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# The Infant and Negligence Per Se in Pennsylvania

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# THE INFANT AND NEGLIGENCE PER SE IN PENNSYLVANIA

by

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The statute and the infant met in *D'Ambrosio et al. v. City of Philadelphia.*[1] The infant, aged twelve years and eight months, with several companions boarded the rear of a truck without the driver's knowledge of their presence and rode on the tailgate. When the truck struck a hole in the street of the defendant city, the jolt threw off the plaintiff resulting in his injury. In the suit against the city, the Supreme Court held that the minor plaintiff was negligent per se because he violated the Vehicle Code, as amended by Act of June 27, 1939, P.L. 1135, section 1023, P. L. 1179, 75 P. S. sec. 632.[2] "In the absence of the statute," said the Court, "the minor plaintiff's contributory negligence would have been for the jury. But the legislature established a standard of conduct for all persons which neither court nor jury could set aside in a case within its terms . . . As the plaintiff's conduct was a direct violation of the statute, the question for decision is whether a jury in a civil suit may be permitted to set aside the statute."[3]

The trial court was of the opinion that the legislature did not intend to make riding on a tailboard negligence per se in all cases. "If it did, then it has obliterated in this type of case the familiar rule that a child under seven is conclusively presumed to be careful and a child between seven and fourteen is rebuttably presumed to be careful, and that the negligence of the second group is always for the jury."[4] The Court answered, "The error is in ignoring the comprehensive mandate of clause (b), 'No person shall . . . ' "[5] Citing *In Re Elkins Estate,* the opinion points out that, "A saving from the operation of statutes for disabilities must be expressed, or it does not exist."[6]

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[1] 47 A. 2d. 256. (1946).

[2] "(b) No person shall hang onto, or ride on, the outside or rear end of any vehicle, and no person on a bicycle, roller skates, sled, or similar device, shall hold fast to or hitch to any moving vehicle, and no operator of a vehicle shall knowingly permit any person to hang onto, or ride on, the outside or rear end of the vehicle which he is operating, or allow any person on a bicycle, roller skates, sled or any similar device to hold fast or hitch onto the vehicle which he is operating on any public highway, and no owner of a vehicle, if present, shall knowingly permit any person to operate any vehicle under his control in violation of this subsection.

"(c) . . . Any person violating any of the provisions of subsection (b) of this section shall, upon summary conviction before a magistrate, be sentenced to pay a fine of (5) dollars and costs of prosecution, and in default of the payment thereof, shall undergo imprisonment for not more than three (3) days."

[3] 47 A. 2d. 256, 258.

[4] Ibid.

[5] Ibid.

[6] Ibid.

The issue one takes with the case is the extension of the negligence per se doctrine to a situation in which the person violating the statute is an infant. To evaluate the decision, it is necessary to examine the rule being "obliterated" and the doctrine employed to destroy the rule.

It is generally admitted that the standard of conduct for children used in determining negligence is not that of adults.[7] A different standard is used because a child may not have the capacity to perceive a risk and realize its danger. He may not be able to exercise the qualities of attention, intelligence and judgment necessary to such a perception and realization.[8] If there is to be this other standard for children, two problems are posed. By what standard is the child's conduct to be measured and when has the child attained those qualities necessary to perceive danger equivalent to those of an adult?

The standard of conduct is that to be expected of a child of like age, capacity and experience.[9] Of course, the application of this standard is only possible after the determination of the second consideration, to wit, that the child is of such inferior capacity to bring the special standard into operation. The chief difficulty is to determine within what ages the special standard applies. The child of like age, intelligence and experience only serves to supply the *careful and prudent child* by which the infant actor's conduct is judged. Age is important in this judgment because it gives some indication as to what to expect in physical ability, knowledge and judgment. If a child has the capacity to appreciate the risk and to avoid it, but is more reckless and daring than ordinary children of his age, he will be judged by the conduct of such ordinary children.[10]

The determination of an age classification to which the special standard shall apply is strikingly similar to the problem confronting the courts in cases of the infant charged with commission of a crime. In criminal law the capacity of the child to distinguish between right and wrong is involved. When has the child attained the mental development necessary to criminal intent? There is a need for arbitrary rules to preclude speculation as to the precise age at which this mental development is attained.[11] Just so, "The law fixes no arbitrary period when the immunity of children ceases and the responsibilities of life begin . . . At what age

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[7]Prosser, Wm. L., Handbook of the Law of Torts, (1941), pp. 229-231.

[8]Restatement, Torts, (1934), secs. 283 (e), 289 (h); Nagle v. Allegheny Valley Railroad Co., 88 Pa. 35 (1878), " . . . not sufficient capacity or discretion to understand danger, and to use the proper means to avoid it. . . . , the incapacity of the child to know the danger and avoid it, shields it from responsibility." p. 38.; Parker v. Washington Electric St. Ry., 56 A. 1001, 207 Pa. 438, "Measure of responsibility of a child for contributory negligence is his capacity to understand and avoid danger." p. 1002; DiMeglio v. Philadelphia & R. Ry. Co., 97 A. 476, 252 Pa. 391 (1916); Strawbridge v. Bradford, 18 A. 346, 128 Pa. 200 (1889); Kirschner v. Oil City St. Ry. Co., 59 A. 270, 210 Pa. 45 (1904); Cress v. Philadelphia & R. Ry. Co., 77 A. 810, 228 Pa. 482; Neidlinger v. Haines, 200 A. 581; (1938), Kehler v. Schwenk, 144 Pa. 348, 22 A. 910 (1891).

