

Whatever be the position in England or elsewhere the practice of the Court of this State has been expressly stated in a judgment *in banc* and acted upon for forty years without challenge. In such circumstances it would require a decision of all the Judges or some higher tribunal to change it. Accordingly we regard the practice in Victoria to be that his failure to take objection to a Judge's summing-up to a jury, where a question of law is concerned, does not debar an appellant from seeking a new trial for misdirection and a new trial will normally be granted on that ground.

This is of course subject to the exceptions mentioned by Cussen J. in *Holford's Case*, *videlicet*, unless the Court feels that it can allow for the effect of the error or it is clear that with a proper direction the result would have been the same; to which, we think, should be added the further exception—unless the Court is satisfied that counsel for the party seeking a new trial realized the error or omission at the time of the summing-up and deliberately failed to draw the trial Judge's attention to it, thinking thereby to gain an advantage.

In this case we accept the statement of the defendant's counsel that he did not appreciate the omission until he had read the transcript of the Judge's charge and, as there is ample evidence of negligence on the part of the plaintiff and it is impossible to say that the jury's verdict would have been the same had there been a proper direction on the effect of such negligence, the appeal should be allowed and a new trial granted.

Appeal allowed.

Solicitor for the appellant: *F. T. Krcrouse*.

Solicitors for the respondent: *Doyle & Kerr*.

P. E. J.

TUCKER v. McCANN.

FULL COURT (Herring C.J., Lowe and Gavan Duffy JJ.)

NOVEMBER 5, 1947, APRIL 12, 1948.

Negligence—Collision on road—Breach of road traffic regulations—Effect of breach—Whether private right of action arises—Whether conclusive evidence of negligence—Road Traffic Act 1935 (No. 4352), sec. 3—Road Traffic (Country) Regulations 1944.

Per Herring C.J. and Lowe J.—Breach of the Road Traffic (Country) Regulations 1944, made under sec. 3 of the *Road Traffic Act* 1935, does not give rise to a private right of action. Where negligence is alleged, breach of the regulations is one circumstance or piece of evidence to be considered along with all the other evidence in order to determine whether or not there has been an absence of reasonable care.

McAsey v. Lobban, [1938] V.L.R. 140, explained.

Per Gavan Duffy J. (dissenting)—Breach of regulation 10 and, *semble*, of regulation 8 of the regulations, is conclusive proof of negligence.

APPEAL.

The appellant brought an action claiming damages in respect of the alleged negligence of the respondent in driving a motor car which came into collision with a motor cycle on which the plaintiff was riding pillion. The action was tried by Fullagar J. and a jury and the jury having found a verdict in favour of the respondent, judgment was entered accordingly. This appeal was then brought. The relevant facts are set out in the judgment.

D. M. Little, for the appellant.

Stafford K.C. and *Burbank*, for the respondent.

Cur. adv. vult.

HERRING C.J. read the following judgment: On this appeal it was sought to set aside a verdict of a jury in an action for negligence arising out of a collision at the junction of Telford Street with Belmore Street and Benalla Road in the town of Yarrawonga, between a motor car driven by the defendant and a motor cycle on which the plaintiff was riding pillion. The jury found a verdict for the defendant. The plaintiff appealed substantially on two grounds, the first that on the evidence the verdict was one that no reasonable jury could come to, and the second that the learned Judge failed to direct the jury sufficiently or misdirected them.

I deal with the latter ground first. This ground raises for consideration the duty of a Judge in directing a jury with regard to the Road Traffic (Country) Regulations 1944 made under sec. 3 of the *Road Traffic Act* 1935. This section provides that the Governor in Council may make regulations for or with respect to the control of traffic on roads and matters incidental thereto, and authorises the prescribing of a penalty of not more than 50*l.* for any breach thereof.

The Regulations deal with a variety of matters and a maximum penalty varying from 5*l.* to 25*l.* is fixed for a breach of each of them. They lay down a comprehensive set of rules governing the movement of vehicles, animals and pedestrians along and across roads, at intersections, whilst passing tramcars and so on. They are designed to promote a steady flow of traffic with due regard to its protection. A number of them deal with the crossing of intersections. Thus provision is made for the case of an intersection controlled by a member of the police force in uniform or by traffic lights (regulation 22), or where there is a standard stop sign erected in a street near its intersection with another street (regulation 6). For other cases regulations 8, 9 and 10 provide as follows:

8. Except as provided in clause 6 of these Regulations, the driver of a vehicle or horse proceeding along any street shall, on approaching and crossing the intersection of such street with another street, proceed at such a rate of speed that he shall be able to stop immediately such vehicle or horse. Penalty 20*l.*

9. The driver of a vehicle or horse approaching an intersection shall give the right of way to a vehicle or horse which has entered the intersection from a different street. Penalty 5*l.*

10. The driver of a vehicle or horse proceeding along any street and reaching the intersection of that street with another street at approximately the same time as another vehicle or horse approaching from his right along such last-mentioned street shall give the right of way to such other vehicle or horse:

Provided that this Regulation shall not apply in respect of any intersection where the driver of a vehicle or horse is required, in conformity with these Regulations, to stop such vehicle or horse before entering the said intersection, or where traffic is being controlled by a member of the police force. Penalty 5l.

The negligence alleged against the defendant was particularised as follows in the statement of claim:

- (a) driving at an excessive speed;
- (b) failing to keep any or any proper look-out;
- (c) failing to observe the provisions of the Road Traffic Regulations and in particular regs. 8 and 10;
- (d) failing so to control the speed and/or course of the said motor car as to avoid colliding with the said motor cycle;
- (e) failing so to apply the brakes on his motor car as to avoid the said collision.

Breaches of the regulations thus appear merely as one class of acts amongst a group of five relied upon as constituting negligent conduct on the part of the defendant, that caused the injuries complained of. It is not sought in the statement of claim to treat the failure to take the precautions specified in the regulations as of itself conferring a private right of action. The question whether a failure to take such precautions does of itself confer any such right, does not, therefore, strictly arise in the present case. And in my opinion there is nothing to the contrary in the recent case referred to by my brother Gavan Duffy in the judgment he is about to deliver, viz., *Upson v. London Passenger Transport Board*, [1947] 1 K.B. 930. All three Lords Justices in the Court of Appeal in that case referred to the fact that the action was framed in negligence and that there was no claim made in respect of a breach of statutory duty, the alleged breach being put forward as evidence of negligence and no more. It is not therefore strictly necessary to consider how far a breach of the regulations does operate to confer a private right of action. As however, the effect of the regulations and breaches thereof are under review, it is perhaps desirable to say something about the matter.

