinery if found to be dangerous. In Indiana Manufacturing Co. v. Coughlin, 65 Ind. App. 268, 115 N.E. 260 (1917) the act was said to apply to a machine whether or not used in the usual discharge of the employee's duties if his work required him to come near it. In Kokomo Steel & Wire Co. v. Carson, 69 Ind. App. 523, 119 N.E. 224 (1918), foresight of injury as the boundary of the employer's duty to properly guard machinery was dealt a mortal blow.

46. Over 20 years later, a brief revival permitted recovery for two otherwise uncompensated occupational diseases. Dalton Foundaries v. Jeffries, 114 Ind. App. 271, 51 N.E.2d 13 (1943); Dean v. Dalton Foundaries, 109 Ind. App. 377, 34 N.E.2d 145 (1941). If the factory act is dead there has been no burial. It remains on the books. 47. Thayer, Public Wrong and Private Action, 27 HARv. L. REV. 317, 323 (1914). Harper and James suggest that the strict rule was ascendant nationwide during this period. 2 HARPER & JAMES, TORTS 1013 (1956).


49. In 1900 there were 6,471 miles of steam railway in Indiana. This is roughly equivalent to the 1950 mileage. The peak was in the 1910-1920 decade at about 7,425 miles. 2 BARNHART & CARMONY, op. cit. supra note 2 at 457.

50. Blackburn, Interurban Railroads of Indiana, 20 IND. MAG. Hist. 221, 400 (1924). Now only one remains; the South Shore Line from South Bend to Chicago. 2 BARNHART & CARMONY, op. cit. supra n. 2 at 463. In cities electrical street railways first appeared in the late 1880's. Id. at 266.


the earlier pattern, negligence as a matter of law was the order of the day. The high point of this litigation appears to be in the decade 1910 to 1920, roughly corresponding with the heyday of the railways. There is no real indication that the courts intended any occupational variations of the strict negligence per se rule. During this period the statutory negligence rule as applied in the railway cases was consistent with the rule applied to the two previous categories.

D. The motor vehicle cases. The first statutory negligence case involving the automobile appeared in the Indiana Supreme Court in 1912.53 The pattern had now become familiar. The basis of the charge of negligence was a breach of the speed law.54 Before 1912 the automobile was a thunderous, erratic contraption and the star of negligence per se was ascendant. It is no wonder then that the court without hesitation applied the older authorities55 and pronounced the violation negligence as a matter of law. Beginning about 1915 the motor vehicle litigation developed apace.56 As in other areas of statutory responsibility, except for insignificant deviations,57 the earlier authorities were consistently severe. But after 1940 the deviations from the strict rule of negligence as a matter of law became more frequent and by 1955 it became apparent that the negligence per se doctrine, with respect to rules of the road at least, could no longer be said to be the Indiana rule.58

One of the early cases, Condor v. Griffith,59 had long troubled the Indiana courts because defendants relied upon it frequently. In that case


54. Ind. Acts 1905, Ch. 123, § 2 at 202, as amended, Ind. Acts 1907, Ch. 258, § 1 at 558. This was the first state speed law applicable to motor vehicles.
55. Specifically, Pennsylvania Co. v. Hensil, 70 Ind. 569 (1880), (the Indiana genesis of negligence per se) and other railroad and factory act cases, one of which, Inland Steel Co. v. Yedinak, 172 Ind. 423, 87 N.E. 229 (1909), was a child labor case.
56. The first motor vehicle registration statute was at Ind. Acts 1913, Ch. 300, at 779. The following year there were 66,410 passenger cars registered in Indiana. 2 BARNHART & CARMONY op. cit. supra n. 2 at 472. In 1957 there were 1,563,713 passenger cars and 296,810 trucks.
57. Typical were: Hamilton Harris Co. v. Larrimer, 183 Ind. 429, 432, 105 N.E. 43, 44 (1915). "[T]he willful or negligent violation of a city ordinance was negligence per se," (emphasis supplied) and Gerlot v. Swartz, 212 Ind. 292, 7 N.E. 960 (1937) in which the court suggested there could be some excuse for not having statutory flares marking a truck parked upon the highway.
58. Of the 18 Indiana cases since 1940, exactly one-half said there could be an excuse civilly for violation of the motor vehicle statutes. Since 1950 excuse was permitted in two-thirds of the motor vehicle violations.
59. 61 Ind. App. 218, 111 N.E. 816 (1916).
the appellate court admitted that it found no authority for but favored the allowance of an excuse for a technical violation of an ordinance requiring riders and drivers to keep "as nearly as practicable"60 to the right side of the street. Condor received little support until thirty years later in a case61 involving a statute requiring adequate brakes. The Appellate Court, by dictum, approved the Condor rule and further stated the Supreme Court likewise approved it.62 This position, while not specifically defined by the courts, treated the violation as presumptive rather than conclusive of negligence.63 Four years later the Supreme Court again applied the "excuse" rule to a parking violation64 but suggested that the statutes mandating certain motor vehicle equipment such as adequate brakes, lights, etc., were "absolute" duties.65 Violation of an "absolute" duty was said to be negligence as a matter of law. This suggestion that rules of the road are flexible and equipment rules inflexible has not been pursued in later cases. A late decision of the Appellate Court66 indicates that the "excuse" or "prima facie negligence" exception has devoured the negligence per se rule in motor vehicle cases and that impression is fortified by a recent Supreme Court opinion.67 But in the latter case the court added: "It should be borne in mind, of course, that some of the statutes define duties which are positive and which remain the same under all circumstances, the breach of which are not excusable in any

