THE FATE OF *STERLING TRUSTS CORP. V. POSTMA*

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In this article the author considers the problem of civil liability arising out of statutory breach. He contends that the proper approach is for the trial judge to determine the extent to which the breach of statute can be relied on in the particular circumstances as a question of law. The English and Canadian courts have, however, generally tried to find in the particular statute an intention of the legislature to create a civil cause of action. In analyzing the Sterling Trusts case the author concludes that the Supreme Court of Canada has again followed the latter approach, but that, although this aspect of the decision is open to criticism, the decision, nevertheless, has the desirable effect in motor accident cases of creating a form of strict liability.

I. INTRODUCTION

The effect on the outcome of a civil negligence action of the plaintiff proving that the defendant violated a penal statute is uncertain. [1] In 1964, in the *Sterling Trusts* [2] case, the Supreme Court of Canada faced this uncertainty in connection with an alleged violation of the Ontario High-

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[1] *See generally* J. FLEMING, THE LAW OF TORTS 126-36 (3d ed. 1965); 2 F. HARPER & F. JAMES, THE LAW OF TORTS 987-1014 (1956); W. PROSSER, THE LAW OF TORTS 191-205 (3d ed. 1964); H. STREET, THE LAW OF TORTS 269-84 (3d ed. 1963); C. WRIGHT, CASES ON THE LAW OF TORTS 284-313 (4th ed. 1967); Alexander, *Legislation and the Standard of Care in Negligence*, 42 CAN. B. REV. 243-76 (1964); Fricke, *The Juridical Nature of the Action Upon the Statute*, 76 L.Q.R. 240-66 (1960); Linden, *Torts-Statutes-Tort Liability for Breach of Automobile Lighting Legislation*, 45 CAN. B. REV. 121-40 (1967); Linden, *Tort Liability for Criminal Nonfeasance*, 44 CAN. B. REV. 25-65 (1966); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21-48 (1949); Morris, *The Relations of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453-77 (1933); PROSSER, *Contributory Negligence as Defence to Violation of Statute*, 32 MINN. L. REV. 105-28 (1948); Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317-43 (1914); Williams, *The Effect of Penal Legislation in the Law of Tort*, 23 MODERN L. REV. 233-59 (1960).

By a penal statute I mean a statute in which a fine or imprisonment or both is imposed for a violation. I do not refer to such a statute as a criminal statute because of certain constitutional difficulties that such a designation would give rise to in Canada.

[2] [1965] Sup. Ct. 324, 48 D.L.R.2d 423 (1964) (Cartwright, Hall, and Spence, JJ.; Ritchie and Judson, JJ., dissenting).

way Traffic Act.[3] In this article I shall attempt a close analysis of that case, followed by an examination of its impact during the three years that have elapsed since it was reported. But before examining *Sterling Trusts* I shall discuss the problem of legislation and civil liability generally.

II. THE PROBLEM

"The common law treatment of legislation has never been happy. The manner in which statutes are used—and sometimes abused—in determining the incidence of civil liability is no exception."[4]

1. *As a Matter of Principle*

Proof in a negligence action of a defendant's violation of a penal statute would almost invariably be directed to the negligence or breach-of-duty issue. This issue is normally resolved by the jury, where there is one. The judge[5] gives the jury general instructions on the "negligence" issue in terms of the "reasonable man of ordinary prudence"; the jury concretize the general instructions into a specific standard for the particular case and decide whether or not the defendant met that standard.

What possible effects could a defendant's violation of a penal statute have on a jury's formulation of the specific standard in a negligence action?[6] I submit there are three possibilities: the defendant's violation could be irrelevant in the negligence action, *i.e.*, it would have no effect; the defendant's violation could be evidence of his negligence; or the defendant's violation could be conclusive of his negligence. As a matter of principle it should be a question of law for the judge as to which of these three possibilities prevails in a particular case.

A judge might hold the violation of a particular statute irrelevant in

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[3] ONT. REV. STAT. c. 167, § 10(1) (1950) (now ONT. REV. STAT. c. 172, § 33(1) (1960)):

> Whenever on a highway after dusk and before dawn, every motor vehicle shall carry three lighted lamps in a conspicuous position, one on each side of the front which shall cast a white, green or amber coloured light only, and one on the back of the vehicle which shall cast from its face a red light only, . . . and any lamp so used shall be clearly visible at a distance of at least 200 feet from the front or rear, as the case may be.

The only substantial change is that under § 33(1) the light must be clearly visible for at least five hundred feet. By § 10(8) (now § 33(11)):

> Any person who violates . . . subsection 1 . . . shall be liable for the first offence to a penalty of not more than $5; for the second offence to a penalty of not less than $5 and not more than $10; and for any subsequent offence to a penalty of not less than $10 and not more than $25, and in addition his licence or permit may be suspended for a period of not more than sixty days.

Section 10(1) (now § 33(1)) was amended by Ont. Stat. 1965 c. 46, § 6(1) to provide, *inter alia*, that a motor vehicle manufactured after January 1, 1966, should have two rear lights.

[4] C. WRIGHT, *supra* note 1, at 284.

[5] The terms "judge" and "court" will be used interchangeably.

[6] Undoubtedly in many cases conduct that is violative of a statute would be evidence of negligence even if there were no statute.

a negligence action for any one of a number of reasons. Suppose the statute was not enacted to promote safety—it does not prescribe a fixed standard of conduct to be followed in order to protect the person or property of others. Since the violation of a statute is directed to the negligence issue, only legislation related to the standard of conduct required of defendants should be relevant. For example, a violation of a statute requiring that a truck be registered as a commercial vehicle should be irrelevant in a negligence action against the owner or driver of an unregistered truck. [7] The purpose of such a statute is to raise revenue, not promote safety. Or suppose that, even though a statute was enacted to promote safety, because of its antiquity the standard that it prescribes is now unreasonable. For example, a violation of an old motor vehicle statute prescribing "speed limits of six miles an hour" [8] should be irrelevant in a negligence action against the driver of an offending vehicle. Or suppose that, although a statute was enacted to promote safety and although its standard is reasonable, there is obviously [9] no cause-in-fact relationship between the conduct violative of the statute and the plaintiff's injuries. For example, the plaintiff's car and the defendant's car crash head on at night, and, contrary to statute, the defendant's rear lights were unlit. [10] Breach of such a statute should be irrelevant in a negligence action arising out of the collision, and the judge should so rule as a matter of law.

If proof of a violation of a penal safety statute, although relevant in a negligence action, is to be merely evidence of the defendant's negligence the jury will be entitled to disregard the statutory standard in arriving at the common-law standard to be applied to the particular case. The judge might consider this gives the jury too much power. He might feel that proof of the violation should be at least prima facie proof of negligence, entitling the plaintiff to a verdict in the absence of some explanation by the defendant. Or he might feel that proof of the violation should shift the burden of proof to the defendant to prove he was not negligent with respect to the violation. These three possible variations of the evidence of negligence effect—mere evidence, prima facie proof, and shifting the burden of proof—closely resemble, if indeed they are not identical to, the different procedural effects given to *res ipsa loquitur* in negligence actions. [11]

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[7] Roy Swail Ltd. v. Reeves, 2 D.L.R.2d 326 (Sup. Ct. 1956).

