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USE OF CRIMINAL STATUTES IN TORT CASES IN MISSOURI

Historically, tort causes of action have been created by court decision and not by statutory enactment.[1] However, courts have looked to legislative pronouncements, in the form of criminal statutes, to define and supplement the common law of torts.[2] This note examines the influence criminal statutes[3] have had on tort law in Missouri.

Negligent and intentional torts are considered separately to facilitate clarity of analysis; considerations and issues paramount to liability in one type of tort action play only a minor role in the other. Criminal statutes have substantially affected the duty, breach, and limitation of liability issues in negligence[4] cases. Their main impact on intentional tort liability, when courts have been willing to use criminal statutes at all, has been in creating new causes of action.

What are and should be the issues dealt with by the courts in determining whether to impose civil liability for conduct which breaches a criminal statute? Should the courts be confined to statutory construction, to making a finding of whether or not there is an expressed or implied intention of the legislature to impose civil liability for conduct which violates a criminal statute? Or should the courts be free to choose which statutes and under what circumstances liability will be imposed? These are the issues central to the problem dealt with in this note.

I. Negligent Torts

A. *Duty*

The breach of a criminal statute does not affect the duty issue in a negligence case unless there is a concomitant common law duty of due care applicable to the defendant's conduct. Criminal statutes have been interpreted as defining, particularizing, or expanding the scope of existing duties, but never as creating a duty where none existed at common law.

In Missouri, there are three examples of situations in which no common law duty of due care is imposed. (1) A landowner has no duty to protect

1. Prosser, Torts § 4, at 19-21 (3d ed. 1964).

2. *Id.* § 35, at 191-205.

3. Throughout this note, the word "statutes" includes ordinances, unless a distinction is clearly made.

4. References to negligence apply equally to contributory negligence, unless a distinction is clearly made.

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licensees[5] or trespassers[6] from dangerous conditions. (2) A landowner has no duty to remove natural accumulations of snow and ice from sidewalks which abut his land.[7] (3) A landlord has no duty to inspect leased premises for dangerous conditions or to remedy such conditions.[8] Legislation has been enacted by municipal governments which requires the landowner to eliminate the existence of dangerous conditions on his land,[9] to remove snow and ice from abutting sidewalks,[10] and to repair dangerous conditions on leased premises.[11] While conduct which violates these enactments renders the defendant liable criminally, the courts have refused to allow the enactments to serve as grounds for imposition of civil liability.[12] In the first group of cases, attempts have been made to apply the criminal ordinances to cover injuries to both trespassers and invitees. The latter classification of plaintiffs has a common law right of recovery for injuries caused by unsafe conditions. The legislation is construed merely as providing a criminal sanction for conduct which violates the concomitant common law duty and not as extending civil liability to cover injury to trespassers, who enter the land uninvited and at their own risk.[13]

5. Walters v. Markwardt, 361 Mo. 936, 237 S.W.2d 177 (1951); Lentz v. Schuerman Bldg. & Realty Co., 359 Mo. 103, 220 S.W.2d 58 (1949); Ford v. Rock Hill Quarries Co., 341 Mo. 1064, 111 S.W.2d 173 (1937).

6. Wells v. Henry W. Kuhs Realty Co., 269 S.W.2d 761 (Mo. 1954); Kelly v. Benas, 217 Mo. 1, 116 S.W. 557 (1909).

7. Hart v. City of Butler, 393 S.W.2d 568 (Mo. 1965); Russell v. Sincoe Realty Co., 293 Mo. 428, 240 S.W. 147 (1922); Riley v. Woolf Bros., Inc., 236 Mo. App. 661, 159 S.W.2d 324 (1942).

8. Ford v. Rock Hill Quarries Co., 341 Mo. 1064, 111 S.W.2d 173 (1937); Corey v. Losse, 297 S.W. 32 (Mo. 1927). Only if the lease provides that the landlord shall make repairs does he have such a duty. Correy v. Losse, *supra;* Croskey v. Shawnee Realty Co., 225 S.W.2d 509 (Mo. Ct. App. 1949).

9. See Wells v. Henry W. Kuhs Realty Co., 269 S.W.2d 761 (Mo. 1954).

10. See Russell v. Sincoe Realty Co., 293 Mo. 428, 240 S.W. 147 (1922).

11. St. Louis, Mo., Rev. Code vol. 2, §§ 2125.1, 2126.4 (1960).

12. Corey v. Losse, 297 S.W. 32 (Mo. 1927) (landlord-tenant); Russell v. Sincoe Realty Co., 293 Mo. 428, 240 S.W. 147 (1922) (abutting sidewalk case); see Breen v. Johnson Bros. Drug Co., 297 Mo. 176, 248 S.W. 970 (1923) (abutting sidewalk case); Wells v. Henry W. Kuhs Realty Co., 269 S.W.2d 761 (Mo. 1954) (landowner-trespasser). The *Wells* case is particularly helpful in drawing the distinction between situations in which there is no concomitant common law duty and situations in which such a duty exists. The court pointed out that normally a landowner owes no duty to protect a trespasser from dangerous conditions; hence, the criminal statute would have been of no avail to the trespasser. However, the court went on to say that in this case, the attractive nuisance or turntable doctrine might apply, creating a common law duty; only in this case would the court permit the statute to be used.