60. Thus the ordinance carried a built in defense. The court did not, however, rely entirely upon the words "as nearly as practicable." The case is distinguished in Union Traction Co. v. Wynkoop, 90 Ind. App. 331, 154 N.E. 40 (1926) (violation of a speed ordinance) on that basis. Other examples of built in excuses are: Indianapolis St. Ry. v. Slifer, 35 Ind. App. 700, 74 N.E. 19 (1905), involving the same ordinance, in which the court said whether it was practicable to keep to the right was a question of fact for the jury; statutes making excessive speeds "prima facie unreasonable" as in Buchanan v. Horris, 198 Ind. 79, 151 N.E. 385 (1926); and the Factory Act with its language "properly guarded."

62. Jones v. Cary, 219 Ind. 268, 37 N.E.2d 944 (1941). The statute required drivers to yeild one-half of the right-of-way on passing oncoming vehicles. The language of the case is not clear but it does seem a tentative step away from negligence per se.
64. Northern Indiana Transit, Inc. v. Burk, 228 Ind. 162, 89 N.E.2d 905 (1905).
65. See supra, n. 16.
67. Larkins v. Kohlmeyer, 229 Ind. 391, 98 N.E.2d 896 (1951), unless emphasis which is not suggested by the court is to be placed on the word "operation" in the decision, in order to limit it to "operating" offenses. The court said:

"Thus it may be said that where one has violated the provisions of a statute or ordinance in the operation of an automobile on a public highway, he is guilty of negligence as a matter of law unless the evidence discloses that compliance was impossible or non-compliance was excusable because of circumstances resulting from causes or things beyond his control, and in no way produced by his own negligence, or his conduct comes within an excuse or exception specifically provided in the statute itself." Id. at 400, 98 N.E.2d at 900.
case. We are not here concerned with any such."

Nor is it made clear what the "positive" duties are.

Any attempt to synthesize the later Indiana cases into a rational theory which will distinguish safety regulations whose violation may be civilly "excusable" from others which impose an "absolute duty" is futile. Actually there are hardly enough decided cases of the "prima facie" negligence type to justify any conclusion at this time. To date neither economic protection for a certain social group or against certain hazards, nor likelihood of injury from violation of the statute appear as reasons for maintaining a difference between negligence per se and "prima facie" negligence. The explanation probably lies in a change in attitude rather than in the subject of regulation. Furthermore, one wonders in how many cases the courts have talked in terms of negligence per se simply because no excuse for the violation was offered or one would have been preposterous in the circumstances.

III. RATIONALE

A. Fault and statutory negligence.

It is a tenable assumption that the function in a free society of the law of torts and of criminal law is the promotion of security: "deterrent" security in the case of criminal law wherein the ultimate goal is the prevention of socially dangerous conduct and "compensatory" security in the case of expanding tort law, wherein the ultimate goal is the assurance of compensation for recognizable injuries. As Dean Pound has suggested, the difficulty with the compensation goal is the stopping place. If everyone is compensated for every injury or conversely, if every actor is required to compensate for any injury he causes the result is an almost stagnating burden upon enterprise. Or so it is thought. Thus, tort law has evolved several methods of limiting liability for injuries caused. Losses are not shifted "willy-nilly" from the injured to the actor, but pursuant to a factor which will approximately equalize the competing social pressures for compensation and for freedom to act.