[8] W. PROSSER, *supra* note 1, at 201.

[9] If there is doubt about the cause-in-fact relationship, the issue should be left to the trier of fact.

The burden of proof is on the plaintiff to establish the factual relationship between his injuries and the conduct violative of the statute: H. STREET, *supra* note 1, at 279.

[10] *Cf.* Fitzgerald v. Penn, 91 Commw. L.R. 268 (Austl. High Ct. 1954).

[11] *Cf.* L. GREEN, W. MALONE, W. PEDRICK & G. RAHL, CASES ON THE LAW OF TORTS 643 (1957).

See generally on the different procedural effects given to *res ipsa loquitur* in negligence actions Wright, *Res Ipsa Loquitur*, *in* UPPER CAN. L. SOC'Y SPEC. LECTURES: EVIDENCE 103-36 (1955).

If proof of a violation of a penal safety statute is to be conclusive proof of negligence—negligence per se—the determination of the negligence issue will be taken from the jury. The jury may have to determine whether the statute has been violated, but once they determine it has, the negligence issue will be concluded against the defendant. This third possible effect in a negligence action of a breach of a penal safety statute—negligence per se—goes well beyond, at least in theory, even the shifting the burden of proof variation of the second possibility. The negligence per se effect will in many cases impose strict liability: although many violators may in fact be negligent, those who are not cannot escape liability by proving their innocence.

A judge by his choice of one of these three effects of proof of a violation of a penal statute will be exercising a large measure of control over the jury and the course of the negligence action. In addition, through a judicious use of these effects, he will be able to give effect to policy considerations, which he may not be prepared to articulate. For example, in the field of motor vehicle accident litigation, since most car owners are now insured,[12] a policy of enterprise liability without fault[13] could be advanced, under the rubric of negligence, by the use of negligence per se with respect to violations of highway traffic laws. Or if this were thought to be too obvious an imposition of strict liability, virtually the same result could be achieved by applying the "evidence of negligence—shifting the burden of proof effect" to such violations.

I have suggested that, as a matter of principle, the courts should control the effect of legislation on civil liability; the difficulty has been that, as a matter of practice, our courts have not admitted they have this power.

2. *The Traditional English and Canadian Approach*

Traditionally, when presented with proof of a violation of a penal statute in a civil action, English and Canadian judges search for the intention of the legislature: Did the legislature when it enacted the penal statute intend to affect civil liability?[14] This approach is unobjectionable when the legislature clearly expresses its intention one way or the other.[15]

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[12] *E.g.*, in Ontario as of March, 1963, approximately ninety-eight per cent of all motor vehicles were insured: ONTARIO SELECT COMM. ON AUTO. INS., FINAL REPORT (1963).

[13] *See generally* J. FLEMING, *supra* note 1, at 10-14.

[14] *E.g.*, Direct Lumber Co. v. Western Plywood Co., [1962] Sup. Ct. 646, 35 D.L.R.2d 1; Phillips v. Britannia Hygienic Laundry Co., [1923] 2 K.B. 832 (C.A.).

[15] As, for example in the Railway Act, CAN. REV. STAT. c. 234, § 392 (1952): "Any company that . . . does, causes or permits to be done, any matter, act or thing contrary to the provisions of this [Act] . . . is, in addition to being liable to any penalty elsewhere provided, liable to any person insured by any such act or omission for the full amount of damages sustained thereby . . .;" and in the Highway Improvement Act, ONT. REV. STAT. c. 171, § 32(2) (1960):

> Every person who, being the owner . . . of horses, cattle, swine, sheep or goats,

But when the legislature is silent on the issue the ordinary canons of statutory construction will rarely yield a positive intention to affect civil liability. [16] In addition, in a country of divided legislative jurisdiction like Canada, a finding that Parliament intended to affect civil liability when it enacted a penal statute would in most cases render the statute ultra vires. [17]

The traditional judicial pursuit of this "will-o'-the-wisp of a non-existent legislative intention" [18] is concerned with discovering whether the legislature when it enacted the penal statute in question intended to confer civil causes of action on those injured by violations. There is a substantial difference, in theory if not in result, between a legislative intention to confer civil causes of action, and a legislative intention to make violations relevant in common-law negligence actions: if the legislature intends to confer civil causes of action, an injured plaintiff should have an action on the statute quite apart from any action he may have at common law. And consistent with the traditional approach, English courts, where they find a legislative intention to confer civil causes of action, see the plaintiff's

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suffers or permits them or any of them to run at large within the limits of the King's Highway is guilty of an offence and on summary conviction is liable to a fine of not more than $5 for every such animal found at large upon the highway, but this section does not create any civil liability on the part of the owner of the animal for damage caused to the property of others as a result of the animal running at large within the limits of the King's Highway.

[16] O'Connor v. S.P. Bray Ltd., 56 Commw. L.R. 464, at 477-78 (Austl. High Ct. 1937) (per Dixon, J.):

> The received doctrine is that when a statute prescribes in the interests of the safety of members of the public or a class of them a course of conduct and does no more than penalize a breach of its provisions, the question whether a private right of action also arises must be determined as a matter of construction. The difficulty is that in such a case the legislature has in fact expressed no intention upon the subject, and an interpretation of the statute, according to ordinary canons of construction, will rarely yield a necessary implication positively giving a civil remedy.

See W. PROSSER & Y. SMITH, CASES AND MATERIALS ON TORTS 225 (3d ed. 1962).

The American courts have long since discarded the traditional approach: 2 F. HARPER & F. JAMES, *supra* note 1, at 995; Satterlee v. Orange Glenn School Dist., 177 P.2d 279, at 287 (Cal. 1947) (per Traynor, J.):

> It is clear that the legislative standard is controlling if the statute expressly provides for civil liability. Confusion has arisen in the past from a failure to understand why the legislative standard governs civil liability when the statute prescribes criminal sanctions only. The reason is simply that the courts under common law principles make the legislative standard controlling and take the formulation of a standard from the jury, when they find that the criminal statute has been enacted not merely in the interest of the community as a whole but to protect a general class of persons, of which the party invoking the statute is a member, against the kind of harm that has been sustained. The decision as to what should be the controlling standard is made by the court, whether it instructs the jury to determine what would have been due care of a man of ordinary prudence under the circumstances or to follow the standard formulated by a statute. The latter standard determines civil liability, not because the Legislature has so provided, but because the courts recognize that, with respect to the conduct in question, the duties of the parties are determined by the statute.

[17] *See* B. LASKIN, CANADIAN CONSTITUTIONAL LAW 893-98 (3d ed. 1966); Note, 19 CAN. B. REV. 51-54 (1941); Note, 13 CAN. B. REV. 517-22 (1935).