[9]Restatement, Torts, (1934), secs. 464, 263(e); West Philadelphia Passenger Ry. Co. v. Gallagher, 108 Pa. 524 (1885); McMillen v. Steele, 119 A. 721, 275 Pa. 584 (1923); Liguori v. City of Phila., 41 A. 2d. 563, 351 Pa. 494 (1945).

[10]Philadelphia City Passenger Ry. Co. v. Hassard, 75 Pa. 366 (1874).

[11]Hitchler, W. H., The Law of Crimes, (1939), Vol. 1, p. 126.

then must an infant's responsibility be presumed to commence? This question cannot be answered by referring it to the jury. That would furnish us with no rule whatever. It would give us a mere shifting standard affected by the sympathies and prejudices of the jury in each particular case . . . It is a question of law for the court."[12] Following the analogy to the responsibility for crime, Pennsylvania established the rule that a child under seven years of age is conclusively presumed to be incapable of appreciating danger and guarding against it, a child between seven and fourteen years old is presumed to be incapable of appreciating danger, but this prsumption is rebuttable and grows less strong each year until the child attains the age of fourteen, when it is presumed the child is capable of appreciating danger and subject to the ordinary rules of negligence.[13] In the *Nagle* case,[14] the court claimed the solution not to be difficult in arriving at a presumption of capacity to understand danger at the age of fourteen. Since the law had established that a fourteen year old infant could select a guardian, contract a marriage, and harbor malice and kill under circumstances that constituted murder, ". . . it therefore requires no strain to hold that at fourteen an infant is presumed to have sufficient capacity and understanding to be sensible of danger and to have the power to avoid it."[15] The age presumptions ignore mental and psychological age. They are, " . . . only convenient points in the uncertain line between capacity and incapacity, at which the law changes the presumption."[15a]

The age presumptions are criticized as arbitrary rules founded on a faulty analogy with the criminal law doctrine of capacity.[16] There is no valid comparison between the capacities being established by the use of the presumptions. A perception and judgment between right and wrong are separate and apart from, and perhaps even psychologically and physiologically different than a perception and judgment of a danger involved in an act. A recently edited criminal text even suggests that mental capacity has no place in tort liability, " . . . for the object of the action is to compensate the party injured, and not to punish the child."[17] Fictitious and arbitrary as they may be, the presumptions are justified on the grounds of expediency and facility of administration.[18] Except for the declaration that all infants below seven years of age are incapable of negligence, the age presumptions ostensibly only determine whether the child is capable of negligence but do not fix the standard of care.

Because the child has attained the age of fourteen and is therefore presumed to be capable of recognizing and avoiding danger, does not deprive him of being

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[12]Nagle v. Allegheny Valley Ry. Co., 88 Pa. 35, 39. (1878).
[13]Parker v. Washington Electric Ry. Co., supra, n. 8; supra, n. 12; Kehler v. Schwenk, supra, n. 8. For the presumptions in criminal law, see Hitchler, supra n. 11, p. 125 et seq.
[14]Supra, n. 12.
[15]Ibid. at pp. 39-40.
[15a]Ibid., at p. 40.
[16]Prosser, supra n. 7, p. 231.
[17]Clark & Marshall, A Treatise on the Law of Crimes, (4th ed. 1940), sec. 76, p. 115.
[18]Shulman, The Standard of Care Required of Children, 37 Yale L. J. 618.

judged by the standard of a child of like age, intelligence and experience. In *Kehler v. Schwenk,* the court points out:

> " . . . the increase of responsibility is gradual. It makes no sudden leap at the age of fourteen. That is simply the convenient point at which the law . . ., changes the presumption of capacity, and puts upon the infant the burden of showing his personal want of intelligence, prudence, foresight or strength usual in those of such age. The standard remains the same, to wit, the average capacity of others in his condition."[19]

A fifteen year old boy is not required to remember the presence of a submerged pipe in a swimming pool of which he had knowledge a year ago. He is held, " . . . only to such measure of discretion as is usual in those of his age and experience."[20] The decisions do not foreclose the infant of fourteen years or over from showing that he did not have the mental capacity or qualities of perception normal for one of his age.[21] In most cases, the infant cannot sustain this as a matter of proof. As a consequence, the courts treat him as an adult.

The courts have not hesitated to declare an infant of fourteen years of age and upward to be contributorily negligent as a matter of law if the act was such that had the actor been an adult he would have been contributorily negligent. Turning a bicycle across the path of an approaching auto,[22] feeding a threshing machine from an obviously dangerous position,[23] crossing a track in front of a locomotive,[24] riding on the platform of an electric car when there was room inside,[25] using a hazardous way when a safe way was available,[26]—have been held contributory negligence as a matter of law.

The standard of care required of children has been for the most part deduced from cases in which the child's contributory negligence was in issue. It is said no difference in principle is to be observed.[27] In the case of adults, it is generally assumed that the standard of conduct of negligence and contributory negligence is the same.[28] There is doubt expressed by the writers of the Restatement of Torts that statements as to the standard of care required of children by analogy to contributory negligence situations are beyond criticism:

> "It may be that children should not be required to conform to a particular standard in order to relieve an admittedly negligent defendant from

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[19]144 Pa. 348, 22 A. 910 (1891).