68. Id. at 401, 98 N.E.2d at 900.
69. 2 Harper & James, Torts, 1013 (1956).
70. 1 Austin, Jurisprudence 278 (1875); Von Ihering, Law as a Means to an End 362, 363 (1924); Pound, Causation, 67 Yale L. J. 1, 4 (1957).
71. See Sauer v. U.S., 241 F.2d 640, 649 (9th Cir. 1957); Caldwell, Criminology 115 (1956); Hall, General Principles of Criminal Law 200 (1947); Salmond, Torts 21 (11th ed. 1953); Pound, The Future of the Criminal Law, 21 Col. L. Rev. 1, 3 (1921).
73. Pound, Causation, 67 Yale L. J. 1, 2 (1957).
74. Holmes, The Common Law 49, 50 (1881); Morris, Torts 9 (1953); Pound, op. cit. supra n. 72.
In negligence cases the factor has by definition been lack of reasonable care—fault, if that term is preferred. Only in the event the actor is at fault is the loss shifted to him.

Traditionally, statutory negligence has not been considered as an independent sanction but has been treated (illogically or not) as a species of negligence wherein the standard of care is either fixed or suggested by a criminal enactment. If the traditional classification is correct it follows that the loss shifting factor in statutory negligence cases is the same as in all other negligence cases—lack of due care. Unless one assumes the state of perfection in which no reasonable man ever violates the law, breach of a criminal statute will not inevitably be imprudent conduct. Ultimately then, whether a breach of a criminal statute automatically produces civil liability or is only more or less persuasive of liability depends upon abandonment of or adherence to the due care (or fault) principle. For example, Driver in his new car tested the brakes in the dealer's garage. On leaving the garage he attempted to apply the brakes at the first stop signal; they failed to operate and he crashed into Victim, a pedestrian, who was in the proper crossing and walking with the traffic light. Driver drove with inadequate brakes. In so doing he violated the motor vehicle code. Assuming that he exercised reasonable care throughout shall he be civilly responsible to Victim because of the breach of the safety regulation? If he is, is this negligence? The unalterable imposition of responsibility because of a criminal misdemeanor—the disallowance of any explanation or excuse for the breach—is inconsistent with the basic principle of negligence. It is something less than negligence. On the other hand, the strict doctrine (negligence per se) is an appealing doctrine for the bench because it provides some measure of certainty in an area of imponderables and for the bar because it affords a greater measure of predictability of outcome. And, arguably, it is no sufficient indictment of the negligence per se rule merely to say that it fails to fit neatly into the negligence pattern.

Nevertheless, a conclusion of civil liability should not be compelled by the existence of the criminal statute. As a penal regulation the statute

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75. See Morris, Criminal Statutes & Tort Liability, 46 Harv. L. Rev. 453 (1933). Of course there are areas in tort law wherein vestigially or functionally no fault is required. But note that these areas usually involve circumstances in which the fault principle has not produced satisfactory results. For example, many suggest the fault principle is unsuited to the millions of motor vehicle accidents. Conceding that to be true arguendo, abandonment of the fault principle should apply to all auto accident cases and not just those involving safety regulations.

76. The rationale proposed by Thayer is that a reasonably prudent man does not break a criminal law and therefore one who does is negligent. See Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317, 322 (1914). Compare Lowndes, Civil Liability Created by Criminal Legislation, 16 Minn. L. Rev. 361 (1932).
creates a minimal standard of individual conduct for the benefit of the group. Criminal responsibility under it may not be dependent upon moral dereliction for two practical reasons:

(1) If the safety regulation is to achieve a maximum deterrent security, certainty of convictions for violations is as important as the penalty. Certainty of conviction, of course, decreases in direct proportion to the increase in permissible excuses for violation. Hence, no excuses are allowed.

(2) Practical judicial administration militates against excusing violations of safety regulations of a minor nature, involving little if any immorality but time consuming and expensive if defendant's moral fault must be tried in even a small proportion of the great number of cases.

Thus, strict statutory criminal responsibility is a tool for social control. But when the same statute is used as a strict measure of individual tort liability it is something like using a yardstick to measure a pint of spaghetti simply because the yardstick happens to be handy. Furthermore, the arguments for a quick and inexpensive determination of responsibility are not as strong in civil cases: For one thing, civil injury does not always follow violation of the speed regulation and for another, if injury does follow the resultant damages are frequently anything but trivial. Determination of whether the loss should be shifted is of tremendous importance to the interested parties in this situation. In short, there is no greater policy reason for the elimination of the fault principle in statutory negligence cases than there is in any negligence case.