Undoubtedly § 392 of the Railway Act, CAN. REV. STAT. c. 234 (1952), the provisions of which are set out in note 15 *supra*, is intra vires Parliament because of Parliament's authority over railways under the British North America Act, 30-31 Vict., c. 3, § 92(10)(a) (1867).

[18] 2 F. HARPER & F. JAMES, *supra* note 1, at 995, n.5.

action as being on the statute for breach of statutory duty, and as being quite distinct from, and often an alternative to, an action for common-law negligence. [19] Canadian courts, on the other hand, have not drawn this clear distinction between the two actions.

Again consistent with the traditional approach, where a legislative intention to confer civil causes of action is found, our courts consider it to be a question of legislative intention as to those [20] who can complain about a violation, and as to the risks [21] against which they can claim protection. The courts also consider it to be a question of legislative intent as to what, if any, excuses for a violation will be recognized : [22] the courts may find that the legislature intended to impose strict liability, in which case no excuse for a violation will be recognized, or the courts may find that the legislature intended to impose negligence liability only, in which case a defendant will be able to escape liability by showing he acted as a reasonable man.

What factors influence the courts in finding or refusing to find this non-existent legislative intention to confer civil causes of action? Usually little reliance can be placed on what the courts say, because they normally purport to be merely interpreting the particular statute and discovering the intention of the legislature. However, despite the traditional approach, there are indications in the cases of some of the factors that influence their approach to legislation and civil liability. The courts are likely to find a legislative intention to confer civil causes of action when the particular section of the statute in issue provides a specific standard of safety, *i.e.*, a fixed standard of conduct to be followed in order to protect the person or property of others; [23] they are unlikely to find such legislative intention if the section does not provide a specific standard of safety. [24] The courts are likely to find the legislative intention to confer civil causes of action when the person on whom the statutory duty is placed already owes a common-law duty to use care with respect to the matter dealt with by the penal section; [25] they are unlikely to find such a legislative intention if he does not owe a common-law duty. [26] The courts are unlikely to find a legislative intention to confer civil causes of action if this would

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[19] *E.g.*, Kilgollan v. William Cooke & Co., [1956] 2 All E.R. 294 (C.A.).

H. STREET, *supra* note 1, at 269, points out that the total number of actions brought for breach of statutory duty in England is, perhaps, second in volume only to those brought for negligence.

[20] *E.g.*, Knapp v. Railway Executive, [1949] 2 All E.R. 508 (C.A.).

[21] *E.g.*, Gorris v. Scott, L.R. 9 Ex. 125 (1874).

[22] *E.g.*, John Summers & Sons v. Frost, [1955] A.C. 740.

[23] O'Connor v. S.P. Bray Ltd., *supra* note 16, at 478 (per Dixon, J.).

[24] *See* Cutler v. Wandsworth Stadium Ltd., [1949] A.C. 398. *But see* Monk v. Warbey, [1935] 1 K.B. 75 (C.A.).

[25] O'Connor v. S.P. Bray Ltd., *supra* note 16, at 478 (per Dixon, J.).

[26] *E.g.*, Commerford v. Board of School Comm'rs, [1950] 2 D.L.R. 207 (N.S. Sup. Ct.).

result in strict liability,[27] or when subordinate legislation is in issue.[28] In a country of divided legislative jurisdiction like Canada, another factor influencing the courts in their pursuit of legislative intention is the constitutional difficulty of finding a Parliamentary intention to confer civil causes of action. Such an intention, if it were found to exist, would in most cases be unconstitutional; hence, the courts are unlikely to find such an intention when to do so would be to render the particular statute ultra vires.[29]

I have mentioned a number of factors that influence courts in their search for the fictional legislative intention to confer civil causes of action. There may be others.

Doubtless a judge who is fully aware[30] of the fictional nature of this pursuit of legislative intention can manipulate the pursuit to give effect to policy considerations just as well as a judge who in his judgment expressly recognizes that the courts, not the legislatures, control the effect of legislation on civil liability. However, the danger of, and the main objection to, the traditional English and Canadian approach is that the courts are apt to believe that the legislatures actually control the effect of legislation on civil liability.[31] Despite the pretence of legislative control involved in the traditional search for legislative intention, in reality, the courts control, and should control, the effect of a violation on civil liability when the statute has been silent on such effect. But the pretence can be taken for reality with a consequent abdication by the courts of their responsibilities.

III. THE *Sterling Trusts* CASE

1. *The Facts*[32]

Postma was driving his car in a westerly direction on a clear night at a speed of about 55 miles per hour. The highway was dry, straight, and paved. As Postma came up over a knoll, from the crest of which there was clear visibility looking west for over half-a-mile, he was momentarily blinded by the headlights of an oncoming car. He then saw a flicker[33] of a light and noticed for the first time the presence of what turned out to be the westbound Little truck proceeding slowly and only three or four car lengths ahead of him. The Little truck was about to

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[27] Phillips v. Britannia Hygienic Laundry Co., *supra* note 14.

[28] *See* Commerford v. Board of School Comm'rs, *supra* note 26.

[29] Transport Oil Ltd. v. Imperial Oil Ltd., [1935] Ont. 215.

[30] As, for example, was Dixon, J., in O'Connor v. S.P. Bray Ltd., *supra* note 16.

[31] *Cf.* Cutler v. Wandsworth Stadium Ltd., *supra* note 24, at 410 (per Lord du Parcq).

[32] Taken for the most part from Ritchie's judgment, [1965] Sup. Ct. at 336-37.

[33] Since Postma asserted throughout that the tail-light of the Little truck was unlit, presumably the flicker of light he claimed he saw was caused by the brake lights of the Little truck. Frederick A. Little said he pumped the brakes on seeing Postma's car coming from the rear. [1965] Sup. Ct. at 337.

make a left turn into a driveway on the south side of the highway. Postma applied his brakes and his car skidded a distance of over 120 feet on his own side of the road when, fearful of hitting the Little truck, he veered to the left and skidded 15 feet more before colliding with the Brown car which was proceeding in an easterly direction on its own side of the highway and whose lights Postma had not seen until he turned into the eastbound lane. A passenger in the Brown car, Mrs. Brown, was killed, and her husband, Brown, the driver, was seriously injured.

2. *The Problem*

Sterling Trusts, as Mrs. Brown's executor, and Brown, on his behalf, brought action against Postma, and against Frederick H. Little, the owner of the Little truck, and his father Frederick A. Little, the driver. It was accepted in all courts that Postma's negligence was a cause of the collision and that Brown was not guilty of any negligence. "The question of difficulty is whether there was negligence in the maintenance or operation of the [Little] truck... which was also an effective cause of the collision."[34]

Plaintiffs claimed the Littles were negligent in three respects: (1) the tail-light of the Little truck was, contrary to the Highway Traffic Act, [35] unlit; (2) also contrary to the Highway Traffic Act, [36] there was no reflector on the rear of the truck; (3) the driver of the truck was negligent in slowing down and attempting to make a left hand turn without adequate warning and without ascertaining that this movement could be made in safety.