The regulations, as already indicated, are penal provisions, a penalty being imposed for the breach thereof. But the question whether, in addition to becoming liable for a breach the party, who has failed to comply with any such regulation, becomes also by reason of that breach, *ipso facto*, civilly liable to anyone who has been injured by that breach, can only be determined by examining the regulations themselves, and their nature and purposes, and ascertaining therefrom the intention that lies behind the regulations. The position was very clearly put by Dixon and McTiernan JJ. in their joint judgment in *Henwood v. Municipal Tramways Trust (S.A.)*, [1938] 60 C.L.R. 438, at p. 461.

Their Honours there say:

When negligence as a cause of action is in question, breach of a legislative provision requiring a specific precaution amounts to evidence of want of reasonable care (*Blamire v. Lancashire and Yorkshire Railway Co.*, [1873] L.R. 8 Ex. 283, at p. 289). But it is not negligence *per se*. If the statute means to confer a private right, a cause of action arises, and as a matter of nomenclature neglect of a statutory duty implying a correlative private right may answer the description negligence (*Lochgelly Iron Co. v. M'Mullan*, [1934] A.C. 1). But the reason why the cause of action arises is not because the statute includes in its purposes the prevention of a given kind of accident as a result of the act or omission penalised. It arises because, upon a full consideration and examination of the nature and purposes of the statute, it is found to disclose an intention of conferring a correlative private right, as well as imposing a liability for punishment, in respect of the neglect of the specified

precaution. It is true that in ascertaining the intention of such statutes modes of interpretation are adopted which appear to rest rather on presumption than upon ordinary rules of construction. But the general principle remains that a private right of action is not created by a penal statutory provision unless the statute so intends.

Now the regulations in the present case are the work of a subordinate law-making authority, and so, one has to look for guidance as to legislative intent not only to the content of the regulations themselves, but also to the scope of the power conferred upon the Governor in Council for the making thereof. That power, as already stated, is limited to the making of regulations for and with respect to the control of traffic on roads and matters incidental thereto. The creation of a variety of private rights is quite outside the control of traffic and is not a matter that is incidental thereto. Traffic can be perfectly well controlled without any alteration of the common law rules with regard to civil liability. To read the regulations therefore as creating private rights unknown to the common law might have the effect of invalidating them, and as they can be read as doing no more than controlling traffic on the roads, they should be so read, *ut res magis valeat quam pereat*.

What then is the bearing of a breach of the regulations upon the issue of negligence? By failing to take the specified precaution the party in default has broken the law and laid himself open to prosecution and punishment. Whether the breach will have any bearing on the question of negligence is quite another matter. Negligence is the breach of a duty owed by one person to another, a duty to take care, to do the things that a reasonably prudent man would do in the circumstances and not to do the things he would not do. And so it is only in so far as a breach of the regulations throws any light upon the fulfilment or non-fulfilment of this duty, that such breach can be relevant on the issue of negligence.

It is not because the law has been broken that a breach is relevant, but because the person who has failed to take a specified precaution, was under a duty to someone else to take care and that precaution was one that in all the circumstances of the case a reasonably prudent man would have taken.

Now it is the duty of everyone to know and to obey the law, and so to know and obey the precautions laid down in the regulations. And *primâ facie* a reasonably prudent man will take them. And whenever a person is under a duty to someone else to take care, his failure to take those precautions or any of them is a matter that must be taken into account in determining the question whether he has or has not exercised due care. But this question is one of fact to be determined in the light of all the circumstances, and a breach of the regulations is only one of such circumstances. Such a breach must, therefore, be considered along with all the facts of the case, it cannot be considered *in vacuo* as it were. It is thus no more than a piece of evidence of want of reasonable care on the part of the person guilty of such breach. This piece of evidence a jury or other fact finding tribunal should weigh as they would any other piece of evidence and give to it such weight as they think proper in all the circumstances of the case. Circumstances may be conceived in which obedience to the regulations may as a matter of prudence be the very worst course to take, *e.g.*, where to disobey may avoid injury or save life. In other words it is for the jury to say whether the precaution laid down by the regulation, which the defendant failed to take, was one that in all the circumstances of the case a reasonably prudent man would have taken. It is for them to decide for themselves as a matter of fact the standard of care that was appropriate in the circumstances. To treat the regulations as having some special quality, as for example

conclusively determining that any precaution specified therein is one that a reasonably prudent man would have taken whatever the circumstances, is really to treat them as conferring private rights upon anyone, who can satisfy a jury that he has been injured by a breach of the precaution. This is to treat the regulations as establishing new heads of civil liability, which, as already pointed out, they should not be regarded as doing. There can be I think no middle way. Either the regulations do create statutory duties, neglect of which may itself be described as "statutory negligence", and then the appropriate proceedings are based upon such neglect, or the parties are left to adjust their differences in proceedings based upon negligence at common law, when the conduct of the party charged with negligence has to be tested as a matter of fact by the yardstick of what a reasonably prudent man would or would not have done in the circumstances.

Canning v. The King, [1924] N.Z.L.R. 118, a decision of Sir John Salmond, does not I think require the adoption of any different view, for in my opinion that case is one that falls under the first of the two alternatives I have mentioned. In that case the driver of a motor car disobeyed the provisions of a statute requiring drivers of motor vehicles to stop at railway crossings, and was run down by a train in consequence. Sir John Salmond treated the failure to comply with the duty imposed by the statute as an act of "disqualifying contributory negligence". He said that before a breach of statutory duty could be so regarded, three conditions must be fulfilled. First the breach must be a wilful or negligent breach and not the outcome of inevitable mistake, accident, necessity or other justifying circumstances. Secondly, the breach of the statute must have been the cause of the accident, and thirdly the purpose of the statute must have been to prevent the kind of accident which actually happened. With regard to the third condition the learned Judge adds (p. 123):

In other words, the only statute which is relevant to the question of contributory negligence is one which is designed to establish defined statutory precautions against the accident complained of—designed, that is to say, to substitute for the general rule of the common law that persons must take reasonable care for their own safety, some more definite rule specifying the precise nature of the precautions which must be so taken.

By holding as he did, that all three conditions were complied with, he must I think be taken to have regarded the statute as one that of its own force made non-compliance with the statutory obligation contributory negligence. That this involved a substitution of a statutory rule for the general rule of the common law, he expressly acknowledges. And the first condition is one that could only be attached on the assumption that such non-compliance of itself constituted contributory negligence, which a defendant could rely upon to relieve him from the consequences of his own negligence in the absence of some proved justification. The statute thus created what might be appropriately called "statutory contributory negligence". The importance of the first condition in determining Sir John Salmond's approach to the statute is expressly adverted to by Dixon and McTiernan JJ. in their joint judgment in *Henwood's Case* (*supra*), at pp. 460-1, when discussing *Canning's Case*. Their Honours there say:

According to his [Sir John Salmond's] view, it is not enough that the penal provision had for its purpose the prevention of the kind of accident that happened. He treats such a statute as fixing, so to speak, a precise act or omission as contributory negligence. Because he regards such a provision as determining that specified

conduct shall be contributory negligence, he is able to add a still further condition, namely, that the breach of the penal law shall be a wilful act or omission.