13. See Wells v. Henry W. Kuhs Realty Co., *supra* note 12. It is interesting to note that this reasoning would not support a decision which denies the right of a licensee, who is rightfully on another's land from using the statute to create civil liablity. The

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Courts have refused to use ordinances to impose civil liability on abutting landowners in snow and ice removal cases, stating that the enactments are attempts to force the landowners to discharge the city's responsibility.[14] Despite the ordinances, the city remains ultimately responsible for the condition of the sidewalks.[15] However, a great many pedestrians suffer injuries on city sidewalks without recourse against the municipality. The city is liable only if the condition is not prevalent generally on city sidewalks[16] and if the condition has existed for some substantial period of time.[17]

Refusal to base civil liability on the landlord-tenant ordinances rests on two grounds: (1) the intent of such ordinances was to prevent blight, rather than to protect tenants from injury,[18] and (2) no such duty exists in Missouri's common law, and a municipality may not alter the law of the state.[19] The first reason is vulnerable to the criticism that many dangerous conditions which are violations of the ordinance do not amount to blight,[20] while the second fails to observe that it is the court using the ordinance, rather than the city creating the ordinance, which would be altering the law of the state. Many jurisdictions have used similar ordinances as the basis for creating a duty in landlord-tenant cases.[21]

Missouri courts have not had to consider this question; however, there is a dictum in *Wells* to the effect that a licensee could not use the statute to create a duty.

14. Russell v. Sincoe Realty Co., 293 Mo. 428, 240 S.W. 147 (1922); see Breen v. Johnson Bros. Drug Co., 297 Mo. 176, 248 S.W. 970 (1923) (dictum).

15. Walsh v. St. Louis, 346 Mo. 571, 142 S.W.2d 465 (1940); Stith v. J.J. Newberry Co., 336 Mo. 467, 79 S.W.2d 447 (1935); Young v. City of St. Joseph, 4 S.W.2d 1104 (Mo. Ct. App. 1928); Krucker v. City of St. Joseph, 195 Mo. App. 101, 190 S.W. 644 (1916) (dictum).

16. O'Brien v. City of St. Louis, 355 S.W.2d 904 (Mo. 1962); Luettecke v. City of St. Louis, 346 Mo. 168, 140 S.W.2d 45 (1940); Gudorp v. City of St. Louis, 372 S.W.2d 483 (Mo. Ct. App. 1963); *cf.* Everett v. Wallbrun, 273 S.W.2d 751 (Mo. Ct. App. 1954); Woodley v. Bush, 272 S.W.2d 833 (Mo. Ct. App. 1954).

17. Walsh v. St. Louis, 346 Mo. 571, 142 S.W.2d 465 (1940); Vonkey v. City of St. Louis, 219 Mo. 37, 117 S.W. 733 (1909); Gudorp v. City of St. Louis, 372 S.W.2d 483 (Mo. Ct. App. 1963).

18. See Corey v. Losse, 297 S.W. 32 (Mo. 1927).

19. Corey v. Losse, *supra* note 18, at 32-33; Burnes v. Fuchs, 28 Mo. App. 279, 282 (1887); Mo. REV. STAT. § 73.110 (1959).

20. This criticism, in turn, can be attacked by pointing out that a city has a valid blight interest in remedying conditions which do not as yet amount to blight. More specifically, it could be argued that structural disrepair is a cause of blight or is the first step toward blight.

21. Whetzel v. Jess Fisher Management Co., 282 F.2d 943 (D.C. Cir. 1960); McNally v. Ward, 192 Cal. App. 2d 871, 14 Cal. Rptr. 260 (1961); Rivera v. Grill, 65 N.J. Super. 253, 167 A.2d 638 (1961); Frion v. Coren, 13 Wis. 2d 300, 108 N.W.2d 563 (1961); Prudhomme v. Berry, 69 So. 2d 620 (La. Ct. App. 1953) (by implication); Morningstar v. Stritch, 326 Mich. 541, 40 N.W.2d 719 (1950); Shass v. Abgold Realty Corp., 198 Misc. 1052, 102 N.Y.S.2d 707 (Sup. Ct. 1950); Tkach v.

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Despite the asserted reasons for refusing to extend civil liability, all the above situations can be explained by concluding that Missouri courts will not use criminal statutes to create a cause of action in negligence cases in which no concomitant common law duty of due care exists. This position is apparently based upon the unarticulated belief that absent expressed or strongly implied legislative intent, courts should not impose negligence liability in new areas. However, there seems to be no evidence that legislatures consider whether criminal statutes provide appropriate standards for the imposition of civil liability.[22] Further, the bulk of negligence law has traditionally been created by court decision rather than legislative enactment. Therefore, courts can extend and enlarge a defendant's duty on their own initiative. Instead of limiting consideration of extension or creation of a duty to expressed or implied legislative intent, courts can examine policy considerations, such as who can best prevent or control injury and who can best pay for or insure against the damages.[23]

B. *Breach of the Duty*

When there is an existing concomitant common law duty, evidence of breach of a statute can be used to establish the defendant's negligence. Proof of conduct which violates a statute can be "evidence of negligence" or "negligence per se."[24] Missouri courts follow the latter alternative.[25]

Montefiore Hosp., 289 N.Y. 387, 46 N.E.2d 333 (1943). See Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21, 23 & n.5 (1949).