The issue of the Littles' liability in all three courts turned on the first of these grounds, *i.e.*, the condition of the tail-light immediately prior to the accident. [37] This ground raised three questions for decision: (1) Was the tail-light lit?; (2) If not, was the failure to have it lit an effective

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[34] [1965] Sup. Ct. at 327 (Cartwright, J.).

[35] ONT. REV. STAT. c. 167, § 10(1) (1950), quoted in note 3, *supra*.

[36] ONT. REV. STAT. c. 167, § 40(2) (1950) (now ONT. REV. STAT. § 51(2) c. 172 (1960) as amended by Ont. Stat. 1965 c. 46, § 8 to provide, *inter alia*, that a commercial vehicle manufactured after January 1, 1966 should have two rear reflectors).

[37] The second ground of negligence was disposed of in this way by Cartwright: "As to the second ground, the learned trial judge found as a fact that there was no reflector on the Little truck but, having found that the tail-light was not lighted and that this was an effective cause of the collision, he did not deal with the question whether the lack of a reflector was also an effective cause." [1965] Sup. Ct. at 327.

The third ground of negligence was disposed of in this way by Ritchie:

> The only other allegation of negligence contained in the statement of claim which appears to me to find any support in the evidence is that Little "was in the process of making an unusual manoeuvre without first ascertaining that it could be done in safety". It is, however, apparent that the learned trial judge did not place this construction on the movements of the Little truck . . . .
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> [His] view of the matter was not disturbed by the Court of Appeal and the evidence does not satisfy me that any negligent manoeuvre by Little caused or contributed to the accident . . . .

[1965] Sup. Ct. at 341.

cause of the collision?; (3) If it was unlit and an effective cause of the collision, does it follow that the Littles are liable to the plaintiffs?

3. *At the Trial and in the Ontario Court of Appeal*

Neither the trial nor the appeal was reported; however, both judgments are discussed in some detail in the Supreme Court of Canada.

At the trial, Mr. Justice Moorhouse, sitting without a jury, answered each of the three questions in favour of the plaintiffs. As between the defendants he apportioned fault one-third to the Littles and two-thirds to Postma. In the Supreme Court of Canada the plaintiffs conceded that in answering the first question, *i.e.*, was the tail-light lit, Moorhouse "misdirected himself as to the incidence of the burden of proof, holding that it was for the Littles to show that the tail-light was lighted." [38]

The Littles appealed to the Court of Appeal; Postma did not appeal. The Court of Appeal, in allowing the Littles' appeal and dismissing the plaintiff's action against them, held that the first question, *i.e.*, was the tail-light lit, should be answered "yes," "but, in so doing, mistakenly proceeded on the assumption that certain answers made by Frederick H. Little on his examination for discovery had been admitted in evidence and were evidence against the . . . [plaintiffs]." [39]

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[38] [1965] Sup. Ct. at 327-28 (per Cartwright, J.). Moorhouse, J., in reaching the conclusion he did on the burden of proof, misapplied the case of Kuhnle v. Ottawa Elec. Ry. Co., [1946] 3 D.L.R. 681 (Ont.).

In the Supreme Court of Canada the plaintiffs attempted, unsuccessfully, to invoke § 51 of the Highway Traffic Act, ONT. REV. STAT. c. 167 (1950) (now ONT. REV. STAT. c. 172, § 106 (1960)). Section 51 provides that:

> (1) When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that the loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver.
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> (2) This section shall not apply in the case of a collision between motor vehicles on the highway . . . .

The plaintiffs argued that since the Little truck was not involved in the collision the defendants could not claim the protection of § 51(2). Ritchie disposed of this argument as follows:

> This was "a collision between motor vehicles on a highway" and in order to invoke the provisions of s. 51 at all in the present case it is necessary to construe subs. (2) of that section as only applying to the two motor vehicles which actually collided so that the words "This section shall not apply in case of a collision between motor vehicles on the highway" are to be read as meaning that the section shall not apply to the owners and drivers of two motor vehicles so colliding, but that it shall apply in respect of other motor vehicles which, although not directly involved, are alleged, by reason of their presence on the highway, to have contributed to the collision. It appears to me that if such a construction were placed on the statute it would mean that whenever a driver on the highways of Ontario was involved in an accident as a result of having pulled out to pass a car ahead of him in the face of oncoming traffic, the owner or driver of the car which he passed could become involved by a mere allegation of negligence in a lawsuit in which he would be required to assume the burden of disproving his own negligence.
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> I cannot believe that the legislature intended any such meaning to be attached to the provisions of s. 51 of The Highway Traffic Act . . . .

[1965] Sup. Ct. at 340.

[39] [1965] Sup. Ct. at 328 (per Cartwright, J.).

The evidence issue was this: Could the examination for discovery of Frederick H. Little,

4. *In the Supreme Court of Canada*

The plaintiffs appealed to the Supreme Court of Canada from the Court of Appeal's dismissal of their action against the Littles. The Supreme Court of Canada, by a majority of 3 to 2, reluctantly [40] ordered a new trial. The Court of Appeal's judgment could not stand because it was based on inadmissible evidence; the trial judgment could not be restored, however, because Moorhouse had misdirected himself on the burden of proof. The majority could not say from a perusal of the record whether or not the tail-light was lit, but they felt there was evidence on which the trial judge, properly directed as to onus, could have found that it was; the minority would have dismissed the plaintiffs' appeal on the basis that the plaintiffs had failed to discharge the onus of proving that the tail-light was unlit, because a perusal of the record indicated that there was no evidence on which the trial judge could have found that it was.

There are four judgments in the *Sterling Trusts* case in the Supreme Court of Canada: Mr. Justice Cartwright (as he then was), gave the main majority judgment, with which Mr. Justice Hall concurred, although adding some comments of his own on the necessity for a new trial; Mr. Justice Spence gave the other majority judgment; Mr. Justice Ritchie gave the dissenting judgment for himself and Mr. Justice Judson. I propose to deal with the three main judgments in the case in the order in which I have mentioned them, with particular emphasis on that of Cartwright.

(a) Mr. Justice Cartwright

Cartwright dealt with the case on the basis that the only allegation of negligence against the Littles was that the tail-light of the truck was unlit, and that this allegation raised the three questions mentioned earlier, *i.e.*, (1) Was the tail-light lit?; (2) If not, was the failure to have it lit an effective cause of the collision?; (3) If it was unlit and an effective cause of the collision does it follow that the Littles are liable to the plaintiffs?

He discussed the bases of both Moorhouse's decision in favour of the plaintiffs and the Court of Appeal's reversal of that decision. After pointing out why neither decision could stand, [41] he set out the reasons why in his view there would have to be a new trial, [42] and then said this about that new trial:

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the owner of the truck, be used by counsel for the executrix of the estate of Frederick A. Little, the driver of the truck, as evidence against the plaintiffs? Counsel argued that such a procedure was authorized by the ONT. R.P. 29 permitting any party to read, in whole or in part, the examination for discovery of an opposite party. Spence's short answer to this contention was: "I cannot imagine how the interest of Mr. Nourse's client, the executrix of the estate of the driver, could be considered as opposite to that of the owner and it was the owner's examination which he sought to read." [1965] Sup. Ct. at 347.