Both reason and authority (see the remarks of Dixon and McTiernan J.J. cited above) support the conclusion that in an action for negligence at common law a breach of the regulations is no more than a piece of evidence of want of reasonable care to be taken into account along with all the other evidence in the case. This conclusion, moreover, is one that provides a readily comprehensible and satisfactory working rule, one that is capable of being simply expounded to a jury and easily understood by them. It leaves of course, to the jury, where the case is tried by a Judge and jury, the determination of the weight, if any, to be attached to any breach of the regulations, that they may find established on the evidence. And there is nothing incongruous in allowing them to determine this matter. For it is a matter which has to be determined by reference to what a reasonably prudent man would or would not do in the given circumstances. And this is peculiarly a jury matter, one that juries are constantly being invited to consider in the light of their commonsense and knowledge of every-day affairs.

It has also to be recognised, I think, that justice requires that too much emphasis should not be placed upon the precautions specified in the regulations, just because they are found written therein or just because persons who fail to take them are liable to a penalty. For they are not necessarily the only precautions that a prudent man would take in any given case. Driving at excessive speed probably causes more accidents than perhaps anything else, yet "speed" is only once mentioned in the regulations (reg. 8). Keeping a proper lookout is another very important precaution, which the regulations only require to be taken in certain specified circumstances and then only incidentally. The relative importance of all such precautions can only be gauged in the light of all the circumstances of the case. It cannot be determined by any rule of thumb.

So long, moreover, as the test in proceedings for negligence at common law is what would a reasonably prudent man have done or not done in the given circumstances, there will be breaches of the regulations that may be of little or no assistance in determining the issue of negligence. So much depends upon the nature of the precaution specified, the nature of the breach and the circumstances under which the breach takes place. The precautions specified are many and various and they differ in quality. To cross an intersection against the traffic lights is clearly something that no prudent driver would do except in the most abnormal circumstances. On the other hand to turn to the right from one street into another by the method laid down in regulation 12 is a precaution of a very different character. It is notorious that a very different method is adopted in many other parts of the world, where there are presumably reasonably prudent drivers. Then again the precaution specified may be regarded as a counsel of perfection, going beyond what a reasonably prudent man would do in all circumstances. Thus regulation 6 requires a driver to stop before entering an intersection from a street containing a standard stop sign, and it may be that a reasonably prudent driver would in cases, where there was a clear view, be content to slow down to 2 or 3 miles per hour. Then also breaches of the regulations vary in intensity. Thus the same regulation 6 will be broken by anyone who fails to stop as required by the regulation, but from the point of view of prudence it is one thing to proceed into the intersection at 2 or 3 miles per hour and quite a different thing to do so at 20 miles per hour.

Then again other circumstances may prove to have a most important bearing on the matter. Much may depend upon the nature of the locality, whether it is built up or open, upon what the driver can see and so on; or, where the operation of the regulation depends upon the position of the vehicle being driven relative to that of another vehicle, upon what the driver of that other vehicle may do. Thus regulation 10 which was much relied upon in the present case, is concerned with the case where two vehicles approaching an intersection from different streets reach it at approximately the same time. When this occurs the regulation gives the vehicle on the right the right of way. But suppose the driver of the vehicle on the right has only reached the intersection at approximately the same time as the other vehicle by racing to the intersection at terrific speed, and he then crashes into the other vehicle in the intersection as it crosses, what then? The driver of that other vehicle may have technically committed a breach of the regulations, but it is hardly one that can be expected to throw any light upon whether he was driving as a reasonably prudent man would, for he was entitled to expect that the driver of the vehicle on the right would exercise due care and approach the intersection at a speed that was reasonable in the circumstances.

All these considerations would seem to require that in an action for negligence at common law a breach of the regulations should be treated in accordance with the conclusion set out above.

Perhaps I ought to add, to show that I have not overlooked the matter, that I have considered the English decisions, which discuss the effect in an action of negligence of a breach of traffic regulations. They show some fluctuation of opinion, but in the result I think they will not be found inconsistent with the conclusion I have reached.

I pass now to the learned Judge's charge to the jury, which was attacked on a variety of grounds before us, most of which centre round what His Honour said or did not say about regulations 8 and 10 and their bearing upon the negligence of the defendant. It will be necessary to consider what he did say in a moment, but at the outset it is proper to recall that the Judge's charge is made at the conclusion of the addresses of counsel, and with due regard to the way in which each has put his client's case. With all that counsel has said present to his mind the Judge may consider that points elaborated at length by them require but little elaboration by him. The principle that Cussen J. stated in *Holford v. The Melbourne Tramway and Omnibus Co.*, [1909] V.L.R. 497, at p. 520, must also be borne in mind:

that a Judge's charge to a jury is not to be read rigorously, but fairly as a whole, that isolated and detached expressions are not to vitiate it if reference to the rest of the charge will correct any erroneous impression which might be produced by their standing alone, and that a Judge is entitled either expressly or by inference to state strongly his views relating to facts.

The duty of this Court, where a new trial is sought, as is the case here, is laid down by Order LVIII, rule 6, which provides that a new trial shall not be granted on the ground of misdirection, unless in the opinion of the Full Court some substantial wrong or miscarriage has been thereby occasioned in the trial. As to whether there is or is not a substantial miscarriage in any particular case must depend upon the circumstances of that case, see Lord Watson in *Bray v. Ford*, [1896] A.C. 44, at p. 50. And though, as pointed out by him, it may be impossible to formulate any rule, which would be useful, considerable assistance may be derived from the views expounded by Cussen J. on the matter in *Holford's Case*, at pp. 526-7. At p. 526, His Honour said:

I think that the rule is very little different from the view which was taken by the Courts before the Judicature Act. The Courts would not necessarily direct a new trial if the misdirection was on an immaterial or collateral matter, or if the trial resulted in a verdict against the person in whose favour the misdirection operated, or if the misdirection was in respect of a pure question of fact, and the Judge's attention was not called to the mistake. But it is an error to think there never can be a wrong or miscarriage unless it can be shown that the jury were in fact influenced in giving their verdict by a misdirection. There is a wrong or miscarriage occasioned by a misdirection in law, or as to the application of evidence, if, as a final result of what has been said by the Judge, the jury retire to their room under a wrong impression in relation to these matters, and the result of the case is such as to show that they may have been influenced in their verdict by the misdirection. "Miscarriage" is a technical word and includes this technical meaning.