As previously noted the Indiana cases have offered no satisfactory explanation of the negligence per se rule. The very lack of an articulate rationale for the negligence per se doctrine as opposed to the "prima facie" doctrine suggests the former may have been a procedural device to facilitate case solution. Further, a latent dissatisfaction with it as a rule of thumb has begun to appear. Perhaps the rationale for which Indiana courts and others are searching is simply this: As a statute becomes more clearly a mandate to deliberate, plan or prepare for the safety of others, an excuse for its violation becomes inherently more difficult to prove. It would be very difficult, for example, to establish an excuse for failure to have a required fire escape upon a theatre. Likewise it is improbable that excuses for operating a motor vehicle with dangerously worn tires could be produced. Inevitably as more safety preparation is mandated excuse will become more difficult and even im-

77. On the general subject see Morrisette v. U.S., 342 U.S. 246, 252 (1952); Hall, General Principles of Criminal Law 279 (1947); Perkins, Criminal Law 692 (1957); Model Criminal Code, § 1.05, Comment (Tentative Draft No. 2, 1954).
possible. This is nothing new—it is only the counterpart of the phrase "under the circumstances" in non-statutory negligence cases. It is the problem of the fact finder to determine whether an adequate excuse consistent with the standard of a reasonably prudent man under the circumstances has been shown. In short, the rule is constant—only the circumstances change its application and one of the circumstances is the inherent difficulty or ease of showing an excuse for violation of varying safety regulations. For this result it is not necessary to apply a negligence per se rule in one case and the "prima facie" rule in another. The latter could serve in all.

There is no evidence that the application of the rule of negligence per se for violation of safety regulations is intended as a transitional doctrine on the way to strict civil liability. If it were, it would be a pretty haphazard strict liability lacking consistency and independent of any rational basis therefor such as ultra-hazardous conduct or ability to absorb a financial loss. Rather it is suggested, the doctrine of negligence per se at least modernly, is a case-solving device.

B. Presumptive of Fault. Before attempting a final appraisal of statutory negligence or the trend of the Indiana cases, it would be desirable to transfix two slippery terms. They are "prima facie" and "presumption." The other pertinent term, "negligence per se" has already been fairly well immobilized.78

Exact definition of "prima facie" out of context is difficult. It is capable of at least two meanings: (1) It may be used in the sense that plaintiff79 has merely satisfied his obligation of producing enough proof to entitle him to jury consideration. The jury may decide for or against him but a verdict cannot be directed against him at that point. (2) It may be used in the sense of a rebuttable (sometimes called mandatory) presumption. Ideally "prima facie" achieves more certainty when it sheds any connotation of presumption and is employed only in the first meaning. The Indiana use of the term has not been perfectly consistent. "Prima facie" has on occasion been defined as here suggested; i.e., not binding upon the jury.80 More often, however, it has been considered in Indiana as a rebuttable presumption which shifts to the other party the

79. Plaintiff is used herein as the beneficiary of the presumption because most often he is. But if the issue is statutory contributory negligence, the defendant will be the beneficiary.
80. Huffman v. State, 205 Ind. 75, 80, 185 N.E. 131, 134 (1933); Landreth v. State, 201 Ind. 691, 702, 171 N.E. 192, 196 (1930); Blough v. Parry, 144 Ind. 463, 494, 43 N.E. 560, 563 (1895).
burden of going forward with the evidence. Specifically, in the statutory negligence cases, while the Indiana courts have ordinarily used the language "prima facie evidence of negligence" it is clear they have intended the phrase in its rebuttable presumption connotation.

Returning now to the qualitative effect of the violation of a safety regulation in a civil case it is well to note again that for criminal law administrative purposes the defendant will normally be precluded from arguing that through no fault of his there were circumstances which prevented his compliance with the regulation. In this context, i.e., for criminal law purposes, the varying circumstances of each case must be ignored. This may be the crux of the matter. The regulation does not purport to establish what a reasonable man would do in the particular circumstances of a given case but establishes for penal regulatory purposes the least anyone should always do. So while this legislative minimum is conclusive criminally it need not be conclusive of liability or immunity in a civil case because a reasonable man might do more or less in the circumstances. Nevertheless, it should not be ignored completely in a civil case. As a minimal standard it is persuasive of fault but how persuasive remains to be explored. Conceivably, if negligence per se were excluded the violation of a safety regulation could produce one of four alternatives in a civil case:

1. It could be relevant evidence admissible on the issue of negligence.
2. It could give the plaintiff a prima facie case in the lesser sense; i.e., plaintiff has produced enough evidence of negligence to entitle him