[40] [1965] Sup. Ct. at 334 (Cartwright, J.), 343 (Hall, J.), 348 (Spence, J.).

[41] [1965] Sup. Ct. at 327.

[42] *Id.*

> If it were established that the tail-light was not lighted, it would be my opinion that there was evidence to support the finding of the learned trial judge that this failure was an effective cause of the collision. If at the new trial it is found as a fact that the tail-light was not lighted it will be for the judge on the evidence adduced before him to decide whether or not that failure was an effective cause of the collision. [43]

What does Cartwright mean by "effective cause" when he says the unlit tail-light must have been an "effective cause" of the collision? Does this mean anything more than that the unlit tail-light must have been a cause-in-fact of the collision? It is clear that normally a plaintiff cannot recover in a tort action against a defendant unless the plaintiff can prove on a balance of the probabilities that the defendant's conduct was a cause-in-fact of his injury; [44] and it is a legitimate refinement of this principle to require that there be a cause-in-fact link between the plaintiff's injury and the particular aspect of the defendant's conduct that is in issue : [45] in the *Sterling Trusts* case, the unlit tail-light.

A fact situation like that in *Sterling Trusts* could give rise to a cause-in-fact problem. For example, suppose that in fact the tail-light was unlit, but that Postma was paying so little attention to his driving that he would not have seen the Little truck before he did, even if the tail-light had been lit. In such an assumed state of facts there would be no cause-in-fact relationship between the unlit tail-light and the plaintiffs' injuries, and the Littles would, therefore, not be held responsible for those injuries. Is that the type of situation Cartwright is thinking of when he speaks of "effective cause," and if so what purpose does the adjective "effective" serve? I should like to think that Cartwright was talking of cause-in-fact and that the word "effective" was mere surplusage, but I suspect (and fear) that, although he did not elaborate, by "effective cause" he means proximate or legal cause. [46] In the context of the *Sterling Trusts* case this would mean that the Littles might escape liability because, although the unlit tail-light was a cause-in-fact of the plaintiffs' injuries, for some unexpressed reason that conduct should not be considered to be a legal cause of those injuries. Does anything more than the "last wrongdoer" [47]

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[43] *Id.* at 328.

[44] *See* J. FLEMING, *supra* note 1, at 274.

[45] *See* Kauffman v. T.T.C., [1959] Ont. 197.

[46] The term "effective cause," meaning proximate or legal cause, has been used in a great many Canadian cases. *E.g.*, Great East. Oil & Import Co. v. Frederick E. Best Motor Accessories Co., [1962] Sup. Ct. 118; McLaughlin v. Long, [1927] Sup. Ct. 303; Pritiko v. Hamilton, [1960] Ont. W.N. 360 (C.A.).

[47] For long, the arbitrary principle prevailed that if, after the defendant's default, there intervened the culpable act of a third person, the 'last human wrongdoer' was alone answerable for the plaintiff's injury. That rule may have been partly due to the idea that the law fulfilled its function so long as it offered *one* legally responsible defendant to the plaintiff and that it was superfluous to offer more, and partly to the common law refusal to allow contribution between the tortfeasors which encouraged the traditional preoccupation with finding a *sole* responsible cause.

idea, which one would have hoped is now discredited, underlie such a conclusion? I suppose one might argue that the "effective cause" concept gives the courts a flexible device for limiting the effect of violation of statute on civil liability. [48]

Cartwright then turned to counsel's argument that even if the tail-light was unlit, and even if that was an effective cause of the accident, there should not be a new trial because there was no evidence that the driver of the truck knew or ought to have known that the tail-light was out. Presumably counsel was arguing that the burden was on the plaintiffs to prove, not only that the tail-light was unlit and that this was an effective cause of the accident, but also that the driver was at fault with respect to the tail-light being unlit. Cartwright rejected this argument and in doing so turned for the first time to some of the cases dealing with the effect on civil liability of the plaintiff proving that the defendant had violated a penal statute. He says :

> The decision of the House of Lords in *London Passenger Transport Board v. Upson* [49] appears to me to proceed on the basis that the breach by the driver of a motor vehicle of a statutory provision which is designed for the protection of other users of the highway gives a right of action to a user of the highway who is injured as a direct result of that breach. The statutory provision requiring a motor vehicle to have a lighted tail-light when it is travelling on a highway after dark is designed for the protection of other users of the highway, particularly the drivers of overtaking vehicles. Its primary purpose is to prevent the occurrence of such a disaster as that out of which this case arises.
>
> In my opinion, the law on this question is so well settled that it is unnecessary to multiply citations of authority. There have been differences of opinion as to whether an action for breach of a statutory duty which involves the notion of taking precautions to prevent injury is more accurately described as an action for negligence or in the manner suggested by Lord Wright in *Upson's* case, at p. 168, in the following words : "A claim for damages for breach of a statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the

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J. FLEMING, *supra* note 1, at 205. Postma could be considered to be the last wrongdoer in the *Sterling Trusts* case.

The last wrongdoer doctrine, in so far as it prevented an innocent plaintiff from suing a negligent defendant whose negligent conduct had combined with the later intentional or negligent conduct of another to produce the plaintiff's injury has been pretty well done away with. *See* Tiffin Holdings Ltd. v. Millican, 53 W.W.R. (n.s.) 505 (Alta. 1965); Thiele & Wesmar Ltd. v. Rod Service (Ottawa) Ltd., [1964] 2 Ont. 347; Chapman v. Hearse, 106 Commw. L.R. 112 (Austl. High Ct. 1961); Grant v. Sun Shipping Co., [1948] A.C. 549; Clay v. A. J. Crump & Sons, [1964] 1 Q.B. 533 (C.A.). *But see* J. B. Hand & Co. v. Frederick E. Best Motor Accessories Ltd., 34 D.L.R.2d 282 (Nfld. Sup. Ct. in banc 1962).

[48] 2 F. HARPER & F. JAMES, *supra* note 1, at 1012.

[49] [1949] A.C. 155.

> benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty. It is an effective sanction. It is not a claim in negligence in the strict or ordinary sense. . . ."
>
> I do not find it necessary in this case to attempt to choose between these two views as to how this cause of action should be described. I think it plain that once it has been found (i) that the respondents committed a breach of the statutory duty to have the tail-light lighted, and (ii) that that breach was an effective cause of the appellant's [*sic*] injuries, the respondents are *prima facie* liable for the damages suffered by the appellants.[50]

A number of things should be noted about these excerpts from Cartwright's judgment: first, he is confining his remarks to highway safety statutes, statutes designed for the protection of users of the highway; second, he considers it well settled that a person who is injured by a violation of a highway safety statute has a right of action against the violator; third, he moots, but does not decide, whether the injured person's action should be described as one for negligence, or whether his action should be described as one for breach of statutory duty, quite distinct from any action he might have for negligence; fourth, Lord Wright's observations in the *Upson* case are contrary to the traditional English and Canadian approach to legislation and civil liability, although in accord with what is in my opinion the proper approach. Under the traditional approach, it will be recalled,[51] the courts search for legislative intention: Did the legislature when it enacted the statute in question intend to confer causes of action on those injured by violations? Lord Wright in the *Upson* case, however, points out that it is the common law (*i.e.*, the court) that gives the action for violation of the statute, not the legislature. I believe this is a clear recognition by Lord Wright that the courts, not the legislatures, control the effect of legislation on civil liability. Because of certain observations made later in his judgment, I doubt, with respect, whether Cartwright fully understood what Lord Wright was saying.