His Honour's charge in the present case contains a clear exposition of the law of negligence, so far as was essential to a clear understanding of the issue which the jury had to determine. His Honour then deals with the evidence and continues:

Now the negligence alleged against McCann seems to fall, as Mr. Burbank suggested to you, under three headings. It is said, firstly, that there was a breach of the regulations, which have been put in evidence, in that McCann ought to have given way to the vehicle, the cycle, which was on his right, and that he did not do so. It is suggested, secondly, that he was travelling at an excessive speed and it is suggested, thirdly, that he was not keeping a proper look-out. Now all these things are, of course, matters for you to consider, and, as I have told you, it is entirely for you to say what view you take of them. You may think that in a case of this kind a breach of the regulations as such is not a matter of great importance and that accidents of this kind really happen because somebody is travelling too fast and not keeping a proper look-out, and, of course, the faster you travel the more necessary it is to keep a careful look-out for any other vehicle which may be in the vicinity. But it is for you to say as to all these things, and there are those three heads of negligence alleged.

His Honour then deals further with the evidence and directed the jury as to damages. At 12.50 p.m. when he had practically completed his summing up, he told the jury he would adjourn and complete his summing up at 2 p.m. The foreman then asked a question which practically amounted to this:

The defendant told Your Honour that the cycle was 20-25 yards away from him when he first saw it. If you take the point at which the defendant says he was when he first saw the cycle, and another point being the centre of the intersection, you get what is practically a right-angled triangle, and, the evidence giving you the length of each of the two sides adjacent to the right-angle, you can then calculate the length of the hypotenuse, which will give you the distance between the two vehicles when the driver of the car (the defendant) first saw the cycle? Is it right to make this calculation? Is the calculation correct? If so, what follows from it?

His Honour then adjourned and at 2 p.m. proceeded:

On consideration I do not think that there is anything I need add to my summing up apart from the question asked immediately before the adjournment. I have considered the question, and I do not think I should attempt to give you a precise answer to any part of it. I do not think it is either practicable or desirable for me to check the accuracy of any calculations you may see fit to make or tell you what deductions you should make from them, though, if you put something to me which I thought involved an actual mistake, I would, of course, correct it. I think I should point out to you that there are certain dangers involved in basing a decision

on any precise mathematical calculation such as the foreman has put to me. In the first place there must be a degree of unreliability in any such calculation unless you can fix your points with some assurance of accuracy. And, in cases of this kind, it must always be difficult to feel that you have that assurance. In the second place, the foreman's question would seem to indicate a view that the decisive question in this case was, who reached the intersection first? And, although this may be an important question, again I think that there are possible dangers in regarding it as decisive. The regulation about giving way does not, to my mind, mean that anyone is entitled to tear across an intersection at terrific speed without even giving a glance to his right. The regulations are only one element, and are only one thing for you to consider in deciding whether the defendant was guilty of negligence causing the accident in the sense I explained to you this morning.

The jury then retired and Mr. Burbank pointed out to His Honour that the regulation contemplated that a driver must look to his right at an intersection, and that His Honour should not have said, "without a glance to his right". His Honour agreed to correct this. Mr. Little for the plaintiff then asked His Honour in view of the foreman's question and what he had said to the jury, that taking the latest point at which the defendant said that he saw the cycle, it was impossible for the cyclist not to have been in the intersection. His Honour declined to redirect as to this.

The jury was recalled and His Honour said to them:

Mr. Burbank has pointed out to me that I told you that the regulation did not mean that anyone was entitled to tear across an intersection without looking to his right. The regulation, of course, really requires you to look to your right, and I should have said "without looking to his left". But what I really meant to convey to you was a matter of substance and not a technicality. No regulation entitles anybody to drive at high speed across an intersection without keeping a proper look-out for any approaching vehicle. As I told you, the regulations are only one element in this case. If the only fault alleged were a breach of the regulations, then the question of breach or no breach might be decisive, but, where you have, as you have here, allegations of travelling at excessive speed without keeping a proper look-out, then you have to consider those allegations too.

After the jury had again retired Mr. Little asked His Honour to redirect the jury to the effect that the driver of the motor-cycle was under no obligation to look to his left at the intersection and therefore that the jury should not infer negligence against him for not keeping a look-out in the direction from which the defendant's car had approached the intersection. His Honour refused to redirect the jury further on this point.

Directed as they were by the learned trial Judge, the jury should, on retiring to the jury room, have been clear that the standard they had to apply was that of the reasonably careful man; that in applying that standard all the circumstances of the case had to be considered in the light of their commonsense and experience; and that they should not bring in a verdict for the plaintiff unless reasonably satisfied on the whole of the evidence that the defendant had been guilty of negligence and that his negligence was a cause of the accident.

These were the directions the jury had to apply to the three heads of negligence, which His Honour told them were alleged against the defendant. The first head was based on the failure to take the precautions specified in regulation 10, which is the regulation which deals with giving way to the man on the right. One can be sure, I think, that counsel for the plaintiff dealt fully with this regulation in his address. The foreman's question shows that the jury were very much

concerned with the relative positions of the motor car and the motor cycle as they approached the intersection, and this concern on their part would show that they were fully seized of the import of regulation 10.

Now it is true that the learned Judge did not tell the jury that if they found that the defendant had committed a breach of the regulations, had failed to take a precaution specified by them, his breach was evidence of want of reasonable care on his part. But had he done so, it would have been proper for him to go on and tell the jury that this piece of evidence had to be weighed like every other piece of evidence in the case, and that it was for them to say whether in all the circumstances of the case a reasonably careful driver would have taken the precaution specified in the regulation. Had he done this, the question arises whether the plaintiff would have been better off in any way, whether in other words there is any reason to suppose the jury would have been influenced in his favour, had this been put to them in so many words.

The learned Judge would, no doubt, have said more about the regulations, had not they been fully dealt with by counsel. He no doubt felt the matter had been sufficiently canvassed to make it unnecessary for him to labour the point. And the jury's appreciation of the matter as shown by the foreman's question, suggests that this view was justified. By putting the breach of regulation 10 as one of the heads of negligence, that the jury might find in favour of the plaintiff, His Honour must be taken to have been telling the jury that if they found a breach by the defendant of the regulation they might find negligence against him, and this is really to tell them that they might treat such a breach as evidence of want of reasonable care. It was a statement of the position that was certainly not unfavourable to the plaintiff. And having made it clear that it was for the jury to say what view they took of the three heads of negligence, His Honour was perfectly entitled to make his comment that the jury might not consider that in a case like the present a breach of regulation 10 was a matter of great importance owing to the allegations of excessive speed against the driver of the motor cycle.

As to the answer His Honour gave to the foreman's question and his remarks when redirecting them, these must be read in the light of the charge as a whole. Having made it clear what the jury's function was and that all questions of fact were entirely for them, he was entitled I think to make the comments he did in answering the foreman's question. For as already pointed out, a driver's failure to comply with regulation 10 must be considered in the light of all the circumstances, and one of those circumstances is the conduct of the other driver concerned. His Honour's final remark in answering the foreman's question may appear at first sight as open to criticism, but read in its context it amounts to no more I think than a statement that a breach of the regulations must be viewed in the light of all the circumstances and one of those circumstances—and one very present to His Honour's mind—was the allegation that the driver of the motor cycle approached the intersection at an excessive speed.