22. See Morris, *supra* note 21, at 22; Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 329-30 (1914).

23. For example, in deciding whether the snow and ice removal ordinances should create a civil duty, the courts could ask whether it is desirable to make an insurer out of the abutting property owner; such a decision would not spread the risk as generally as would a policy which broadens the scope of the municipality's liability. Nevertheless, the ordinances provide an opportunity to protect the pedestrian, who in most cases receives no compensation. *E.g.*, O'Brien v. City of St. Louis, 355 S.W.2d 904 (Mo. 1962); Luettecke v. City of St. Louis, 346 Mo. 168, 140 S.W.2d 45 (1940); Vonkey v. City of St. Louis, 219 Mo. 37, 117 S.W. 733 (1909); Gudorp v. City of St. Louis, 372 S.W.2d 483 (Mo. Ct. App. 1963). See generally James, *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95 (1950). Furthermore, the court could ask whether the landowner or the city is in the best position to remove recent accumulations of snow and ice; the imposition of liability would certainly help motivate the party who is held responsible.

24. PROSSER, *op. cit supra* note 1, § 35, at 202-03; James, *supra* note 23, at 106; see Note, 9 OKLA. L. REV. 98 (1956); Note, 11 S.C.L.Q. 207 (1959).

25. *E.g.*, Beezley v. Spiva, 313 S.W.2d 691 (Mo. 1958); Wilson v. Shumate, 296 S.W.2d 72 (Mo. 1956); Gaines v. Property Servicing Co., 276 S.W.2d 169 (Mo. 1955); Fassi v. Schuler, 349 Mo. 160, 159 S.W.2d 774 (1942); Bowman v. Ryan, 343 S.W.2d 613 (Mo. Ct. App. 1961); MacArthur v. Gendron, 312 S.W.2d 146 (Mo. Ct. App. 1958); Ashby v. Elsberry & N.H. Gravel Rd. Co., 99 Mo. App. 178, 73 S.W. 229

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1. *Evidence of Negligence*

In an evidence of negligence jurisdiction, proof of breach of the criminal statute establishes a prima facie case of negligence. By itself, this proof will not support a directed verdict. The jury considers the breach as it would consider any other evidence of fault to determine whether the defendant exercised the care a reasonably prudent man would have exercised under the circumstances.[26]

2. *Negligence Per Se—The Law in Missouri*

Proof of breach of a criminal statute in Missouri results, as a matter of law, in a directed verdict[27] unless the court recognizes an excuse, or the possibility of an excuse, for the breach. If the breach of the statute is in issue, the court submits an instruction which leaves the factual determination to the jury but directs a finding of negligence if the jury finds the breach. Under the Missouri Approved Jury Instructions, the court would submit the following type of instruction to the jury:

Your verdict must be for the plaintiff if you believe:

> Defendant was driving over 30 miles per hour in a 30 mile per hour speed zone, ...[28]

Adoption of the Missouri Approved Jury Instructions in 1964 by the supreme court apparently resolved any doubts that the state followed the negligence per se approach. Prior to this, several cases used the evidence of negligence terminology when a statute had been breached. These cases fell into two categories: (1) one case in which the court used the words "evidence of negligence" but in fact gave the breach of the statute a negligence per se effect,[29] and (2) those in which the plaintiff did not plead the

(1903); Skinner v. Stifel, 55 Mo. App. 9 (1893); *cf.* Gas Serv. Co. v. Helmers, 179 F.2d 101 (8th Cir. 1950); Swigart v. Lusk, 196 Mo. App. 471, 192 S.W. 138 (1917). *But see* PROSSER, *op. cit. supra* note 1, § 35, at 203; Morris, *The Role of Criminal Statutes in Negligence Actions,* 49 COLUM. L. REV. 21, 34 & n.50 (1949). Both of these works comment on Cantwell v. Cremins, 347 Mo. 836, 149 S.W.2d 343 (1941).

26. PROSSER, *op. cit. supra* note 1, § 35, at 202-03; James, *supra* note 23, at 106; Morris, *The Relation of Criminal Statutes to Tort Liability,* 46 HARV. L. REV. 453, 456 (1933).

27. Cases cited note 25 *supra.*

28. See Missouri Approved Jury Instructions (hereinafter cited MAI), Change No. 18 (Supp. June 1964). This instruction further requires that the jury must find that the breach of the statute caused the plaintiff's damages. The question of cause in fact is not discussed in this note because no Missouri cases suggest problems which are peculiar to statutory torts. For a discussion of some causation problems which may arise when a statute has been breached see BECHT & MILLER, FACTUAL CAUSATION § 16 (1961).

29. Cantwell v. Cremins, 347 Mo. 836, 149 S.W.2d 343 (1941). The supreme

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statute as the basis for a finding of negligence, but merely pleaded common law negligence, and introduced the statute as proof thereof.[30] In the latter cases, the courts treated the breach of the statute as evidence of negligence, and might well do so today.[31] However, since the plaintiff is allowed to plead in the alternative,[32] there seems to be no valid reason for a failure to plead the statute as the basis of liability.

3. *Excused Breach*

The defendant may be able to avoid a directed verdict by pleading an excuse, demonstrating that he had a valid reason for violating the statute. The allowance of an excuse is based on the premise that a criminal statute

court said that breach of the pertinent statute was evidence of negligence. *Id.* at 842, 149 S.W.2d at 346. Yet, the court went on to hold that the breach of the statute created a presumption of negligence which would support a directed verdict; only if the defendant proved that he had a valid excuse for violating the statute could he avoid a directed verdict.