Cartwright had held that once the plaintiffs in the *Sterling Trusts* case proved the Littles were in violation of the rear-light provision of the Highway Traffic Act, and that their violation was an effective cause of the plaintiffs' injuries, the Littles were prima facie liable to the plaintiffs for those injuries. In the next part of his judgment he discusses what he means by prima facie liability. Here he is concerned with the procedural effect of a violation. He says:

> I have used above the expression that once it is found that the breach of the statute was committed and was an effective cause of the collision the respondents are *prima facie* liable to the appellants. The question then arises whether the respondents can absolve themselves from liability by showing

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[50] [1965] Sup. Ct. at 329-30.

[51] *See* text accompanying note 14 *supra*.

> that they had done everything that a reasonable man could have done under the circumstances to prevent the occurrence of the breach. A passage in the judgment of Lord Uthwatt in *Upson's* case, at p. 173, seems to suggest that this can be done by showing that under the circumstances it was impossible for the defendants to avoid committing the breach so that the maxim *lex non cogit ad impossibilia* takes effect. On the other hand in *Galashiels Gas Co. Ltd. v. O'Donnell or Millar*[52] the House of Lords held the statutory duty there under consideration to be absolute.
>
> I do not find it necessary in this case to decide whether the statutory duty to have the tail-light lighted was an absolute one or, if it be not absolute, to attempt to define the extent of the burden cast upon a person who has committed the breach because, even if it is not so heavy as Lord Uthwatt seems to suggest, I do not think it can be said that in the case at bar the respondents have discharged it. The position of the respondents is not that there was a sufficient explanation to account for and excuse the fact that the light was not lighted, their position is that the light was in fact lighted at all relevant times. If the burden could be discharged simply by showing that the person upon whom it lay neither intended nor knew of the breach, the protection which it is the purpose of the statute to afford would in most cases prove illusory.[53]

As this indicates, Cartwright did not have to decide, and did not decide, the procedural effect of a violation of the rear-light provision. However, I believe he is suggesting that three possible procedural effects could follow proof by the plaintiffs of the Littles' violation and that their violation was an effective cause of the collision. The possibilities are: (a) that proof of these matters will be conclusive of the Littles' liability —no excuse for a violation will be recognized, and thus a form of strict liability will be imposed; (b) that proof of these matters will impose a burden on the Littles to prove they could not possibly have conformed to the statute (*lex non cogit ad impossibilia*—the law does not compel the doing of impossibilities);[54] (c) that proof of these matters will impose a burden on the Littles to prove they were not at fault with respect to the violation, *i.e.*, they acted as a reasonable man of ordinary prudence would have acted in like circumstances.[55]

Admittedly the passages quoted do not expressly establish this third possibility; I believe, however, this is what Cartwright has in mind when

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[52] [1949] A.C. 275.

[53] [1965] Sup. Ct. at 330-31.

[54] This suggests to me something like the defence to a trespass action of inevitable accident. In my opinion, a person relying on inevitable accident must show that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill. That seems to me to be the very distinction which was taken, and was meant to be taken, between the case of inevitable accident and a mere want of reasonable care and skill.
The Albano, [1892] P. 419, at 429 (C.A.) (per Lord Esher, M.R.).

[55] Although Cartwright in the passage last quoted might seem to be suggesting the contrary, there may be circumstances where it would be reasonable to intentionally violate a statute. *See* Taber v. Smith, 26 S.W.2d 722 (Texas Ct. App. 1930).

he suggests that there might be a lighter burden on the Littles than proof of impossibility. His last sentence is not in my view a denial of this third possible procedural effect. I think all he is there saying is that the Littles cannot discharge the burden placed on them by proving they did not in fact know of the violation. They might still be able to exonerate themselves by proving that a reasonable man in their position would not have known of the violation either, and that, therefore, they were not at fault.

After discussing the possible procedural effects of a violation of the rear-light provision, Cartwright turned to a number of Canadian cases on legislation and civil liability, including two, in some respects, conflicting decisions of the Ontario Court of Appeal, *Falsetto v. Brown* [56] and *Irvine v. Metropolitan Transp. Co.* [57]

In *Falsetto v. Brown* the plaintiff's car ran into the back of the defendant's stationary truck; it was after dark, and contrary to statute, [58] the tail-light of the truck was unlit. The trial judge found both parties equally to blame. The defendant's appeal was allowed, the majority in the Court of Appeal being of the opinion, apparently, [59] that the unlit tail-light was not a cause-in-fact of the collision. However, Mr. Justice Davis, one of the majority, speaking for himself alone, gave this additional reason for allowing the defendant's appeal :

> The statutory duty to have a red tail lamp burning at certain times imposed by the statute is a public duty only to be enforced by the penalty imposed for a breach of it, and 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. [60]

Clearly Davis is articulating the traditional approach to the effect of legislation on civil liability, *i.e.*, that the effect depends on the intention of the legislature; and in his opinion, the legislature did not intend to affect civil liability when it enacted the legislation involved in *Falsetto v. Brown*. In referring to this additional reason given by Davis, Cartwright, in the *Sterling Trusts* case, said : "While this statement was not necessary for the decision of the appeal, it was a ground on which Davis J. A. based his decision and cannot be regarded as having been said *obiter*." [61]

In *Irvine v. Metropolitan Transp. Co.* the defendant left its truck parked on the travelled portion of the highway in violation of a provision

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[56] [1933] Ont. 645.

[57] [1933] Ont. 823.

[58] Highway Traffic Act, ONT. REV. STAT. c. 251, § 9(1) (1927) (now ONT. REV. STAT. c. 172, § 33(1) (1960)). Section 9(1) is substantially the same as ONT. REV. STAT. c. 167, § 10(1) (1950), the provisions of which are set out in note 3 *supra*.

[59] It is hard to tell from the majority decisions in *Falsetto v. Brown* whether they were based on legal or factual causation.

[60] *Supra* note 56, at 656.