So far as His Honour's remarks when redirecting the jury are concerned, here again his comment that no regulation entitles anybody to drive at high speed across an intersection without keeping a proper look-out for any approaching vehicle was one that I think he was entitled to make. His final remarks should be read in the light of this comment. His Honour is not saying that where only one head of negligence, viz., a breach of the regulations, is alleged against the defendant, the question of breach or no breach may be decisive, whilst, where there are other allegations charged against him it is not. What he is saying is that where a breach is alleged against one person, and there are no allegations

of fault against the other party concerned, the question of breach or no breach may be decisive, but that where there are allegations of fault alleged against the other party, those allegations must be considered as well as the alleged breach. And this would appear an accurate statement of the position.

In the light of this review of what His Honour said, the attack based on misdirection with regard to regulation 10 is not I think made out. It would no doubt have been better had His Honour given a more specific direction with regard to the regulations and the effect of a breach thereof. But, even if it can be said that his failure to do so amounted to a misdirection, it is clear I think, that the jury were under no wrong impression when they retired to their jury room. They fully understood the significance of the breach of regulation 10, and it was right that they should be made aware that in considering the bearing of such a breach by the defendant, they should also take into account the conduct of the driver of the motor cycle. They should have been in no doubt that it was for them to decide whether he was driving at an excessive speed. And if they found that he was, this was undoubtedly a fact to be given due weight in considering whether the defendant was negligent in not giving the driver of the motor cycle the right of way. This being so, there was certainly no substantial miscarriage such as the rule requires before this Court can order a new trial.

The attack on the charge based on regulation 8 raises different considerations. A breach of this regulation is particularised in the statement of claim along with the breach of regulation 10 as one head of negligence. And yet, when His Honour came to state the heads of negligence relied upon, he mentions none based on regulation 8. He does mention excessive speed, but that appears in the statement of claim as a distinct head apart from any allegation of a failure to observe regulation 8. In the circumstances one can only conclude that the plaintiff did not seek to rely at the trial upon any failure by the defendant to take the precaution specified in regulation 8. It seems most unlikely that the learned Judge would have omitted all reference to it, had it been put forward by counsel. And then when one finds that counsel for the plaintiff says nothing whatever about the matter when the charge is concluded, makes no suggestion that His Honour should add anything with respect to it, the conclusion appears irresistible that the case the plaintiff was making at the trial was not based on any breach of regulation 8. It was for the plaintiff to say how his case should be shaped, and there was no obligation on the learned Judge to put some other case on his behalf to the jury. I can find no misdirection here in the circumstances, and I think any intervention by this Court would not relieve against any substantial miscarriage, but would rather create one. In any event, counsel's failure to object before verdict to the omission of all reference to regulation 8 would seem a fatal obstacle to the granting of the relief sought from this Court.

There is one further attack on the charge that should be mentioned, and that is the one that counsel for the plaintiff referred to before verdict, when he submitted that the learned Judge should direct the jury that the driver of the motor cycle was under no obligation to look to his left at the intersection. He relied upon *McAsey v. Lobban*, [1938] V.L.R. 140, and *Huxtable v. Williamson*, [1946] V.L.R. 516. In *McAsey v. Lobban* the Court was concerned with the case of a plaintiff, a cyclist, who was run down by a motor car at an intersection. The defendant relied upon contributory negligence and the negligence alleged was the plaintiff's failure to look to the left as he entered the intersection. It appeared that the plaintiff and the defendant reached the intersection

at approximately the same time and the plaintiff being the man on the right had the right of way under a regulation in similar terms to regulation 10 in this case. The Court held that the plaintiff was not guilty of contributory negligence, as he was entitled to act on the assumption that the regulation would be obeyed, and was consequently under no duty to the defendant to look to the left as he entered the intersection. In that case no negligence on the part of the plaintiff was suggested save his failure to look to his left and see whether the defendant was coming. And there is in my opinion nothing in that case to justify the view that where two vehicles reach an intersection at approximately the same time, the driver on the left can never rely upon the failure by the driver on the right to look to his left before entering the intersection as an act of negligence. All it does it to prevent the driver on the left relying upon such failure, when the only fault attributed to the driver on the right is the failure to look. And though I seem to have expressed myself clumsily, this is, I believe, what I was trying to say in *Huxtable v. Williamson*, at p. 518. The cyclist (the man on the right) in *McAsey v. Lobban*, was riding at a speed which enabled him to dismount at any moment, that is to say, at a speed at which he could stop immediately. Here it was alleged the driver of the motor cycle (the man on the right) was driving at an excessive speed, and it was, I think, perfectly right for the learned Judge to point out that the regulation did not mean that anyone was entitled to tear at terrific speed across an intersection without looking to his left. There is certainly nothing in the cases referred to which conflicts, in my opinion, with this view. It all comes back in the end to the duty that the man on the right owes to the man on the left. So long as the former proceeds with all reasonable care, *McAsey v. Lobban* says he owes no duty to the latter to look to his left before entering an intersection. But the moment he accelerates beyond what is reasonable in the circumstances, that is to say, behaves in a way that the man on the left is entitled to assume he will not behave, the duty to avoid the consequences of his own wrongful act and for this purpose to keep a proper lookout, descends upon him and this duty he owes to the drivers of approaching vehicles from whatever quarter they may come. All of which emphasises that breach of the regulations is only one of the circumstances to be considered in particulars of negligence. This last-mentioned attack on the charge of the learned Judge therefore also fails.

I pass now to the contention that on the evidence no jury could reasonably find a verdict for the defendant. It was of course for the jury to say what evidence they believed and what evidence they disbelieved. And as they found for the defendant, it seems safe to assume that they accepted his evidence. According to that evidence he kept a proper lookout as he approached the intersection from the west, he looked to the right and did not see the motor cycle, then to the left and then back again to the right, when his car was about in line with the drain on the west side of Belmore Street. He then saw the motor cycle approaching from the south for the first time, when it was about ten yards down Benalla Road, that is south of the fence line. It was travelling at an excessive speed, fast. The defendant immediately swung to the left and applied his brakes. The cyclist appeared to come straight at the car, there was no sign of an attempt to avoid the car. The cycle struck the car about the forward portion of the front door. At the point of impact there were signs of a distinct push (of the car) to the north, as if the back of the car had been thrown over. The place of the collision was ten feet north of the centre line of Telford Street and slightly to the east of the extended centre line of Benalla Road. The

defendant was doing about twenty-five miles per hour when he first saw the cycle and he then eased off five miles per hour. He was going about fifteen miles per hour at the point of impact. Other evidence showed that the front of the cycle was badly damaged.