83. "The duty of coming forward with the evidence to sustain such a defense is upon the operator of the vehicle." Larkins v. Kohlmeyer, supra n. 82 at 400; Tate v. West, 120 Ind. App. 519, 94 N.E.2d 371 (1950); "[T]he operator may be excused from compliance with this section, but the duty of coming forward with the evidence to show such excuse is upon him." Northern Indiana Transit Co. v. Burk, supra n. 82 at 173; "[T]he violation of such statute or ordinance is prima facie negligence per se," Condor v. Griffith, 61 Ind. App. 218, 224, 111 N.E. 816, 818 (1916). See also, Hancock Truck Lines, Inc. v. Butcher, 229 Ind. 36, 94 N.E.2d 537 (1950); Jones v. Cary, supra n. 81.
84. The extent to which insanity, infancy, coercion and necessity are defenses to a criminal charge of this nature remains largely unexplored. Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 75 (1933).
85. If the statutory standard is minimal it would follow that its violation is not per se conclusive of negligence nor is its observance per se conclusive of due care. See 3 Harper & James, Torts 1014 (1956); Prosser, Torts 163 (2d ed. 1955); Morris, Criminal Statutes and Negligence, 49 Colum. L. Rev. 21, 23, 42 (1949).
THE USE OF CRIMINAL LAW

to jury consideration if the evidence is uncontested. The jury may or may not agree that negligence has been shown. This is sometimes described as a permissible inference.

3. It could raise a rebuttable presumption of negligence which could compel a verdict for plaintiff unless a reasonable excuse is offered by defendant.

4. It could shift the burden of proving a reasonable excuse to the defendant.

It is submitted that of these alternatives the third (rebuttable presumption of negligence) offers the most desirable choice; it affords recognition of the legislative judgment and still makes the determination of negligence dependent upon the circumstances of each case. One who fails to comply with a minimal standard of safety should incur the obligation of showing circumstances which excuse his noncompliance and neither the first nor the second alternatives (evidence and inference) impose such an obligation. Furthermore, circumstances excusing compliance with a minimal standard will be out of the ordinary. There is no injustice in a rebuttable presumption of normalcy.

A slavish regard for the traditional in assigning the burden of proof to one party or another should not alone preclude the fourth possibility (shift in burden of proof). However, the circumstances which the defendant will wish to establish in order to excuse his non-compliance are not in the nature of an affirmative defense like confession and avoidance. The ultimate issue is not the breach of the regulation but negligence. What defendant is saying is, "In spite of the breach of the regulation I was not negligent." Thus his evidence of the circumstances is relevant to a denial of the issue raised by plaintiff's assertion of negligence. Stronger reasons of policy than here appear should be advanced before the traditional burden of persuasion is shifted on this the most important issue in most damage suits.

Without wishing to labor the point, the Indiana statutory negligence cases decided within the last decade exhibit a clear trend toward re-assimilation of statutory negligence into the negligence complex—toward a rule which makes the breach of a statute presumptive but not conclusive of negligence. Whatever terminology is from time to time employed in all of the later deviations from the negligence per se formula.

86. See McCormick, Evidence § 308 (1954); Model Code of Evidence (Morgan Forward) 56; 9 Wigmore, Evidence § 2491 (3rd ed. 1940).

87. See McCormick, op. cit. supra n. 85 § 309, Thayer, A Preliminary Treatise on Evidence at the Common Law 326, 340 (1898); Morgan, Some Observations Concerning Presumptions, 44 Harv. L. Rev. 906, 930 (1931).

the breach of a safety regulation has actually raised a rebuttable presump-
tion of negligence.

IV. PROCEDURAL CONSEQUENCES

A. Effect of a Rebuttable Presumption of Negligence. Reluctantly,
the obvious must again be stated that if “presumption” ever was a precise
legal term it has long since ceased to have significance as such. But it
would serve no useful purpose in this connection to plow under the pre-
sumption patch.9 The term is so deeply ingrained in the legal literature
it would now be difficult to abandon. It would seem preferable to ac-
cept the term, to isolate its meaning in negligence cases and ruthlessly
to prune any extraneous connotations.90

As generally characterized “presumption” describes a factual rela-
tionship—when a basic fact is known to exist another fact must be as-
sumed.91 Normally these are known as presumptions of law but some-
times may be described as presumptions of fact. There are many and
varied reasons for a legally recognized connection between two facts and
consequently “myriads” of types of presumptions. The most common
species is the presumption based upon probabilities; i.e., once the basic
fact (e.g., violation of a safety regulation) is established it is rationally
probable the presumed fact (negligence) is true.92 If the original analy-
sis herein is correct that a legislative safety regulation establishes a mini-
mal standard of care, the presumption of negligence from its violation is
a rational one of probabilities. For example, one who fails to put out
flares around a truck stalled on the travelled portion of the highway
probably has not exercised the care of a reasonably prudent man. The
assumption from statutory violation to negligence is one entirely consis-
tent with human experience.