[20]Liguori v. City of Philadelphia, supra n. 9.

[21]Flowers v. Pistella, 200 A. 904 (Pa. Super.) (1938); Rice v. King, 165 A. 833 (1933); Miller v. City of Erie et al., 16 A. 2d. 37 (1940). For the results of this rule see note 44.

[22]Geiger v. Garrett, 113 A. 195, 270 Pa. 192 (1921).

[23]Rice v. King, supra n. 21.

[24]Nagle v. Allegheny Ry. Co., supra n. 12.

[25]Kirschner v. Oil City Ry. Co., supra n. 8.

[26]Simpkins v. Penna. R. Co., 5 A. 2d. 103 (1939), Seventeen year old minor treated as an adult without discussion.

[27]Prosser, supra n. 7, p. 230; Shulman, supra n. 18.

[28]Bohlen, F. H., Studies in the Law of Torts, (1926), p. 527; Restatement, Torts, (1934), sec. 289(a).

liability to them. It does not necessarily follow that a child should not be required to conform to a higher standard of behavior where it is necessary for the protection of innocent members of the public."[29]

Thus the child would be measured by a less rigorous standard of behavior when he is the injured plaintiff than he would be if he were the negligent actor defendant.

In the use of the age presumption applicable to children between seven and fourteen years of age, Pennsylvania has developed a tradition of submitting the issue of the child's negligence to the jury. This has been expressed in recent decisions as " . . . a well established principle that the contributory negligence of a child of ten years old is for the jury,"[30] and, "The question of contributory negligence of a child of twelve years of age is particularly one for the jury under the decisions of this court."[31] It is not the age of the child which supports this practice. The responsibility of the child is predicated upon his knowledge and experience and on the character of th danger to which he is exposed. The existence of those factors are based upon interpretation of facts, a function of the jury.[32] The facts are frequently in dispute and the interpretations and inferences of them doubtful. In the *Nagel* case[33] and the *Parker* case,[34] the Court was careful in its language to reserve unto itself the right to declare the presumption rebutted as a matter of law if the facts were beyond doubt. Even children will be contributorily negligent if they do not avoid a danger obvious to one of their age, intelligence and experience. An eleven year old girl is negligent as a matter of law if she climbs over a wire fence to reach a drinking fountain in a playground and falls, when there is a safe access to the fountain by a slightly longer route known to the child.[35] A twelve year old minor was non-suited because he took an obvious risk in attempting to cross between railroad cars by climbing over the coupling while the train halted on the crossing.[36] While the court has retained its right, it has seldom used it, and the principle that the negligence of children between the ages of seven and fourteen is for the jury has gained a traditional and familiar place in our law.

That the rule has entrenched itself firmly is borne out by an examination of the issue in *Gress v. Philadelphia & R. Ry. Co.*[37] A girl within ten days of her fourteenth birthday led her six year old brother across the defendant's railroad

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[29]Tentative Draft of the Restatement of Torts, sec. 167 (Tent. Draft, Part IV.)
[30]Harris et al. v. Seiavitch, 336 Pa. 294, 9 A. 2d. 375 (1939).
[31]Fabel v. Hazlett, 157 Pa. Super. 416, 43 A. 2d. 373.
[32]Parker v. Washington Electric St. Ry. Co., supra n. 8; Kelley v. Pittsburgh & Birmingham Traction Co., 204 Pa. 623, 54 A. 482 (1903); Byron et al. v. Central Ry. of N. J., 64 A. 328, 215 Pa. 82 (1906); DiMeglio v. Philadelphia & R. Ry. Co., supra n. 8; Danze v. Devlin, 195 A. 882 (1938); Strawbridge v. Bradford, supra n. 8.
[33]Supra n. 12.
[34]Supra n. 8. Also see dicta in Braden v. City of Pittsburgh, 18 A. 2d. 99 (1941).
[35]Brown v. City of Scranton, 313 Pa. 230, 169 A. 435 (1933).
[36]Studer v. Southern Pacific Co., 53 Pac. 942, Calif. (1898).
[37]Supra n. 8.

tracks in a manner in which it would have been negligent for an adult to proceed. The Court decided the minor plaintiff was negligent as a matter of law and a nonsuit was proper. The majority reasoned that since " . . . the legal presumption of her incapacity to appreciate and avoid injury had reached that point in the diminishing scale when it was almost a negligible quantity," and within ten days the presumption would have been the other way, it had the power to declare the plaintiff negligent as a matter of law. Three able colleagues, Justices Elkin, Mestrezat, and Moschzisker, dissented on the ground that the question of contributory negligence of the minor was for the jury. In *Strawbridge v. Bradford*,[38] the Court refused to find that an infant of thirteen years eight months was contributorily negligent as a matter of law because he was familiar with an elevator with open sides as an employee who made frequent use of it. Similarly, a boy under fourteen years riding on the lower step of the front platform of a street car over a long distance and only holding on with one hand had the issue of his conduct submitted to a jury.[39] But a fifteen year old boy standing on the platform of a moving electric car when there was room inside was held to be negligent by the court.[40] The Pennsylvania decisions have not been as stringent as the California court in *Studer v. Southern Pacific Co.*, supra note 36, in applying the obvious danger doctrine to the seven to fourteen year old age group. In *Kelley v. Pittsburgh & Birmingham Traction Co.*[41] a twelve year old stepped in front of an unlighted train; and in *Byron v. Central Ry. of N. J.*[42] a youth under fourteen stepped in front of an engine apparently without looking or listening. In both cases the jury determined the issue of contributory negligence. The court in the *Byron* case saw " . . . no reason to distinguish the case at bar from the long line of cases in which this rule (of submitting the issue of the infant's contributory negligence to the jury) has been recognized and followed in our state."[43]