On this evidence it was clearly open to the jury to find that the driver of the motor cycle approached the intersection at an excessive speed, and without keeping a proper lookout and without taking any steps whatever to avoid the collision that took place; that he just drove straight ahead into the car at an excessive speed, a speed sufficient to damage badly the front of the cycle and to push the car bodily to the north. It was, therefore, open to the jury to find that the driver of the motor cycle was negligent and that his negligence was the cause of the accident.

Great stress was laid before us on regulation 8. It was said that on his own evidence the defendant failed to take the precaution specified by that regulation, that as he entered the intersection at twenty miles per hour he was not proceeding at such a rate of speed that he was able to stop his car immediately. It was for the jury, however, with all the facts before them to say whether the defendant was negligent, and also whether, if he were, his negligence caused the accident in the sense of materially contributing to it. On the evidence it appears to me they could legitimately find that the negligence of the driver of the motor cycle was the substantial cause of the accident. It cannot, I think, be said that the verdict is such that reasonable jurors, understanding their responsibility, could not reach.

I, therefore, think that this contention also fails and that the appeal should be dismissed with costs.

LOWE J.: I agree with the judgment which has just been delivered by the Chief Justice and which I have previously had the opportunity of reading.

GAVAN DUFFY J. read the following judgment: This was an action based on negligence. Amongst the particulars of negligence given by the plaintiff in his statement of claim was this: "Failing to observe the provisions of the Road Traffic Regulations and in particular regulations 8 and 10".

The regulations referred to are the Road Traffic (Country) Regulations 1944 made under sec. 3 of the *Road Traffic Act 1935* which provides that the Governor in Council may make regulations for or with respect to the control of traffic on roads, and matters incidental thereto, and authorises the prescribing of a penalty of not more than 50*l.* for any breach thereof.

Regulation 8 reads:

Except as provided in clause 6 of these regulations the driver of a vehicle or horse proceeding along any street shall, on approaching and crossing the intersection of such street with another street, proceed at such a rate of speed that he shall be able to stop immediately such vehicle or horse. Penalty 20*l.*

Regulation 10 reads:

The driver of a vehicle or horse proceeding along any street and reaching the intersection of that street with another street at approximately the same time as another vehicle or horse approaching from his right along such last-mentioned street shall give the right of way to such other vehicle or horse.

It then concludes with a proviso which is immaterial for our present inquiry.

The jury found a verdict for the defendant McCann, and the plaintiff in this appeal contends that there was no evidence which could justify such a verdict and that the learned trial Judge misdirected the jury.

To answer either of these questions it is necessary first to determine what is the result in law of a breach of these regulations.

The question is an interesting and in my opinion a difficult one. It has long been established that breach of a penalty statute may give a person injured thereby a private right of action if the statute so intends and that intention may arise by implication and without express words. Where such an action is brought it is an action for damages caused by breach of the statute, and the only proof required is of the breach and the resulting damage. The difficulty, often a great one, is to determine whether the statute should be read as giving any private right of action at all, and no satisfactory touchstone for trying the question is available, but the cases do indicate what matters point with more or less insistence one way or the other. The difficulty of the task is illustrated by what Dixon J. said in *O'Connor v. S. P. Bray Ltd.*, [1937] 56 C.L.R. 464, at p. 477):

The received doctrine is that when a statute prescribes in the interests of the safety of members of the public or a class of them a course of conduct and does no more than penalize a breach of its provisions, the question whether a private right of action also arises must be determined as a matter of construction. The difficulty is that in such a case the legislature has in fact expressed no intention upon the subject, and an interpretation of the statute, according to ordinary canons of construction, will rarely yield a necessary implication positively giving a civil remedy. As an examination of the decided cases will show, an intention to give, or not to give, a private right has more often than not been ascribed to the legislature as a result of presumptions or by reference to matters governing the policy of the provision rather than the meaning of the instrument. Sometimes it almost appears that a complexion is given to the statute upon very general considerations without either the authority of any general rule of law or the application of any definite rule of construction. An illustration may be found in a comparison of the decision and reasoning in *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832, with those in *Monk v. Warbey*, [1935] 1 K.B. 75 . . . In the absence of a contrary legislative intention, a duty imposed by statute to take measures for the safety of others seems to be regarded as involving a correlative private right, although the sanction is penal, because it protects an interest recognized by the general principles of the common law . . . Whatever wider rule may ultimately be deduced, I think it may be said that a provision prescribing a specific precaution for the safety of others in a matter where a person upon whom the duty laid is, under the general law of negligence, bound to exercise due care, the duty will give rise to a correlative private right, unless from the nature of the provision or from the scope of the legislation of which it forms a part a contrary intention appears. The effect of such a provision is to define specifically what must be done in furtherance of the general duty to protect the safety of those affected by the operations carried on.

The use of breach of statute as evidence of negligence has by no means so well settled a status. Indeed it appears from the report of the hearing in the Court of Appeal in *Upson v. London Passenger Board*, [1947] 1 K.B. 930, that Humphreys J. was of opinion that it was immaterial that the act relied on was a breach of regulation (see judgment of Asquith L.J., at p. 945). However there is ample authority now both in the High Court and the Court of Appeal in England that evidence of breach of a statute or regulation may be admissible as evidence of negligence. It is obvious, however, that, at first sight, such evidence, at any rate in a running down case, has a foreign air and it

can only justify its presence if to some extent the Legislature is to be taken as having attached a character of negligence to the act which constitutes the breach.

Asquith L.J. described the position by saying in *Upson v. London Passenger Board* (at p. 945), "for the purposes of civil liability the common law duty is enhanced by the superaddition of the duty contained in the regulation", and Salmond J. in *Canning v. The King*, [1924] N.Z.L.R. 118, at p. 123, had a like approach: "The only statute", he said, "which is relevant to the question of contributory negligence is one which is designed to establish defined statutory precautions against the accident complained of—designed, that is to say, to substitute for the general rule of the common law that persons must take reasonable care for their own safety, some more definite rule specifying the precise nature of the precautions which must be so taken", and though this has been disapproved of as a test to determine what breaches are irrefutable evidence of negligence, it does, I think, *mutatis mutandis*, correctly indicate the only ground on which evidence of any statute and its breach can be admissible as a particular of negligence.

In view of authority binding on me I must take it that evidence of a statute and its breach is admissible to prove negligence even when the breach is not irrefutable evidence, but in any event to be relevant at all the statute must impose in some degree the nature of negligence on the act which constitutes the breach. If that were not so, if the fact of breach were like any other fact, for instance the pace of a car, the non-application of brakes, the omission to sound a warning, a matter indifferent in itself which the jury might treat as negligent or not as it thought fit, any mention of the statute would be otiose and irrelevant. That evidence is so admissible, however, leaves the question of the exact effect of a breach unanswered.