89. See McCormick, op. cit. supra n. 86 § 308; 9 Wigmore, Evidence, § 2491;
Model Code of Evidence (Morgan Forward) 52, 54, 306 (1942); McCormick, Charges
on Presumptions and Burden of Proof, 5 N.C.L. Rev. 291 (1927); McBaine, Burden of
Proof; Presumptions, 2 U.C.L.A. L. Rev. 13 (1954); Morgan, Some Observations Con-
cerning Presumptions, 44 Harv. L. Rev. 906 (1931); Morgan, Instructing the Jury upon
Presumptions and Burden of Proof, 47 Harv. L. Rev. 59 (1933).

90. It has been suggested by many courts and almost all writers agree that it is
possible to attribute one fixed meaning to “presumption” which will control its applica-
bility and effect. Unfortunately they are not agreed upon the one meaning. See Model
Code of Evidence (Morgan Forward) 55 (1942); McBaine, op. cit. supra note 88;
“[T]he numberless propositions figuring in our cases under the name of presumptions,
are quite too heterogeneous and non-comparable in kind, and quite too loosely conceived
of and expressed, to be used or reasoned about without some circumspection,” Thayer,
op. cit. supra note 87, 351.

91. Model Code of Evidence, Rule 701, p. 312 (1942); authorities cited supra note
89.

92. The presumption device also has meaning in many jurisdictions where the doc-
trine of res ipsa loquitur is applicable and for the same reason.
There are two major theories of the procedural effect of this type of presumption.93

1. If the basic fact has been established (in this case, the statutory violation) the presumption of negligence arising therefrom, if uncontested, is enough to carry the one alleging negligence safely past a motion for involuntary nonsuit or motion for directed verdict. Undisputed, it requires a finding of negligence. But if evidence appears from whatever source and at whatever point in the trial which would justify a jury in finding the presumed fact (negligence) did not exist, like a genii the presumption vanishes and the case proceeds as if it had never existed.

Thus under this, the Thayer type presumption,94 the effect is to place upon the opponent of the presumption (the defendant in most negligence cases) the "risk of non production" of evidence. Since, on the appearance of countervailing evidence, the presumption could disappear during the plaintiff's case, theoretically the unwonted departure could leave the plaintiff without sufficient evidence to go to the jury.95 So the Thayerian effect gives the beneficiary of a presumption no unconditional guarantee against a nonsuit or directed verdict.96

2. Other authorities, notably Morgan and McGuire,97 favor a

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93. A third, less frequently encountered, theory treats the presumption as evidence in the case instead of a rule about the effect of certain evidence. The presumption becomes an item of proof in the case to be weighed with all other evidence. Practically, this appears to give proof of the basic fact, i.e., breach of a safety regulation in these cases, a double effect: procedurally as a presumption of negligence and substantively as proof of negligence. The latter effect requires the fact finder to perform the ridiculously impossible task of adding apples and aphorisms. Almost everyone agrees that this exercise in confusion is to be avoided. Kaiser v. Happel, 219 Ind. 28, 33, 36 N.E.2d 784, 786 (1941); McCormick, EVIDENCE § 317 at 669 (1954); Maguire, EVIDENCE COMMON SENSE AND COMMON LAW 190 (1947); 9 WIGMORE, EVIDENCE § 2491 at 290 (1940); Morgan, Some Observations Concerning Presumptions, 44 HARV. L. REV. 906, 908 (1931).


95. Apparently the Thayer theory of dissolving presumptions obtains in Nebraska, New Jersey and Tennessee, among other jurisdictions. In a number of cases involving a presumption in plaintiff's favor directed verdicts for defendant were nevertheless sustained: Schaeffer v. Anchor Mut. Fire Ins. Co., 133 Iowa 205, 100 N.W. 857 (1904); Withthauer v. Paxton-Mitchell Co., 146 Neb. 436, 19 N.W.2d 865 (1945); Carroll v. Prudential Ins. Co. of America, 125 N.J.L. 397, 15 A.2d 810 (1940); Walters v. Staton, 21 Tenn. App. 401, 111 S.W.2d 381 (1937). In other cases where a verdict against the beneficiary of the presumption was directed, the strength of the presumption was not clear, e.g., Walker v. Stephens, 221 Ala. 18, 127 So. 668 (1930); McCullogh v. Harshman, 99 Okla. 262, 226 P. 555 (1923). See Cleveland C. C. and St. L. Ry. v. Wise, 186 Ind. 316, 320, 116 N.E. 299, 301 (1917) where the court said, "This presumption (plaintiff's due care) does not prevail in favor of plaintiff throughout the trial except in the absence of evidence on the subject."