To summarize, Pennsylvania does not apply the standard of care of adults in negligence cases to children. In consideration of the child's incapacity to perceive danger and avoid it, it measures his conduct by that of children of the same age, intelligence and experience. At what ages this special standard is applied is determined by the use of presumptions analogous to those employed in the field of criminal law to ascertain whether an infant has the capacity to commit crime. While the use of age presumptions are justifiable only by facility of administration and expediency, they have, nevertheless, assumed a fixed and familiar role in this jurisdiction. By their use the infant below seven has been eliminated as a problem by the arbitrary declaration that he is incapable of contributory

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38Supra n. 8.
39West Philadelphia Passenger Ry. Co. v. Gallagher, supra n. 9.
40Kirschner v. Oil City St. Ry. Co., supra n. 8.
41Supra n. 32.
42Supra n. 32.
43Parenthetical material my own. Cf. Nagle v. Allegheny Valley Ry. Co., supra n. 12, in which a fourteen year old minor was held contributorily negligent as a matter of law because he failed to stop, look and listen.

negligence. The child of fourteen years and above has in fact been judged by an adult standard.[44] Children from seven to fourteen years have been given special consideration in the measurement of their conduct. Generally, their conduct has been determined by a jury. This has been because the ascertainment of the capacity to perceive danger involves the determination of judgment factors, i. e., knowledge, intelligence, experience, character of the danger, which are often associated with questions of fact and hardly ever beyoned reasonable doubt. In addition, a long line of cases has made this treatment of the standard of care issue for children in this age group traditional and familiar. The rule being abrogated in the *D'Ambrosio* case is a familiar one, indeed.

The violation of a statute intended to protect individuals or a class of individuals, of which the injured person is one, from a hazard or harm which has in fact occurred to produce the injury is negligence per se, i. e., in itself, and the court so directs the jury.[45] Why a statute which creates no civil liability is construed to create civil liability has taxed the ingenuity of judges and writers. Some courts have been content with the assertion that the statute creates a criminal liability and therefore creates a civil liability, without explaining the "therefore," which is the crux of the problem.[46] The intent of the legislature to create a civil liability has been read into the statutes by some courts, when the lawmakers did not have civil liability in mind at all, and may even have deliberately omitted to provide for it.[47] A more plausible theory is that the reasonably prudent man does not disobey the law, hence, if he violates a statute he is no longer a reasonably prudent man, and therefore, is negligent; and the court shall tell the jury in certain terms.[48] These theories do not explain the refusal of the court to leave the issue

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[44]This occurs in every case in which the court holds that an infant of fourteen years or older is contributorily negligent as a matter of law. If an adult would have perceived the act or omission under consideration of the court to be an exposure of an unreasonable risk of harm to himself, the infant is held to the same standard of perception because he is presumed to have the capacity of an adult in that respect. The presumption operates until it is overcome "by clear proof of the *absence* of such discretion and intelligence as is usual with infants of fourteen years of age." Rice v. King (1933) supra n. 21. The proof is not what a child of similar age and discretion might have done under the circumstances, it is "proof of the *absence* of such discretion." Flowers v. Pistella, supra n. 21. Unless the infant can show that he is sub-standard he cannot remove the consideration of his act from the court to the jury. Since such proof is rarely available a a matter of fact, the expressions, that if the jury were to consider his conduct, it would be judged by the recognized standard in infant cases are meaningless. In connection herewith, note the expression of the court in Rice v. King, supra, that at sixteen and one-half years of age the presumption of capacity is greater.

[45]Harper, F. W., A Treatise on the Law of Torts, (1933), pp. 193-195; Prosser, supra n. 7, pp. 274-278; Restatement, Torts, (1934), sec. 286. That the more accurate term is *duty* per se, 36 Dickinson L.R. 192, 193.

[46]Parker v. Barnard, 135 Mass. 116 (1883).

[47]Lowndes, Civil Liability Created by Criminal Legislation, 16 Minn. L.R. 361, 364, "A right is simply the ex post facto aspect of a remedy, and it savors of absurdity to impute to the legislature an intention to create a civil liability, where it has manifested no intention of creating a civil remedy."