There is no doubt that in certain cases the breach of a statute *ipso facto* amounts to negligence or, to put it another way, provides irrefutable evidence of negligence. Lord Sumner, in dealing with a question of contributory negligence in *R. v. Broad*, [1915] A.C. 1110, at p. 1120, said:

Upon the facts of the case it can hardly be doubted that, if Broad had come to a standstill at the level crossing and had looked up the line, while still clear of the rails, he must have seen the approaching train and must have gone scathless. If it was his legal duty to have "stopped" in this sense, and if, by voluntarily going on without stopping he met his death, he would be no less the author of his own injury than if his breach of duty had been breach of a common law duty to do whatever was reasonably careful and not breach of a prescribed duty to do a particular thing.

It was a by-law that required plaintiff to so stop.

Indeed it would seem the logical result of allowing the fact that Parliament had set up a standard of negligence to be given in evidence at all that failure to comply with such standard should be conclusive of negligence. That, however, is not the law in Australia whatever it may be elsewhere, and we must therefore enquire when a breach of statute is conclusive evidence of negligence.

In *Canning v. The King* Salmond J., who apparently would allow no other effect to breach of statute relied on as negligence, propounded the test thus in its application to contributory negligence (at p. 124): If the plaintiff has by a wilful or negligent disregard of a statutory precaution brought upon himself a mischief which the statute was intended to guard against, and which he could have avoided by obeying the statute, I think that on principle and on authority he must be deemed to be guilty of contributory negligence.

This test, however, was rejected by the High Court in *Henwood v. Municipal Tramways Trust*, [1938] 60 C.L.R. 438, Latham C.J., as I understand his judgment, making the test whether an action would lie for damage suffered as a result of a breach of the statute, Dixon and McTiernan JJ. expressing it thus (p. 467): "In our opinion the true inquiry is whether it is the intention of the statute penalizing the particular conduct to affect civil responsibility".

Starke, Dixon and McTiernan JJ. all treated the passage from *R. v. Broad*, [1915] A.C. 1110, at p. 1120, to which I have referred, as explainable by the fact that the Privy Council must have construed the regulation in question as intending the effect described in the judgment as following from its breach.

We must not, therefore, attribute conclusive effect to a breach of either regulation 8 or regulation 10 of the Transport (Country) Regulations 1944 unless the regulations on their proper construction so intend. Breaches of such regulations may, however, as I have said, be admissible as evidence of negligence though not conclusive evidence. This has been expressed in various ways. In *Henwood v. Municipal Tramways Board*, [1938] 60 C.L.R. 438, at p. 449, Latham C.J. described such breaches as relevant circumstances—as usually affording *primâ facie* evidence. He quoted Isaacs J. "The existence of a relevant regulation directed towards securing safety is 'evidence to go to the jury' that the observance of the regulation 'was a reasonable and proper precaution' . . . 'one circumstance of the highest importance'".

Starke J. (p. 453) after saying that the by-law in question was not conclusive added "Though its contravention in relevant circumstances would afford evidence of a want of reasonable care and caution".

Dixon and McTiernan JJ. (p. 461), quoted *Blamires v. Lancashire and Yorkshire Railway Co.*, [1873] L.R. 8 Ex. 283, at p. 289, to the effect that: "When negligence as a cause of action is in question, breach of a legislative provision requiring a specific precaution amounts to evidence of want of reasonable care".

The fact that an act is a breach of statute is therefore of itself evidence that the act was negligent. Since it is not conclusive, however, the jury may look at the whole of the evidence to determine whether in the circumstances it was negligent. This for all practical purposes means that the jury are to hold the act negligent if they think that a reasonably careful driver would not have committed it. The test is, of course, then the same as they would have applied if the act alone had been proved and the statute had never been mentioned, though the breach being *primâ facie* evidence they are not theoretically at complete liberty since if the evidence is all one way, and no question of credibility arises they are in duty bound to find in accordance with it. Once, however, there are other facts in evidence they may give as much or as little weight as they please to the breach. This perhaps hardly adds to the dignity of Parliament and it might have been advisable to exclude in actions of negligence all evidence of breach of a statute except where that breach would amount of itself to statutory negligence leaving the person committing the breach to the protection that it will not effect his responsibility unless the breach is a cause of the accident. However such is not the course the law has taken, and before leaving this question of breaches which are evidence but not conclusive evidence of negligence it only remains to enquire how the Judge should treat the matter in his charge to the jury. A Judge should, of course, make it clear to a jury where the burden of proof lies but whether he should go through the evidence step by step pointing out where evidence amounts to *primâ facie* proof and where other facts intervene that may counteract such *primâ facie*

proof depends on the circumstances of the case. I think that where a breach of a regulation is relied on as proof of negligence the jury should have their attention drawn to the significance of the regulation. They should be told that when an act that of itself may or may not be negligent is also a breach of a statute that alone is some evidence of negligence, though if they are of opinion on the whole of the circumstances that in doing such act the defendant did not show want of reasonable care they should not treat it as negligent. Unless some such direction is given them, they would, in my opinion, be unable to properly appreciate the bearing of the evidence.

That such direction is proper gains some support from the words of Murray C.J. in *Goodger v. Knapman*, [1924] S.A.S.R. 347, where speaking of a regulation that forbade a motor driver to pass a stopped tram at more than six miles per hour, he said:

Whether an action would lie for damages alleged to have been sustained from the mere breach of the regulation, apart from negligence, is a nice question which need not be considered, because the plaintiff has based her claim solely on negligence. But it is clear, I think, that the breach of the regulation in question, resulting in damage to a person who has just alighted from what was practically a stationary tram-car will afford *prima facie* evidence of negligence as regards that person . . . and, as no justification was proved by the defendant for a departure from the regulation, the negligence stands unanswered.

The Road Traffic (Country) Regulations 1944 are made as I have said under sec. 3 of the *Road Traffic Act* 1935 and consist of a number of clauses all of which are directed to the maintenance of properly regulated traffic and most of them also to the safety of either pedestrians or persons in vehicles or both. For instance, clause 11 seems to be largely directed to secure the safety of pedestrians alighting from or entering tram-cars, and clause 16 to secure the safety of pedestrians on safety zones. Perhaps clauses 23, 26 and 27 are mainly police provisions for the maintenance of good order, while clauses 33 and 34 contain prohibitions directed to secure the safety of those to whom they are addressed. The clauses contain varying penalties for breach.

Turning first to clause 10 this appears to me to be clearly directed to prevent the interference by collision or otherwise of the two vehicles which reach the intersection at approximately the same time and to be as plainly intended to secure a safe right of way to whichever vehicle is on the right of the other.

Clause 8 is quite apparently directed both to the free flow of traffic and to the safety of others using the intersection and more particularly of those coming at right angles to the driver to whom the command is addressed.