[61] [1965] Sup. Ct. at 332.

of the Highway Traffic Act; [62] the plaintiff's car ran into the back of the truck. The trial judge found both parties at fault and apportioned blame, seventy-five per cent to the defendant and twenty-five per cent to the plaintiff; the defendant's appeal was dismissed. In discussing whether the defendant's violation of the statute gave the plaintiff a right of action, Mr. Justice Masten, speaking for the majority, said :

> Upon a consideration of the whole section, I think that, notwithstanding that it prescribes a penalty for breach of the duty imposed, it also creates a cause of action in favour of a particular class of persons, namely, those who are travelling on the highway and suffer damage from breach of the statute. My reasons are (1) that the legislation is for the protection of one particular class of the community; (2) that the penalty is not payable to the party injured; (3) that a penalty of $5.00 up to $50.00 would in most cases be a wholly inadequate compensation for the damages suffered. [63]

Note that in Masten's opinion it is the statute that "creates" the cause of action; he is implicitly accepting the traditional view that the intention of the legislature is controlling, which view was also accepted by Davis in *Falsetto v. Brown,* although with a different result.

In concluding his analysis of the *Falsetto* and *Irvine* cases, Cartwright, in the *Sterling Trusts* case, said: "In my respectful view the reasoning of Masten J. A. on this point in *Irvine* is to be preferred to that of Davis J. A. in *Falsetto.*" [64] What Cartwright is preferring, of course, is Masten's view that the statutory provision in *Irvine* created a cause of action in favour of the injured plaintiff, to Davis' view that the statutory provision in *Falsetto* did not create such an action. Both Masten and Davis saw the problem as being one of legislative intention. So, apparently, Cartwright also believes the problem of the effect of legislation on civil liability to be one of legislative intention. In the context of the *Sterling Trusts* case he believes, apparently, that the Ontario Legislature intended to confer civil causes of action on those injured by violations of the rear-light provision of the Highway Traffic Act. This is why I suggested earlier [65] that Cartwright did not fully understand Lord Wright's observations in the *Upson* case about a civil action for a violation of a statutory duty being given by the court, not by the legislature.

(b) Mr. Justice Spence

Spence was one of the majority who held there would have to be a new trial. Nowhere in his judgment does he deal with the rationale of legislation and civil liability. On the procedural effect of a violation of

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[62] ONT. REV. STAT. c. 251, § 35a (1927), as amended by Ont. Stat. 1931 c. 54, § 11 (now ONT. REV. STAT. c. 172, § 89, (1960), as amended by Ont. Stat. 1965 c. 46, § 12).

[63] *Supra* note 57, at 833.

[64] [1965] Sup. Ct. at 333.

[65] *See* text following note 51 *supra.*

the rear-light provision he says :

> I agree with my brother Cartwright, whose reasons I have had the privilege of reading, that if the Court upon the retrial were to find that the tail-light were unlit and that such unlit condition was an effective cause of the collision, there is a *prima facie* liability upon the defendants. . . . I am not prepared to say that that liability is an absolute one and that the said defendants would be unable to discharge it by showing that such condition occurred without negligence for which they are in law responsible . . . .[66]

So Spence, apparently,[67] believes that, procedurally, proof by the plaintiff of the defendant's violation of the rear-light provision, and that the violation was an effective cause of the plaintiff's injury, shifts the burden of proof to the defendant to prove he was not at fault with respect to the violation. I suggested earlier[68] that Cartwright mooted this effect as one of three possible procedural effects.

(c) Mr. Justice Ritchie

Ritchie, speaking for himself, and Judson, dissented. He would have dismissed the plaintiffs' appeal and refused a new trial on the basis that a perusal of the record showed the plaintiffs had failed to discharge the burden of proving the tail-light was unlit. However, on the rationale of legislation and civil liability he says :

> In the view I take of this appeal, it is unnecessary to consider the effect of a breach of the statutory duty for which provision is made in s. 40(2) of *The Highway Traffic Act*. If it were necessary, I would adopt the analysis of the conflicting decisions in *Falsetto v. Brown* and *Irvine v. Metropolitan Transport Co. Ltd.*, contained in the reasons of Cartwright J., and hold that once it is found that the tail-light was unlit, the problem then is one of causation.[69]

So apparently, Ritchie and Judson, like Cartwright and Hall, who concurred with Cartwright, take the traditional approach to the effect of legislation on civil liability : it is a question of legislative intention; and, apparently, they believe that the Ontario Legislature intended to confer causes of action on those injured by violations of the rear-light provision.

5. *Summary*

In its result, the *Sterling Trusts* case is of little significance : a new trial was ordered because the majority in the Supreme Court of Canada could not say from an examination of the trial record whether the tail-light was lit or not. The significance of the case lies in the remarks made by

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[66] [1965] Sup. Ct. at 348.

[67] It could be argued that I am reading more into this passage than is justified.

[68] *See* text preceding note 56 *supra*.

[69] [1965] Sup. Ct. at 341 (footnotes omitted). I presume Ritchie meant to refer to the rear light section of the Highway Traffic Act, ONT. REV. STAT. c. 167, § 10(1) (1950), the provisions of which are set out in note 3 *supra* rather than § 40(2), which provides for rear reflectors.

the Justices as to the position at the new trial if the plaintiffs proved that (a) the tail-light was unlit and (b) this was an effective cause of their injuries. It is with respect to this imagined situation at the new trial that the Justices' views on the effect of legislation on civil liability are important.

The majority,[70] speaking through Cartwright, apparently took the traditional approach to the effect of legislation on civil liability: Did the legislature when it enacted the provision in question intend to confer causes of action on those injured by violations? I say the majority apparently took the traditional approach because, near the beginning of Cartwright's judgment, he quoted without comment a passage from *London Passenger Transp. Bd. v. Upson*,[71] in which Lord Wright clearly did not take the traditional approach. Lord Wright said it is the common law, *i.e.*, the court, that gives the cause of action for violation of a statute. Cartwright did not seem to appreciate that this observation by Lord Wright is inconsistent with the traditional approach to legislation and civil liability taken by Davis, in *Falsetto v. Brown*,[72] and by Masten in *Irvine v. Metropolitan Transp. Co.*,[73] which traditional approach was accepted by Cartwright later in his judgment.

Cartwright, speaking only for himself and Hall, mooted, but did not decide, whether violation of a statute gives an injured plaintiff a separate cause of action on the statute, or whether the violation is merely relevant in connection with the standard of care in a common-law negligence action. The first alternative is more consistent with the traditional approach to the effect of legislation on civil liability: if the legislature intended to confer causes of action for violations, it seems appropriate to have injured plaintiffs bring their actions on the statute.

Cartwright, again speaking only for himself and Hall, mooted, without choosing between them, three possible procedural effects on the course of the new trial that could follow the plaintiffs' proving the tail-light was unlit and that this was an effective cause of their injuries. These possibilities were: (a) that proof of these matters will be conclusive of the Littles' liability; (b) that proof of these matters will impose a burden on the Littles to prove that they could not possibly have conformed to the statute; and (c) that proof of these matters will impose a burden on the Littles to prove that they were not at fault with respect to the violation. Spence, speaking for himself alone, apparently supported this third possibility as being the proper procedural effect.

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[70] Cartwright, Hall, Ritchie, and Judson; Spence said nothing about the rationale of legislation and civil liability.