[48]Thayer, Public Wrong and Private Action, 27 Harvard LR 317, 322; Martin v. Hertzog, 228 N.Y. 164, 126 N.E. 814 (1920), Cardozo, J., "By the very terms of the hypothesis, to omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life and limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform."

to the jury.[49] Professor Prosser submits that the best explaination is "that the courts are seeking by a species of judicial legislation, to further the ultimate policy for the protection of individuals which they find underlying the statute, and which they believe the legislature must have had in mind."[50]

Pennsylvania courts recognize that a statute may establish a conclusive standard of conduct. If such a statute is violated that act constitutes negligence per se and the jury may not consider the question. Considerable difficulty has arisen as to when the standards established by the statutes are conclusive.[51] Statutes clearly intended to protect a particular class of persons from their own inability to protect themselves are held to establish a conclusive standard which will abrogate the usual defenses of contributory negligence.[52] The Child Labor Acts have been so construed. The failure to keep duplicate lists as required by the Acts was sufficient to find the employer liable as a matter of law for injuries to an unlawfully employed minor while at work.[53] No negligence need be averred other than the employment of the minor.[54] If the injury has occurred in the course of unlawful employment, " . . . that is enough to show a causal connection and the law will refer the injury to the original wrong as its proximate cause."[55] The statute forbidding the sale of firearms to a minor under sixteen years of age subjects the vendor, who violates it, to liability for accidents regardless of the minor's capacity. The liability extendes to any natural or probable results of the act of sale.[56] Statutes which purport to provide safe places in which to work and statutes forbidding the sale of liquor to intoxicated persons have been held to be conclusive.[57] Any statement of the reasons for applying negligence per se rules in these cases must be weighted heavily with the strong policy considerations involved in these situations and is not valid for other statutes dealing with other types of conduct. For example, contrast the language in *Littell v. Young*,[58] a case which involved

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[49]Cardozo, J., in Martin v. Hertzog, ibid, declares that the standard of conduct having been fixed by the legislature "jurors have no dispensing power by which to relax it." Thayer, supra n. 48, argues that a jury should not be allowed to say that a reasonable man will disobey the law.

[50]Prosser, supra n. 7, p. 265.

[51]Restatement, Torts, (1934), Penna. Annotations (1938), sec. 285.

[52]Stehle v. Jaeger Automatic Machine Co., 220 Pa. 617 (1908), and cases cited in notes 53 to 56 inclusive below.

[53]Chabot v. Pittsburgh Plate Glass, 259 Pa. 504 (1918); Mitchell v. Mione Mfg. Co., 112 Pa. Super. 394 (1934) violation of a similar provision of the act relating to employment certificates.

[54]Zelinko v. Pittsburgh Coal Co., 68 Pa. Super. 239 (1917); Faiola v. Calderone, 275 Pa. 303 (1923).

[55]Krutlies v. Bulls Head Coal Co., 249 Pa. 162, 166 (1915). Cf., if the original employment is not prohibited, and the minor is injured while at lawful work, that he was sometimes employed at an unlawful occupation which was hazardous is not negligence per se. Johnson v. Endura Mfg. Co., 282 Pa. 322 (1925).

[56]McMillen v. Steele, 275 Pa. 584 (1923); Shaffer v. Mowery, 265 Pa. 300 (1919); Mantino v. Piercedale Supply Co., 13 A. 2d. 51.

[57]See cases cited in Penna. Annotations (1938) to Restatement, Torts, (1934), sec. 285 (b). Contributory negligence is an available defense in the safety regulation statutes cases but assumption of risk is not. Dobra v. Lehigh Valley Coal Co., 250 Pa. 313.

[58] 5 Pa. Super. 205 (1897).

the sale of liquor to an intoxicated person, with the attitude of the courts toward Motor Vehicle Code violations developed below:

> "An act done in violation of a criminal statute is of itself an act of negligence, and makes the party doing it responsible for the proximate consequences of his act."

The standards established by traffic regulations were not definitely declared to be fixed and conclusive standards until the decision of *Jinks v. Currie.*[59] Prior to this case, a plaintiff who drove past a standing street car at high speed while the car was discharging passengers had his act characterized as a "flagrant violation"[60] of statute, and an " . . . important fact to be considered . . . " by the jury. A left turn made by a truckdriver against the current of traffic without keeping in line " . . . in direct violation . . . " of the Motor Vehicle Code " . . . was at least evidence of it (negligence) on a two way street."[62] This line of decisions reached its zenith in the gratuitous words in the decision of *Johnson v. American Reduction Co.*:[63]

> "It is not negligence per se to ignore a statutory duty in driving a vehicle, and it was not the proximate cause of this accident."

On its facts, the decision of the *Johnson* case is sound on the second ground. The violation did not produce the harm nor affect the manner of its occurrence at all. The trend began to change with *Jamison v. Kamerer*[64] where making a left turn without looking or signalling " . . . was negligence, statutorily determined to be so, . . . " This was followed by *Dempsey v. Cuneo Eastern Press Ink Co. of Penna.*[65] In that case, it was alleged that the defendant swerved his truck from the right lane without cause and struck the plaintiff. The court said, "Admittedly this, if true, . . . convicts defendant's driver of negligence, and makes the defendant liable to the plaintiff, unless decedent was contributorily negligent . . . " In *Stark v. Fullerton Trucking Co.*,[66] the plaintiff's decedent crashed into a stalled truck and a car which had collided with the stalled vehicle. The decedent failed to operate his car at such a speed which enabled him to stop within the assured clear distance ahead as required by statute. The pronouncement of the court was clear:

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[59]188 A. 356, 324 Pa. 532 (1936).
[60]Bohm v. Beckdol & Welker, 81 Pa. Super. 178 (1923).
[61]Lewis v. Wood, 247 Pa. 545.
[62]Wilson v. Consolidated Dress Beef Co., 295 Pa. 168 (1929).
[63]158 A. 153, 305 Pa. 537 (1931), at p. 154. Contrast with the loose language of the court in Weimer v. Westmoreland Water Co., 127 Pa. Super. 201, 193 A. 665, 668, where in discussing the probative effect of a regulation of the Department of Labor & Industry it said, "Although a statute or ordinance may be offered as evidence of negligence, it cannot be considered a sole basis of recovery." The decision of the court on the evidential use of the administrative regulation is commendable.
[64]313 Pa. 15. (1933).
[65]318 Pa. 557, 560. (1935).
[66]318 Pa. 541 (1935).