However, in Manar v. Taetz, 109 S.W.2d 721 (Mo. Ct. App. 1937), it seems that the court followed the evidence of negligence theory. The court stated, "We agree with the court below that the case, upon the record made, was one *to be submitted to the jury* upon the theory of defendants' actionable negligence arising out of their conceded noncompliance with the requirements of the ordinance." *Id.* at 723. (Emphasis added.) The implication is that the plaintiff was not entitled to a directed verdict, but had merely made out a jury case. Furthermore, the court held that the plaintiff still had the burden of establishing that the defendant was negligent. *Ibid.* The confusion caused by this case was remedied three years later when the state supreme court held that a breach of the same statute under similar circumstances constituted negligence per se. Monsour v. Excelsior Tobacco Co., 144 S.W.2d 62 (Mo. 1940).

30. Cichacki v. Langton, 392 S.W.2d 397 (Mo. 1965); Dickerson v. St. Louis Pub. Serv. Co., 286 S.W.2d 820 (Mo. 1956); Floyd v. St. Louis Pub. Serv. Co., 280 S.W.2d 74 (Mo. 1955); Hart v. Skeets, 346 Mo. 1118, 145 S.W.2d 143 (1940); Bailey v. Kansas City, 189 Mo. 503, 87 S.W. 1182 (1905); Collins v. Leahy, 102 S.W.2d 801 (Mo. Ct. App. 1937); Lach v. Buckner, 229 Mo. App. 1066, 86 S.W.2d 954 (1935); McPherson v. Premier Serv. Co., 38 S.W.2d 277 (Mo. Ct. App. 1931).

One obvious question is why a plaintiff would use a statute to prove common law negligence, when it could be used to get a directed verdict on a negligence per se theory. In Floyd v. St. Louis Pub. Serv. Co., *supra,* the trial court mistakenly directed the plaintiff that he could plead either statutory negligence or common law negligence but not both. The plaintiff chose to plead common law negligence and to use the breach of the statute as evidence of this negligence, presumably because he was not sure that he could establish the breach of the statute. See Brief for Appellant, pp. 30-36, Floyd v. St. Louis Pub. Serv. Co, *supra.* In Hart v. Skeets, *supra,* it appears that the plaintiff did not realize that negligence per se was the law of Missouri. See Brief for Respondent, pp. 14-24, Hart v. Skeets, *supra.*

31. Even with the acceptance of the Missouri Approved Instructions, there appears to be no reason why evidence of negligence will not remain the rule when the plaintiff does not plead the statute. See Cichacki v. Langton, 392 S.W.2d 397 (Mo. 1965). However, the Approved Instructions do not provide for this exception to the negligence per se rule.

32. Mo. R. Civ. P. 55.12.

is not always an accurate standard against which fault can be measured.[33]

For instance, in *Rice v. Allen*,[34] the defendant had allowed the plaintiff to drive his truck, which had defective brakes. Before doing so, he warned the plaintiff that the brakes were not functioning. The plaintiff was injured when he was forced to leap from the truck as it rolled down an incline. Rice based his plea for relief on the breach of a statute requiring motor vehicles to have two sets of adequate brakes, but the court recognized the common law doctrine of warning as a complete excuse and directed a verdict for the defendant.[35]

Application of the negligence per se-excused breach doctrine can have two other effects. The trial court can (1) hold as a matter of law that the excuse is inadequate and direct the verdict for the plaintiff,[36] or (2) find that the excuse is sufficient to avoid a directed verdict for the plaintiff but insufficient to require a directed verdict for the defendant.[37] In the latter cases, the jury determines the question of defendant's negligence by considering both the statutory breach and the exculpatory circumstances.[38]

Missouri Approved Jury Instruction 17.01 provides the form for submitting the issue of negligence to the jury in such situations. Using the *Rice v. Allen* fact pattern as an example, the instruction would read:

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33. See Lochmoeller v. Kiel, 137 S.W.2d 625 (Mo. Ct. App. 1940). See also James, *supra* note 23, at 107-08; Morris, *The Relation of Criminal Statutes to Tort Liability,* 46 HARV. L. REV. 453, 458 (1933); Morris, *The Role of Criminal Statutes in Negligence Actions,* 49 COLUM, L. REV. 21, 23, 32 (1949); Note, 1950 WASH. U.L.Q. 280; Note, 1 WILLAMETTE L.J., 503, 510-11 (1961).

34. 309 S.W.2d 629 (Mo. 1958).

35. The court noted that the defendant also had the valid defenses of contributory negligence and assumption of risk. However, it was careful to point out that it was deciding the case on the issue of negligence. *Id.* at 631-32.

36. Bowman v. Ryan, 343 S.W.2d 613 (Mo. Ct. App. 1961); see Wilson v. Shumate, 296 S.W.2d 72 (Mo. 1956); MacArthur v. Gendron, 312 S.W.2d 146 (Mo. Ct. App. 1958).