96. In Indiana a motion for non-suit is not a defendant's motion. City of Plymouth v. Milner, 117 Ind. 324, 20 N.E. 235 (1889). So the plaintiff would be concerned with a possible directed verdict only.

97. Actually, Professor Morgan's presumption is even stronger. It remains in the case until the jury finds "that the non-existence of the presumed fact is more probable
"strong" presumption. In the face of countervailing evidence, they suggest that instead of disappearing the presumption should remain in the case until the jury finds from all the evidence produced by the parties that due care is as probable as negligence. Stated otherwise, the opponent of the presumption must produce at least enough evidence to place the mind of the fact finder in equilibrium. Consequently this theory not only places upon the defender the risk of nonproduction of evidence but in effect secures the beneficiary of the presumption against a non suit or directed verdict at all stages of the trial. Actually there is an even stronger effect suggested by some, viz., that the presumption shifts the burden of proof to the defender so that he must produce enough evidence to convince the fact finder that negligence is less probable than due care.

Which, if any, of these possibilities obtains in Indiana? As previously observed, the Indiana courts use "presumption" and "prima facie evidence" synonymously in statutory negligence cases. The procedural effect of neither has been consistently stated. An early position seemed to favor a "strong" presumption: "A presumption like a fact proved, remains available to the party in whose favor it arises until overcome by opposing evidence" (emphasis supplied). What appears to be a leading Indiana case, however, pared the presumption to Thayerian dimension.

98. In Pennsylvania a hybrid rule on taking the case from the jury has evolved: "While it is true that, where plaintiff's case rests upon a presumption, he is entitled to have it submitted to the jury though rebutted by defendant's uncontradicted parol evidence . . ., where the presumption is rebutted by plaintiff's own evidence, it disappears and a nonsuit will be granted. . . ." Conley v. Mervis, 324 Pa. 577, 587, 188 A. 350, 355 (1936). This would cause plaintiff to think twice before calling defendant as his witness. If defendant's testimony, even on cross-examination, rebutted the presumption in plaintiff's favor plaintiff might suffer a nonsuit. Compare Bender v. Welsh, 344 Pa. 392, 25 A.2d 182 (1942).

100. But see, Maguire, Evidence Common Sense and Common Law 190 (1947). Burden of proof here, as throughout, is used in the sense of burden of persuasion. See McCormick, Evidence § 308 (1954).

102. See authorities supra n. 83. See also, 9 Wigmore, Evidence, § 2498A at 349.
sions: “It becomes of no avail as evidence to be considered by the court or jury as soon as evidence is introduced in opposition thereto.” But what appeared to be a definite choice by the Indiana court soon lost its certainty. The very next year, the Supreme Court molded two definitions into a legal animal which chews its own tail:

The ordinary function of most so-called presumptions of law, as they relate to the evidence, is to cast on the party against whom the presumption works the duty of going forward with evidence, and when that duty is performed the presumption is functus officio, and has no proper place in the instruction to the jury. . . . “A presumption operates to relieve the party in whose favor it operates from going forward in argument or evidence and serves the purpose of a prima facie case until the other party has gone forward with his evidence, but in itself it is not evidence, and involves no rule as to the weight of evidence necessary to meet it.” Elliott on Evidence, § 91.

The weight of authority is against regarding a presumption as evidence. . . . A presumption, like a fact proved, remains available to the party in whose favor it arises until overcome by opposing evidence.105

A study of the presumption-in-action in statutory negligence cases does not completely resolve the ambiguity. Nevertheless, on reading the limited number of cases the impression is obtained that the Indiana courts lean toward a “strong” presumption. The recurrent theme in those cases is a statement that there is a duty on the party opposing the presumption to show an excuse or produce evidence to show an excuse.106 A later expression is that the violation becomes, in effect, “nothing more than prima facie evidence of negligence, subject to being overcome by proof to the contrary. . . .”107 In brief, if the interpretation of the Indiana cases be correct, the presumption of negligence arising from the violation of a safety statute, ordinance or administrative regulation assures the beneficiary of two things:

1. In any event, the beneficiary is entitled to “get to the jury.”

2. Unless the opponent offers an excuse for his breach of the safety regulation with enough proof to warrant jury consideration, the beneficiary of the presumption is entitled to a directed verdict.