> " . . . the requirement is fixed and unchangeable . . . The statute was passed to protect life and limb; . . . and the statute must be construed to further that purpose."[67]

With these cases already pointing the way, *Jinks v. Currie* came before the court for decision. The driver of a car attempted to pass a truck at an intersection when the truck veered toward the left to negotiate a left turn striking the car and forcing it into an abutment. The trial court charged that the violation of the Motor Vehicle Code, 75 P. S. 543, which prohibits passing at intersections was negligence per se. The Supreme Court approved the charge, as follows:

> "The section of the Act is a positive mandate, a 'thou shalt not.' . . . the violation of such a mandatory provision of the law, passed for the purpose of aiding safe operation of motor vehicles on the public highways, is negligence per se . . . "[69]

Not every violation of a statute is negligence per se. The act must be within the prohibited hazards and be a substantial factor in causing the injury.[70] The *D'Ambrosio* case recognizes this principle with a clarity of expression not always employed in earlier decisions.[71] To support the statement that not every violation is negligence per se, the Court relies on four cases[72] which hold that the act which constitutes the statutory violation must be an efficient cause of the injury in order to rule that the negligence per se principle applies. The expression "proximate cause" is frequent in the cases.[73] The overlapping of the hazard problem and the causal question, which is typical of the negligence field in general, has carried over into this problem.[74] Unless the statute is dealing with the hazard which has occurred to produce the injury, the violation cannot have any causal connection with the harm. It is easy to slide into language which is not distinct enough to clarify the difference between whether the hazard is not within the purview of the statute or whether, even though the hazard is within its purview, nevertheless,

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[67]Ibid., p. 544. The court went on to hold that the decedent's presumption of due care " . . . has no existence as against the certainty that if he had done so here (taken all precaution) he would not have died."

[68]Supra n. 59.

[69]Ibid., citing Restatement, Torts, (1934), sec. 286.

[70]Restatement, Torts, (1934), secs. 286, 469; 36 Dickinson L.R. 192, 193, 200; Harper, supra n. 45, p. 193; D'Ambrosio v. City of Philadelphia, supra n. 1.

[71]Supra n. 1 at p. 259, " . . . there was no dispute of fact from which the jury could find that his act was not within the prohibited hazards and was not a substantial factor in causing his injury; his violation of the statute was negligence per se."

[72]Jinks v. Currie, supra n. 59; Lane v. Mullen, 131 A. 718, 285 Pa. 161 (1926), "Where the failure to heed the statute did not bring about the result complained of, the statute drops out of the factors to be considered." at p. 719.; Purol, Inc. v. Great Eastern System, Inc., 130 Pa. Super, 341, 197 A. 543 (1938), in which the court after a review of the cases holds that efficient cause as used in the opinions means "substantial factor in bringing about the harm;" in accord with Restatement, Torts, (1934) sec. 431. Vunak v. Walters, 157 Pa. Super. 660, 43 A. 2d. 536 (1945). In accord: Gaskill v. Melelia, 144 Pa. Super. 78, 18 A. 2d. 455 (1941); Ennis v. Atkin, 47 A. 2d. 217 (1946); Johnson v. American Reduction Co., supra n. 63; Ross v. Reigelman, 14 A. 2d. 591 (Pa. Supreme Ct.) (1941); Hayes v. Shoemaker, 302 Pa. 72 (1930).

[73]Gaskill v. Melelia, Ennis v. Atkin, Ross v. Reigelman, and cases reviewed and cited in Purol, Inc. v. Great Eastern System, Inc., supra n. 72.

[74]For the confusion of the cause problem with the hazard issue generally, see Eldridge, Laurence H., Modern Tort Problems, (1941), pp. 17-24.

the violation was not a substantial factor in producing the particular harm which occurred in the case. In *Salvatti v. Thrappe,*[75] it was held that passing on a curve where the view is obstructed, which is a violation of the Motor Vehicle Code, was not contributory negligence because the purpose of the statute was to prevent headon collisions. In the case, the truck, which the plaintiff was in the act of passing, swerved to the left forcing the plaintiff to leave the road and crash. The accident was not the result of the hazard contemplated in the statute and the violation had no causal relation to the accident even if it was a negligent act, said the Court. In *Zandras v. Moffett,*[76] the Court found nothing in the statute, which prohibits a vehicle from passing another proceeding in the same direction on the right, to indicate an *intention* that the legislature required, that in *all* cases, regardless of circumstances, the width of the road, the position of the leading car or volume of traffic, a vehicle must pass to the left. Hence, such passing was deemed not to be a proximate cause of the harm.