37. Tener v. Hill, 394 S.W.2d 425 (Mo. Ct. App. 1965); see Wilson v. Shumate, 296 S.W.2d 72 (Mo. 1956); Lix v. Gastian, 261 S.W.2d 497 (Mo. Ct. App. 1953); Lochmoeller v. Kiel, 137 S.W.2d 625 (Mo. Ct. App. 1940).

In this situation the defendant must first convince the judge that the excuse was sufficiently valid to allow a finding that due care *may have been* exercised and then convince the jury that due care *was* exercised. These are, of course, close cases in which the judge wishes to be insulated by the jury. *Cf.* GREEN, JUDGE AND JURY 158 (1930).

38. Tener v. Hill, 394 S.W.2d 425 (Mo. Ct. App. 1965); MacArthur v. Gendron, 312 S.W.2d 146 (Mo. Ct. App. 1958); Lix v. Gastian, 261 S.W.2d 497 (Mo. Ct. App. 1953).

The jury could consider the defendant's conduct by common law standards, as though there were no statute involved in the case. This approach, however, is not explicit in either the cases or the Approved Instructions.

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> Your verdict must be for plaintiff if you believe:
>
> First, at the time of the accident the defendant did not have two sets of adequate brakes; and
> Second, defendant was thereby negligent.[39]

This instruction, however, may not be adequate to inform the jury that it must decide whether the defendant's warning should excuse his act of allowing the plaintiff to drive the dangerous vehicle. In the interest of simplicity,[40] the instruction may create confusion because it fails to indicate in sufficient detail the rational process the jury should follow in reaching a decision.[41] A better balance between simplicity and sufficiency can be achieved by altering the instruction to read:

> Your verdict must be for plaintiff if you believe:
>
> First, at the time of the accident the defendant did not have two sets of adequate brakes; and
> Second, the defendant was thereby negligent and should not be excused by reason of his warning the defendant.

This instruction informs the jury that it must weigh the statutory breach against the possibility that under the circumstances an excuse should be accepted.[42]

Application of the negligence per se doctrine allows the court, by characterizing the issue of negligence as a matter of law, to make it a question for the judge rather than the jury. When an excuse is offered by the de-

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39. M.A.I. No. 17.01 (1964).

40. "The Court's order appointing the Committee directed that measures be considered for simplifying instructions. This has been a primary goal." SUPREME COURT COMM. ON JURY INSTRUCTIONS, REPORT TO MISSOURI SUPREME COURT, MISSOURI APPROVED JURY INSTRUCTIONS XVII (1964).

41. A further purpose of the Approved Jury Instructions should be noted:

> Each pattern instruction was also subjected to these four tests: . . . .
> (2) Is it a complete statement? *Ibid.*

42. Another method of presenting the excuse would be for the defendant to submit a converse instruction. Using the *Rice* case in conjunction with converse instruction M.A.I. No. 29.05(2), the defendant's instruction would read:

> Your verdict must be for defendant if you believe that defendant gave sufficient warning of the dangerous condition of the brakes to excuse defendant for allowing the vehicle to be driven without two sets of adequate brakes.

The problem with this method of hypothesizing the excuse is that when the defendant uses a converse instruction, he assumes the burden of persuasion for the proposition presented in that instruction. See M.A.I. No. 29.01, at 240; SUPREME COURT COMM. ON JURY INSTRUCTIONS, *op. cit. supra* note 40, at X-XI. Yet it appears from the cases that when the excused breach doctrine prevents a directed verdict and the ultimate issue is presented to the jury, the plaintiff still has the burden of persuasion. See Tener v. Hill, 394 S.W.2d 425 (Mo. Ct. App. 1965); see also Wilson v. Shumate, 296 S.W.2d 72 (Mo. 1956); Lix v. Gastian, 261 S.W.2d 497 (Mo. Ct. App. 1953); Lochmoeller v. Kiel, 137 S.W.2d 625 (Mo. Ct. App. 1940).

fendant, the judge's function is to rule on its legal validity and its effect on the question of negligence. As previously noted, he may decide that the excuse should not be recognized; that it should be recognized, but only to the extent of avoiding a directed verdict for the plaintiff; or that it should be recognized to the extent of requiring a directed verdict for the defendant.

Although the asserted reason for recognizing an excuse is that the defendant, in spite of his breach of the statute, has acted as a reasonably prudent man,[43] the courts may give equal or greater weight to other considerations in determining the recognition and effect it will give to an excuse. A comparison of two types of cases illustrates the point. Courts have been willing to recognize excuses for breaches of traffic statutes,[44] but have refused to do so when tenant- and employee-safety statutes are breached.[45] Although

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43. Authorities cited, note 33 *supra*.

44. *E.g.*, Miles v. Gaddy, 357 S.W.2d 897 (Mo. 1962); Wilson v. Shumate, 296 S.W.2d 72 (Mo. 1956); Tener v. Hill, 394 S.W.2d 425 (Mo. Ct. App. 1965); Bunch v. Crader, 369 S.W.2d 768 (Mo. Ct. App. 1963); Lochmoeller v. Kiel, 137 S.W.2d 625 (Mo. Ct. App. 1940); see Note, 1 WILLAMETTE L.J. 503, 511 (1961). See also Morris, *The Role of Criminal Statutes in Negligence Actions,* 49 COLUM. L. REV. 21, 33 (1949).