B. Instructions to the Jury. When the issue is defendant's negligence and for any reason an instructed verdict is inappropriate for either party, should the court make any mention to the jury concerning the presumption of negligence which arises from the breach of a safety regulation? Of course, if the only dispute in the case concerns an unexplained violation of a safety regulation an instruction with respect to its procedural effect is needed. In simple terms, the instruction should be that if the jury finds that defendant did violate the safety regulation, then they should find that defendant was negligent.

On the other hand, if the issue is whether an excuse has been produced by defendant, the instruction depends to some extent upon the strength accorded a presumption of negligence in these cases. If the presumption is treated as a weak or Thayerian presumption and if there is enough evidence of excuse to warrant jury consideration of that issue, the presumption will have disappeared by instruction time in the trial. At the opposite pole, if the violation raises a “strong” presumption of negligence which shifts the burden of persuasion then clearly an instruction concerning the effect of finding a statutory violation is as essential as any other instruction upon the burden of proof. The instruction should be that if defendant did violate the safety regulation then the burden is upon the defendant to show by a preponderance of the evidence that he exercised due care under the circumstances.

If, however, it is the “strong” presumption which obtains and which the opponent needs only to neutralize with his evidence, some mention to the jury of the effect of the statutory violation (if found) would seem to be desirable in any event. While it is true some proof of the violation will be in evidence and the violation is inferential of some dereliction on defendant’s part, unless the jury is given some guidance as to its probative force the violation might well be ignored or over-emphasized. The instruction should be that if the jury finds that the defendant violated the safety regulation then they should find the defendant negligent unless


110. Morgan, op. cit. supra n. 108 at 69.
they find from all of the evidence that it is as probable that defendant exercised reasonable care as that he did not, in which event they should find defendant was not negligent.\footnote{111}

Since the Indiana cases which have employed presumptions have used the "strong" presumption which does not shift the burden of proof,\footnote{112} the appropriate instruction would seem to be the latter one. Actually, although denying that the burden of proof is shifted by a presumption, in practice instructions which had that effect have been tolerated. For example, in \textit{Larkins v. Kohlmeier}\footnote{113} the court said:

In such cases we think it would be proper to instruct the jury that if they find from a fair preponderance of the evidence that the defendant violated the provisions of the statute, he was guilty of negligence, unless they further find from a fair preponderance of the evidence that compliance was impossible or non-compliance was excusable under the rule above stated. (emphasis supplied)

The apparent contradiction, or at least lack of precision, may be attributable to the paucity of Indiana authority on presumptions in statutory negligence cases. Not much experience has been acquired in dealing with presumptions in this context. A judicial reappraisal of the language used both in describing the effect of the presumption and in instructing the jury would now be constructive.

CONCLUSION

A criminal statute, ordinance or administrative rule which is interpreted as a safety regulation for the protection of identifiable groups from identifiable hazards undoubtedly creates on the criminal side a minimal standard of care for those who engage in the designated activity. On the civil side the legislative policy thus enunciated and the traditional principle of no liability without negligence can both be effectuated by treating the statutory violation as presumptive of negligence. That presumption places upon the one who has broken the safety regulation the

\footnote{111} If the particular jurisdiction should require something more than a preponderance of evidence to sustain the burden of proof, use of the word "probable" may not be accurate. Morgan, \textit{op. cit. supra} n. 108 at 64.

\footnote{112} North \textit{v. Jones}, 53 Ind. App. 203, 212, 100 N.E. 84 (1912). See Wass \textit{v. Sutler}, 119 Ind. App. 655, 671, 84 N.E.2d 734, 741 (1949) for the application in \textit{res ipsa loquitur} cases: "[T]he burden of proof never shifts, but there are occasions when the duty to go forward with the evidence shifts."

burden of procuring sufficient evidence of an excuse for the violation so consistent with due care that due care appears as probable as negligence.

Instructions upon the effect of the presumption are desirable: (1) To explain to the jury the effect of an admitted or proved violation of the statute; (2) To explain to the jury the effect of the presumption when an excuse for the violation is offered.

In Indiana the violation of a safety regulation became negligence as a matter of law under circumstances which suggest that rule was adopted because of its facility in solving cases rather than because of reasons of social or legal policy. Recently some cases point to a trend to break away from the rule and to relate statutory negligence to other established principles of liability for negligence. It also appears in the recent cases that breach of a safety regulation raises a rebuttable presumption of negligence. The future trend and the procedural effect of this presumption remains to be clearly defined in the cases.