If the evidence that the act, which constitutes the violation of a statute, is a substantial factor, is not clear, unmistakable and free from reasonable doubt, the question of cause is for the jury.[77] Negligence per se founded upon a statutory violation of a traffic regulation does not preclude the defense of contributory negligence.[78] The actor-violator may also show that he is within an exception of the statute or that he is excused by an act of necessity.[79]

Whether the civil standard of reasonable conduct always requires obedience to the criminal statutes is for the courts to determine.[80] We have examined the theories devised to substantiate and rationalize the creation of civil liability from criminal liability. The decisions concerning the Motor Vehicle Code, the statute with which the *D'Ambrosio* case deals, show a growth from its use as evidence of negligence to the declaration that a violation of it is negligence per se. The standards of the Code have become fixed and conclusive because the court is convinced that highway safety and the protection of life and limb[81] which it assures to the public and users of the highway is a commendable social purpose, and the court is willing to indulge in judicial legislation to promote it. Whether this is sufficient justification to apply the negligence per se rule in the *D'Ambrosio* case does not depend so much upon the theories upon which the doctrine has gained

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[75] 23 A. 2d. 445, 138 A.L.R. 892, 343 Pa. 642.

[76] 286 Pa. 477 (1926). This case must be considered in the light of the interpretation the Motor Vehicle Code was receiving at the time of the decision.

[77] Vunak v. Walters, supra n. 72; Warlich v. Miller, 141 F. 2d. 168 (1944); Landis v. Conestoga Transp. Co., 36 A. 2d. 466 (1944); Bricker v. Gardner, 48 A. 2d. 209 (1946), Marchl v. Dowling & Co., 41 A. 2d. 427 (1945).

[78] Dempsey v. Cuneo Eastern Press Ink Co. of Pa., supra n. 65; Gaskill v. Melelia, supra n. 72.

[79] Prosser, supra n. 7, pp. 272-273; Gaskill v. Melelia, supra; Bricker v. Gardner, supra n. 77.

[80] Prosser, supra n. 7, pp. 273-274, 272; Lowndes, 16 Minn. L.R. 361; Morris, Relation of Criminal Statutes to Civil Liberty, 46 Harv. L.R. 453.

[81] It is these purposes of the statute under consideration which the decisions have stressed in development of the negligence per se doctrine; semble, Jinks v. Currie, supra n. 59; Stark v. Fullerton Trucking Co., supra n. 66.

acceptance, as it does upon the application of the doctrine. It is no answer, however, to the trial court's objection to the obliteration of the age presumption rules and its contention that the legislature did not intend to make riding on the tailboard negligence per se in *all* cases, to say the legislative mandate of "No person" is so comprehensive as to absorb all persons except those specifically excepted. The point is, why apply the criminal statute and the negligence per se rule at all in this situation.[82] It is no confidence betrayed to acknowledge that the courts decide this matter as they see fit.[83] The answer to the issue as the court frames it in the *D'Ambrosio* case,

> " . . . the question for decision is whether a jury in a civil suit may be permitted to set aside the statute,"[84]

is, that the jury may do it if the courts say so. The question remains, why should the court say so.

By saying that an act is negligence per se the question of negligence is eliminated. The liability is predicated upon a failure to comply with an *absolute rule of law* rather than a *standard of conduct created by a jury* for that particular case. The relation of the statute to normal social standards is significant. The criminal law which formulates an existing, but unformulated, standard and provides punishment for failure to conform does not alter the normal conduct. Such a law formulates a standard which can be used in tort cases. On the other hand, a criminal statute which prescribes a course of conduct where none has existed before, may impose liability akin to liability without fault when it is applied to the civil law. If it provides a much needed regulation condoned by society, the imposition of that degree of liability may be justified, as in the child labor field. Since, in the case of the latter type law, there is no existing standard of conduct, it may be advisable to restrict the chastisement for such conduct to the criminal penalty. The judge and the jury have traditionally shared the function of determining the standard of conduct in negligence cases.[85] It has been suggested that the judge use his position to expand the negligence per se rule by borrowing standards from the criminal law more freely than some of the present limitations of the rule

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[82]The cases relied upon to support the proposition that a saving from the operation of a statute by disabilities must be expressed involved a statute designed to quiet titles to real estate and another designed to assure the finality of adjudications of the Orphans Courts after a lapse of five years. In all of the cases, the person under disability was attempting to assert a claim barred by the statute in question. As the court asserted, these statutes are " founded in the highest considerations of public policy." Furthermore, in the case of the Act of April 22, 1856 P. L. 532, the legislature had expressly omitted a saving clause in favor of married women, minors, and persons of unsound mind which had been a part of the previous statute on the subject in 1785. In Re Elkins Estate, 190 A. 650, 325 Pa. 373, (The Fiduciaries Act); Warfield v. Fox, 53 Pa. 382 (1866); Way v. Hooton, 156 Pa. 8 (1893); McCall v. Webb, 88 Pa. 150 (1878); The latter three cases construed the Act of April 22, 1856 P. L. 532.

[83]See Lowndes, 16 Minn. L.R. 361; 364, "This may be what the court does, but it is not what it says." Prosser, supra n. 7, p. 274, " . . . it is the courts' own decision which brings about such a result; . . . "

[84]Supra n. 1, p. 258.

[85]Bohlen, F. H., Studies in the Law of Torts, (1926), pp. 601-613; Prosser, pp. 279-284; Morris, 46 Harv. L.R. 453, 453-456.

now permit.[86] Contrary to this position is that of Professor Lowndes, who argues that since all careless conduct is not negligent, likewise all illegal conduct should not necessarily be negligent. Only that conduct which a jury feels is so socially undesirable that it should be penalized by a civil as well as criminal liability should be negligent.[87] Of course, this latter position is critical of the entire negligence per se rule.