45. In Monsour v. Excelsior Tobacco Co., 115 S.W.2d 219 (Mo. Ct. App. 1938), the defendant had breached an ordinance which required landlords of tenement houses to provide a light in the common halls and stairways. The defendant asserted that the light had not been out for a sufficient time for a reasonable man to discover and replace the bulb. The court replied, "Defendant's duty to furnish light for the common halls and stairways was an absolute duty created by ordinance, so that any nonobservance of such duty was negligence per se. . . ." *Id.* at 222. A new trial was granted on other grounds, however, and the case subsequently came to the Missouri Supreme Court, which held that because there was sufficient lighting from sources other than the stairway light, the ordinance had not been breached. Monsour v. Excelsior Tobacco Co., 144 S.W.2d 62 (Mo. 1940). The supreme court did not have the opportunity to comment on the statement of the court of appeals that failure to light the stairway could not be excused. Yet, the two holdings do not appear inconsistent; it is possible to hold that compliance with legislation does not require literal compliance with the wording of the legislation and still hold that noncompliance may not be excused. There have been no subsequent cases based on this ordinance.

In Ranus v. Boatmen's Bank, 279 Mo. 332, 214 S.W. 156 (1919), the defendant breached a statute which required owners of dormitories to provide fire escapes. He was held liable despite his excuse that he did not know that the building was being used as a dormitory. Hake v. Buck's Stove & Range Co., 234 S.W. 1061 (Mo. Ct. App. 1921), dealt with an ordinance which required that elevator shafts be adequately guarded. Defendant provided a guard but it was left open and plaintiff fell into the shaft. The court held that the ordinance had not been violated. *Id.* at 1066-67. However, because the statute does not appear to allow temporary non-compliance, it would have been more reasonable to hold that the statute had been breached, but the breach should be excused. The holding that there was no violation may be indicative of the courts' reluctance to find that a breach of an employee safety statute can be excused. See Phillips v. Hamilton Brown Shoe Co., 178 Mo. App. 196, 165 S.W. 1183 (1914). See also Burt v. Nichols, 264 Mo. 1, 173 S.W. 681 (1915).

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unarticulated, certain policy considerations may be the actual basis for distinguishing between the two situations.[46]

The ultimate effect of initially characterizing negligence as a question for the judge, rather than the jury, is that it allows courts to vary the degree of fault necessary for the imposition of liability. By refusing to recognize excuses, a court can, in effect, hold that breach of some statutes creates absolute liability, while freely recognizing that similar exculpatory circumstances are sufficient to excuse breaches of other statutes.

By characterizing the issue of negligence as a matter of law, the court avoids the appearance of trying to seize control of that issue.[47] The judge is not faced with the task of removing the issue from the jury, but rather must decide whether to give it to the jury.

C. *Limitation of the Effect of the Statute*

The courts have placed two limitations on the use of criminal statutes in negligence cases: (1) the plaintiff must have been injured by the hazard which the legislature intended to prevent or control, and (2) the plaintiff must have belonged to the class of people the legislature intended the statute to protect.[48]

In *Mansfield v. Wagner Elec. Mfg. Co.*,[49] the defendant violated a statute requiring corporations

> using any polishing wheel . . . which generates dust, smoke or poisonous gases in its operation, [to] provide each and every such wheel or

46. For example, the approach taken toward the employee-safety statutes may have been a harbinger of the doctrine of strict liability which was subsequently included in the workmen's compensation statutes. One possible reason for not imposing strict liability for violations of traffic statutes is that such an imposition would result in fewer recoveries. A statute can be used to prove not only the defendant's negligence, but also the plaintiff's contributory negligence. State *ex rel.* Kansas City Pub. Serv. Co. v. Bland, 354 Mo. 79, 188 S.W.2d 650 (1945); Fitzpatrick v. Kansas City So. Ry., 347 Mo. 57, 146 S.W.2d 560 (1940); Douglas v. Whitledge, 302 S.W.2d 204 (Mo. Ct. App. 1957); Van Sickle v. F.M. Stamper Co., 198 S.W.2d 539 (Mo. Ct. App. 1947). Therefore, it would be easier to prove not only negligence, which juries are already prone to find, but also contributory negligence, which juries are hesitant to find. See James, *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95, 108 (1950); Note, 1 WILLAMETTE L.J. 503, 512-13 (1961). The same is not true with tenant- and employee-safety statutes because they are applicable only to the potential defendants.

47. See GREEN, JUDGE AND JURY 278-79 (1930). See also HOLMES, THE COMMON LAW 121-24 (1881).

48. Some courts have applied a third limiter: The interest which was injured must have been the one which the legislature sought to protect. For example, the plaintiff may not use the statute to recover for personal injuries if the legislature sought to protect only property rights. See PROSSER, TORTS § 35, at 196-98 (3d ed. 1964). This issue has not been raised in any Missouri case.

49. 294 Mo. 235, 242 S.W. 400 (1922).