[71] *Supra* note 50.

[72] *Supra* note 56.

[73] *Supra* note 57.

IV. The Impact of *Sterling Trusts*

The *Sterling Trusts* case has had no impact in the more than three years that have elapsed since its decision. As far as I have been able to discover *Sterling Trusts* has not been referred to in a single reported case, despite the fact that there have been many cases[74] in which its principles would have been relevant.

Why has *Sterling Trusts* been ignored by counsel and bench? I suspect it has been ignored because its reasoning is difficult to follow : the Justices are quite cryptic in their analysis of legislation and civil liability, alike with respect to the theory underlying the use of penal legislation in a civil action, the nature of the plaintiff's action where penal legislation is used, and the effect on the course of the action of proof that the violation of the legislation was causally related to the plaintiff's injuries.

V. Conclusion

The toll exacted by the automobile is well-known. "Motor-car accident litigation presently occupies more than sixty per cent of all Canadian courts' time. In this field negligence has its widest application, yet it is in this field that 'fault,' and any deterrent effect of a judgment based thereon, has least application."[75] And the main reason for the ineffectiveness of a judgment as a deterrent[76] in the field of motor vehicle accident litigation is the prevalence of insurance. In Ontario, for example, ninety-eight per cent of motorists are insured,[77] and the victims of those who are not can look for compensation to the Motor Vehicle Accident Claims Act.[78] However, to collect from either insurer or state the victim must prove the motorist was at fault.

The ability of the common law to deal adequately with automobile losses in terms of fault has been seriously challenged in recent years.[79] The prevalence of insurance, it has been argued,[80] justifies the imposition of strict liability in motor vehicle accident litigation : because of insurance "a defendant is only a nominal party—a 'conduit pipe' through whom a process of distribution starts to flow."[81] Insurance could be the justifica-

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[74] *E.g.*, Fontaine v. Thompson, 61 W.W.R. (n.s.) 321 (B.C. 1967); Brodsky v. Guyot, 55 W.W.R. (n.s.) 509 (Man. 1966); Langille v. Zwicker, 66 D.L.R.2d 196 (N.S. 1967); Goodwin v. Wrycraft, [1966] 1 Ont. 26.

[75] Wright, *The Adequacy of the Law of Torts*, [1961] Camb. L.J. 44, at 53. Despite the high percentage of the courts' time occupied by motor vehicle litigation over ninety per cent of all automobile claims are settled. *Id.* at 54.

[76] If indeed tort judgments have deterrent effects in motor vehicle accident cases in any event : *See* James & Dickinson, *Accident Proneness and Accident Law*, 63 Harv. L. Rev. 769-95 (1960).

[77] *Supra* note 12.

[78] Ont. Stat. 1961-62 c. 84 as amended.

[79] J. Fleming, *supra* note 1, at 21. There is an aura of unreality about a court's discussion of fine questions of fault perhaps several years after an automobile accident which occurred in a split second. *Cf.* [1965] Sup. Ct. at 336 (per Ritchie).

[80] *See* Morris, *The Role of Criminal Statutes in Negligence Actions*, *supra* note 1, at 29, n.32.

[81] C. Wright, *supra* note 75, at 53.

tion for a non-fault enterprise liability [82] whereby the inevitable losses caused by the automobile would be distributed among the whole of the motoring public. So far, however, in the common-law world only Saskatchewan has expressly imposed strict liability for automobile losses. [83]

Twenty years ago, the late Dean Wright noted [84] that our present fault system for dealing with automobile losses is moving towards strict liability: such legislative devices as making the motorist disprove fault in certain circumstances, [85] and holding the owner liable for the fault of anyone driving with his consent, [86] and such judicial devices as an increasingly onerous objective standard of conduct [87] and *res ipsa loquitur*, [88] have hastened this movement. The *Sterling Trusts* case provides the courts with another judicial device for advancing strict liability, under the guise of fault: for example, in a particular case a court could move towards strict liability by imposing an impossible or onerous burden on a motorist to excuse his violation of a statute. Since, arguably, [89] a large percentage of automobile accidents involve violations of penal statutes, the potential of this judicial device for advancing strict liability is obvious. [90] Of course, the principles of the *Sterling Trusts* case are not limited to rear-light violations: there are a great many other highway traffic provisions to which those principles are equally applicable. [91]

The Supreme Court of Canada in the *Sterling Trusts* case issued an invitation to counsel to make greater use of violations of penal safety statutes in motor vehicle accident litigation; although so far ignored, hopefully the invitation will be accepted yet.

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[82] *Supra* note 13.

[83] By legislation: The Automobile Accident Insurance Act, SASK. REV. STAT. c. 409 (1965). For a brief description of the Saskatchewan plan, see W. PROSSER, *supra* note 1, at 586-87.

Similar legislation has been proposed for Ontario: *See generally*, SELECT COMM. AUTO. INS., FINAL REPORT (1963); A. LINDEN, THE REPORT OF THE OSGOODE HALL STUDY ON COMPENSATION FOR VICTIMS OF AUTOMOBILE ACCIDENTS (1965); Linden, *Peaceful Coexistence and Automobile Accident Compensation*, 9 CAN. B.J. 5-17 (1966). It seems unlikely that such legislation will be enacted in the near future in Ontario: the Ontario Law Reform Commission has recently suspended its project on motor vehicle accident compensation because of lack of funds.

[84] Wright, *The Law of Torts 1923-1947*, 26 CAN. B. REV. 46-94, at 72-73 (1948).

[85] *E.g.*, Highway Traffic Act, ONT. REV. STAT. c. 172, § 106 (1960).

[86] *E.g.*, Highway Traffic Act, ONT. REV. STAT. c. 172, § 105(1) (1960).

[87] *See* J. FLEMING, *supra* note 1, at 12.

[88] Wright, *supra* note 75, at 55-56.

[89] *See* Linden, *Torts-Statutes-Tort Liability for Breach of Automobile Lighting Legislation*, 45 CAN. B. REV. 121 (1967); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21; Prosser, *Contributory Negligence as Defence to Violation of Statute*, 32 MINN. L. REV. 105, at 106 (1948).

[90] Hopefully, the Supreme Court's acceptance of the traditional approach to legislation and civil liability, *i.e.*, that it depends on legislative intention, will not inhibit Canadian courts in their use of this device to impose strict liability.

[91] *E.g.*, Highway Traffic Act, ONT. REV. STAT. c. 172, § 33(1) (1960), (front lights), § 33(2) (rear reflector), § 33(6) (clearance lamps on wide vehicles), § 33(28) (mechanical signalling devices), § 35(1) (two braking systems), § 37(1)(a) (windshield wiper), § 37(1)(b) (rear view mirror), § 37(2) (mudguards), § 41(1) (objects on windshield obstructing view), §§ 59-62 (rate of speed), § 63 (right of way), § 64 (stop streets), § 69 (signalling for turns), § 70 (traffic lights), § 89 (parking vehicles on highway).