The judge when he decides to adopt or reject the criminal standard should be guided by two inquiries. "Is standard a fair formulation of the community standard, . . . " neither too severe nor too lenient for use in a tort case? If the answer is, yes, " . . . are there any unique aspects of the present case which make the standard unsuitable?"[88] If it is conceded that hitching rides on trucks and riding on tailboards violates a standard of social conduct already recognized, the answer to the second inquiry should be in the affirmative. There is ground for the concession on the first question in the cases which declare that a person who rides on a running board is guilty of contributory negligence as a matter of law in an action against the driver or owner of the vehicle.[89] The decisions were followed in the case of a person riding on a tailgate when there was room inside of a truck.[90] In an action against a third person, the contributory negligence of the person so riding the vehicle is for the jury. The court ruled, " . . . it is not clear beyond doubt that one who rides a tailboard will be run into by another vehicle."[91] The actions against third persons involve doubt as to the forseeability of harm which the *D'Ambrosio* case does not present. As in the running board cases, the riding of a tailgate presents an obvious risk to an adult concerning which reasonable men can have no difference of opinion. Even so, the Court in the *D'Ambrosio* case concedes that, *but for the statute,* the question of contributory negligence of the minor plaintiff would have been for the jury.[92]

There are "unique aspects of the present case"[93] which make the use of negligence per se rules unsuitable. The plaintiff is a member of a group whose conduct is judged by a different standard than that of adults. Children as a class have been given special consideration. The use of the age presumption has established rigid standards within certain limitations noted above. But, in the age group of which this plaintiff is a member, the presumption has operated to establish that the child does not possess the capacity of an adult and is presumed not to possess it. His conduct, therefore, is measured by a different standard. to wit, that of children of similar age, intelligence and experience. That involves the

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[86]Morris, supra n. 85, especially p. 477.
[87]Lowndes, 16 Minn. L.R. 361, 370.
[88]Morris, supra n. 80, at p. 469.
[89]Srednick v. Sylak, 343 Pa. 486, 23 A. 2d. 333; Valente v. Linder, 340 Pa. 508, 17 A. 2d. 371; Schoemaker v. Hovey, 291 Pa. 30; 139 A. 45, 61 A.L.R. 1241.
[90]Earll v. Wichser, 346 Pa. 357, 30 A. 2d. 803 (1943).
[91]Ibid., p. 804.
[92]Supra, n. 1, p. 258.
[93]Morris, supra n. 88.

formulation of a social standard of conduct. When the function of formulating that standard involves judgment factors, which are the subjective elements of the test of negligence, a line of accepted authority has placed it with the jury. This procedure has avoided the rigidity which judicially created standards would possess and has allowed each case to be decided on its particular merits.[94]

The use of the negligence per se rule in a statutory violation of criminal law by an infant between the ages of seven and fourteen would measure his conduct by a rigid and fixed standard created by the *legislature*. In civil law, the infant is presumed not to have the adult's capacity to perceive danger; therefore, his conduct is measured by a special standard of behavior. In criminal law, the same infant is presumed incapable of committing a crime because he is presumed not to possess criminal intent. To declare that he is negligent per se in civil law, thereby depriving him of the usual consideration given in that sphere of the law, because he violated a criminal statute, when the criminal law would give him a special consideration were he accused in that sphere, seems incongruous. Such a decision can only be rationalized and supported by strong policy reasons which go *beyond* the *ordinary bases and reasons* justifying the use of negligence per se. If such motives influenced the decision, they should be expressed. That the standard by which these infants are judged are fluid and have been kept so by judicial decision which has permitted them to be formulated by the jury is founded on a moral judgment based upon the idea of justice and fairness which is woven through the entire fabric of the concept of negligence.[95]

It is submitted, that the rule of negligence per se in the case under discussion is an unwarranted extension of a fixed legislative standard into an area in which the rigid standard of conduct is contrary to the recognized method of approach and is unfair to the group to which it is applied. The rule is unfair not only because it shifts the placement of the function of formulating standards, but that it is placed with the legislature, which does not have civil liability in mind, much less, any consideration of a sub-standard group.[96]

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[94]Bohlen, supra n. 85, pp. 606-613.

[95]Hall, Criminal Law and Torts, 43 Columbia L.R. 753, 967. "Any legal system that excepts individuals from liability for the harms they cause does so in reliance upon certain principles of culpability. The principles comprise a body of value judgments formulated in terms of personal responsibility." In criminal law such limitations are expressed by judgments as to who ought to be punished; "it is equally true that in torts, also, the rules imposing limitations on liability of all persons, rest on moral judgments regarding the justice of compensation, which in the usual expression signify who ought to bear various losses." at p. 775.

Cooley, T. M., II, Problems in Contributory Negligence, 89 U. of Pa. L.R. 335. "If the function of the concept is . . ., simply to provide a lubricant for the frictions caused by accidents occurring in a highly complex society, it must do so by the application of rough and ready standards. In the first place, the acceptability of the results obtained will be largely determined not by accurate criticism based on scientific grounds, but by a necessary nebulous concept of fairness." at p. 342.

[96]Morris, supra n. 80, maintains the difficulty with the rule is that it does not place the function with the judiciary where it rightfully belongs. Contra, Lowndes, supra n. 47, who takes the position that the function of formulating the standard is peculiarly that of the jury and should remain so.