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> machine with a hood, which shall be connected with a blower or suction fan . . . to carry off said dust, smoke and gases and prevent its inhalation by those employed about said wheel . . . .[50]

Wagner failed to install such a hood and a particle flew from the machine and struck Mansfield in the eye. The court refused to allow him to use the statute to prove negligence per se because the statute was designed to protect employees from lung injuries.[51]

In *Stein v. Battenfield Oil & Grease Co.*,[52] the company contracted for an electrician to make repairs on equipment. The electrician was killed when he fell onto an unguarded motor belt. His wife sought to predicate her claim of negligence on a statute that read:

> The belting, shafting, machines, machinery, gearing and drums in all manufacturing, mechanical and other establishments in this state, when so placed as to be dangerous to *persons employed therein or thereabout while engaged in their ordinary duties*, shall be safely and securely guarded when possible.[53]

The court construed the statute as being designed to protect employees only. Because the plaintiff was an independent contractor, he was not within the class of persons whom the statute was designed to protect. Therefore the statute could not be used.[54]

When the statute is explicit as to the class of persons to be protected and the hazards to be prevented, Missouri courts strictly apply the limiting rules.[55] However, when it is not explicit, they have often construed the statute liberally to include the plaintiff and his injury.[56] Both the class of hazards and class of plaintiffs tests must be satisfied before the statute may

50. Mo. Rev. Stat. § 292.120 (1959).

51. *But see* Prosser, *op. cit. supra* note 48, § 35, at 198 & n.40. See generally Lowndes, *Civil Liability Created by Criminal Legislation,* 16 Minn. L. Rev. 361, 375-76 (1932); Morris, *The Relation of Criminal Statutes to Tort Liability,* 46 Harv. L. Rev. 453, 473-77 (1933); Thayer, *Public Wrong and Private Action,* 27 Harv. L. Rev. 317, 335-42 (1914).

52. 327 Mo. 804, 39 S.W.2d 345 (1931).

53. Mo. Rev. Stat. § 292.020 (1959). (Emphasis added.)

54. See also Prosser, *op. cit. supra* note 48, § 35, at 193-96. See generally Lowndes, *supra* note 51, at 375-76; Morris, *The Relations of Criminal Statutes to Tort Liability,* 46 Harv. L. Rev. 453, 473-77 (1933); Thayer, *supra* note 51, at 335-42.

55. See Stein v. Battenfield Oil & Grease Co., 327 Mo. 804, 39 S.W.2d 345 (1931); Mansfield v. Wagner Elec. Mfg. Co., 294 Mo. 235, 242 S.W. 400 (1922); Glaser v. Rothschild, 221 Mo. 180, 120 S.W. 1 (1909); Anderson v. Wells, 220 Mo. App. 19, 273 S.W. 233 (1925); Behre v. Kemp & Co., 191 S.W. 1038 (Mo. Ct. App. 1917).

56. See Marczuk v. St. Louis Pub. Serv. Co., 355 Mo. 536, 196 S.W.2d 1000 (1946); Phillips v. Henson, 326 Mo. 282, 30 S.W.2d 1065 (1930); Kuba v. Nagel, 124 S.W.2d 597 (Mo. Ct. App. 1939); Loehr v. Wells, 253 S.W. 461 (Mo. Ct. App. 1923).

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be employed. If the plaintiff is thus precluded from using the statute, his negligence action is not necessarily defeated. He may still proceed, with no mention of the statute,[57] to prove common law negligence, and the very conduct which breached the statute may serve as proof of the lack of common law due care.[58]

II. INTENTIONAL TORTS

In Missouri, intentional tort claims can be founded on the breach of a criminal statute only if[59] (1) the statute was designed to protect not only the general public but also the class of plaintiffs of which the plaintiff is a member,[60] and (2) the statute is in two parts, one remedial and the other penal, the plaintiff basing his cause of action on the former.[61] Both conditions must be met.[62] The distinction inherent in the second condition is the most difficult to apply. In one case,[63] the court gave relief to a plaintiff who

57. *Cf.* Behre v .Kemp & Co., 191 S.W. 1038 (Mo. Ct. App. 1917).

58. See Anderson v. Wells, 220 Mo. App. 19, 273 S.W. 233 (1925).

59. See generally Comment, 63 HARV. L. REV. 175 (1949); Comment, 50 MICH. L. REV. 352 (1951). The distinction between intentional torts and negligent torts is not always easy to make. For example, when an unwed, pregnant woman sues the prospective father for damages caused by the pregnancy, it is likely that the pregnancy was unintentionally caused. However, the Missouri courts have considered such suits to be founded on an intentional tort theory. See Heembrock v. Stevenson, 387 S.W.2d 263 (Mo. Ct. App. 1965); James —— v. Hutton, 373 S.W.2d 167 (Mo. Ct. App. 1963). The decisions in both of these cases are based on the intentional tort case of Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956).

Another problem arises when the plaintiff does not make clear to the court which theory is relied upon. In Bailey v. Canadian Shield Gen. Ins. Co., 380 S.W.2d 378 (Mo. 1964), an insured sued an insurance agent for damages caused by the agent's act of placing insurance with a company which had not been authorized to do business in Missouri. Placing insurance with an unauthorized company was forbidden by statute; any offender was subject to criminal liability. MO. REV. STAT. § 375.300 (1959). Relying on intentional tort cases, the court held that the statute did not create a cause of action and, hence, the plaintiff could not recover. Yet the plaintiff probably had a sound negligence case; at common law, an insurance agent owes a duty of at least due care to his principal. City of New York Ins. Co. v. Stephens, 248 S.W.2d 648 (Mo. 1952); Kaw Brick Co. v. Hogsett, 73 Mo. App. 432 (1898). Hence, if the insured had made it clear that he was proceeding on a negligence theory, he may have recovered.

60. Cheek v. Prudential Ins. Co. of America, 192 S.W. 387 (Mo. 1917), *aff'd on other grounds,* 359 U.S. 530 (1922). See Kepner, *Violation of a Municipal Ordinance as Negligence Per Se in Kentucky,* 37 KY. L.J. 358 (1949). It should be noted that in *Cheek,* the court relied on numerous negligence cases to support this proposition, but cited no cases involving intentional torts. 192 S.W. at 387.

61. State *ex rel.* Terminal R.R. Ass'n v. Hughes, 350 Mo. 869, 169 S.W.2d 328 (1943).

62. See Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956).

63. Cheek v. Prudential Ins. Co. of America, 192 S.W. 387 (Mo. 1917), *aff'd on other grounds,* 259 U.S. 530 (1922).

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predicated his cause of action on the failure of an employer to give him a letter stating the services the employee had performed and the reason for termination of the employment. A "service letter" statute[64] required employers to provide such letters to discharged employees. However, the court refused relief to an employee discharged for asserting his rights under the state's workmen's compensation statute.[65] The statute contained a section making it a crime to discharge an employee for trying to collect damages under the statute.[66]

The court distinguished the cases on the grounds that the workmen's compensation statute was neither remedial nor in two parts. Criminal liability was imposed in the latter case to prevent *anticipated* abuses of the workmen's compensation statute, while in the former case the statute was passed to correct an *existing* evil— that employers had hindered former employees in finding new jobs by refusing to discuss their past employment records with prospective employers. Since workmen's compensation statutes were of recent origin, there could be no existing evils associated with them, the court reasoned. The court further held that a statute must have two parts, one punitive and the other remedial, to serve as the basis for founding liability on an intentional tort theory.[67] This "two parts" issue is essentially a rule of statutory construction that helps a court in its search for a legislative intent to provide a remedy. Punctuation becomes critical under such a test. In the "service letter" case, the statute consisted of two sentences. The first sentence imposed a duty on the employer to furnish a letter if requested to do so, while the second dealt with the punishment that could be imposed for failure to do so. The court thus read the statute as having a dual purpose. In the workmen's compensation case, the court interpreted the fact that the relevant provision was embodied in one sentence as indicating that the provision was punitive only and did not have a dual role.

CRITIQUE

It is now possible to evaluate the extent to which Missouri courts use criminal statutes to affect tort liability. That the influence is substantial is evidenced by the negligence per se rule and by the fact that, in at least some circumstances, intentional tort liability is founded on criminal statutes. However, when courts so borrow criminal standards from the legislature, they are not completely controlled by the legislative pronouncement. It is impor-

64. Mo. REV. STAT. § 290.140 (1959).
65. Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956).
66. Mo. REV. STAT. § 287.780 (1959).
67. Christy v. Petrus, 365 Mo. 1187, 1192, 295 S.W.2d 122, 126 (1956).

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tant to recognize that courts, rather than legislatures, make the initial decision to use criminal statutes in tort cases. The use of the excused breach doctrine illustrates the courts' ability to borrow from the legislature while retaining judicial control over civil liability.

Despite this, there are several examples of the courts' relying on what is, at best, a weakly implied legislative intent to determine the extent to which a criminal statute was to be used in a tort case. For example, in the intentional tort case involving a breach of the workmen's compensation statute, the court distinguished the "service letter" statute on insignificant grounds. It is difficult to find an important difference between an existing evil and an anticipated evil which was sufficient to cause the legislature to append the criminal section to the workmen's compensation laws. Even less justifiably, the workmen's compensation statute was held penal and nonremedial because it provided a penalty for doing a proscribed act, but did not first proscribe the act and separately list the penalty. Actually there may well be a strong, though unstated, policy reason for distinguishing the workmen's compensation statute from the "service letter" statute. Proving a breach of the former would depend on ascertaining the employer's state of mind, creating the danger that juries might uphold unfounded claims. On the other hand, whether or not a letter has been written is easily established.

Another rule based partly on supposed legislative intent is that there must be a concomitant common law duty before a statute may be used to create a duty in a negligence case. For example, ordinances requiring landlords to remedy defective conditions on a tenant's leased premises cannot be used to create a civil cause of action. Yet it appears that the landlord is better able to remedy such conditions, at least if their existence is known. Furthermore, the landlord is in a better position than is the tenant to spread the risk through insurance.

The class of hazards and class of plaintiffs rules of limitation provide a third example of court reliance on legislative intent at the possible expense of policy considerations. The stated reason for limiting liability is that unforeseeable plaintiffs, injured by unforeseeable hazards, should not be able to recover. But when courts thus borrow the legislature's standard, they are, in effect, also adopting the limits of the legislature's foresight. This reliance seems undesirable. It is questionable to assume that the legislature has considered whether the plaintiff and his injury were foreseeable. The legislature was contemplating criminal liability, which is not contingent on the *occurrence* of an injury to someone, and was not contemplating the

limits which should confine the use of the criminal statute in affording a civil recovery after an injury has occurred.

There are times when the policies of criminal law coincide to some degree with the policies of tort law. When this occurs, the courts should use the criminal law to influence civil liability, but only to the extent that such coincidence occurs. The courts should realize that though the legislature has suggested the standard by passing the statute, the decision to use the statute to affect civil liability is court-made, and the ultimate effect of the statute should be court-controlled.

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