The fact that some of the regulations do not give a right of action for their breach will not prevent that effect being attributed to others (see Dixon J. in *O'Connor v. S. P. Bray Ltd.*, [1937] 56 C.L.R. 464) and if regulations 8 and 10 were found in a statute I should consider that they fell within that class where "the statute establishes a standard of duty to be observed for the protection of other persons than those who are bound by the statute", where "the duty is a duty to take care in the interests of those persons" (Latham C.J. in *Henwood v. Municipal Tramways Trust*, [1938] 60 C.L.R. 438, at p. 446) and gave a right of action to a person suffering damage for their breach. Even if the duty was a duty not to specific persons or a class or classes of persons, but to the travelling public, this would not prevent a right of action arising by force of the statute (see *O'Connor v. S. P. Bray Ltd.*, [1937] 56 C.L.R. 464, at p. 484).

I think there should be a like answer if the enquiry proposed by Dixon and McTiernan JJ. in *Henwood's Case* were made: "Does the statute penalizing the particular conduct affect civil responsibility?" Such test I would take to be simply a paraphrase of "Does the statute give a right of action?" made to suit the fact that the learned Judges intended to express a rule that applied to actions based on negligence and that covered both negligence by the defendant and contributory negligence by the plaintiff. I have come to this conclusion though caused some difficulty by a passage of their judgment (at p. 463) where, having said that perhaps the Court should in actions of negligence pursue the same methods of interpretation which have been followed in some of the decided cases where an intention has been found in a statute to give a private remedy in damages for its breach, they add:

We think it would be a matter for regret if the Courts carried into another field depending on statutory determination, although perhaps a neighbouring field, such a method of discovering in a penal provision an intention to affect private rights.

The other members of the Court in this appeal have found strong persuasion not to treat a breach of the regulations as conclusive proof of negligence in the fact that such regulations are the creature of a subordinate law-making authority on whom the right of legislating has been conferred in limited terms. I appreciate the weight of such a fact. The authority given to the Governor in Council is to make regulations with respect to the control of traffic on roads and matters incidental thereto, and this, of course, does not in terms authorise them to alter the civil rights of anybody. It is said that no implication of such authority should be made, that the proper conclusion is that the regulations should be read as confined to regulating the flow of traffic, that they can be no more than what has been called "police regulations". I think, however, that a power to make regulations with respect to the control of traffic on roads, may fairly be read as giving power to so regulate traffic as to prevent accidents, and therefore, to lay down precautions that must be taken for that purpose, but I recognise the substance of the contention that a subordinate law-making authority should not easily be treated as authorized to affect important civil rights.

It is a nice question what effect should be given to the Act and regulations and, therefore, I have sought for such light as is available in decided cases, though from the nature of the enquiry that light must be uncertain, the statutes and regulations varying in every case. I shall refer to three which were concerned with breaches of the Pedestrian Crossing Places (Traffic) Provisional Regulations 1935.

Those regulations were made under the authority of the *Road Traffic Act* 1934 (24 & 25 Geo. 5, c. 50), sec. 18, which provided that crossings for foot passengers might be established on roads and allowed the Minister to make regulations:

with respect to the precedence of vehicles and foot-passengers respectively, and generally with respect to the movement of traffic (including foot-passengers) at and in the vicinity of a crossing (including regulations prohibiting foot-passenger traffic on the carriage-way within one hundred yards of a crossing), and with respect to the indication of the limits of a crossing by marks on the roadway or otherwise, and to the erection of traffic signs in connection therewith.

The section also provided that a breach of the regulations should be punished by such a fine not exceeding 5*l.* as might be fixed by the regulation.

In *Bailey v. Geddes*, [1938] 1 K.B. 157, breaches of two of the regulations made under sec. 18 of the *Road Traffic Act* 1934 fell for consideration. The action was one based on negligence and one of the particulars

of negligence was that the defendant failed to give free and uninterrupted passage on a pedestrian crossing.

Regulation 3 of the Pedestrian Crossing Places (Traffic) Provisional Regulations 1935 provided:

The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing.

Regulation 4 provided:

The driver of every vehicle at or approaching a crossing where traffic is not for the time being controlled by a police constable or by light signals shall allow free and uninterrupted passage to the foot passenger who is on the carriage-way at such crossing, and every such foot passenger shall have precedence over all vehicular traffic at such crossing.

A foot passenger on a pedestrian crossing was run into and injured by a motor car. It was argued that the foot passenger was guilty of contributory negligence. The actual decision of the case is immaterial but it is material to observe that the question whether contributory negligence was a defence to an action based on breach of statute was definitely raised in argument, and that the Court treated the case on the assumption that a breach of the statute would *ipso facto* render the defendant liable unless he could rely on contributory negligence.

Greer L.J.'s judgment is consistent with this view but is not necessarily dependent on it. There is, however, no doubt of what Slessor J. thought. First of all (p. 163), he draws a distinction between disobedience to the Highway Code, which in terms provides that a failure to observe any of its provisions may merely be relied upon by any party to any proceedings, civil or criminal, as tending to establish or negative any liability which is in question in those proceedings, and the Pedestrian Crossing Places (Traffic) Provisional Regulations, saying that the Highway Code, therefore, is from a legal point of view far less potent than the regulations: "I do not think", he added (p. 164), "the learned Judge fully appreciated . . . that he had to deal with a regulation made under a statute having the force of law". He then went on, that when one looked at the regulations they were fatal to the defendant's case, that they were positive regulations. As to contributory negligence, he said that the result of the authorities was that contributory negligence of a plaintiff was a defence to an action for an admitted breach of a statute, but went on to say that nothing given in evidence in the case could support a conclusion that there was contributory negligence. Scott L.J. agreed with this judgment.

The Court of Appeal had again occasion to consider these regulations in *Chisholm v. London Passenger Transport Board*, [1939] 1 K.B. 426. The plaintiff, a foot passenger stepped off the kerb on to an uncontrolled pedestrian crossing a short distance in front of a bus belonging to the defendants. The driver was unable to stop in time and the plaintiff was injured. Hilbery J. who tried the case had made two findings, (1) that the driver was guilty of a breach of statutory duty in failing to stop before reaching the crossing, and (2) that he was guilty of negligence. An examination of the report of the case in the Court of Appeal shows that these two bases of liability were treated as distinct. The Court by a majority decided in favour of the appellant apparently on the grounds (1) that on its proper interpretation regulation 3 did not in the circumstances require the defendant's driver to be proceeding at such a speed as to be able to stop before reaching the crossing; (2) that though *Bailey v. Geddes* established that, where a pedestrian was already upon the

crossing when the defendant's vehicle was an "approaching" vehicle, negligence on the part of the pedestrian was no defence, nevertheless when the pedestrian suddenly stepped off the footpath on to the crossing when it was clearly unsafe to do so his negligence did constitute a defence. There was, however, no suggestion in the language of the judgments that compliance with the regulations was not an absolute duty, failure in which would render a defendant liable for the damage it caused, rather the opposite, and *Bailey v. Geddes* was at least tacitly approved.

Bailey v. Geddes and *Chisholm v. London Passenger Transport Board* again came in for consideration by the Court of Appeal in *Upson v. London Passenger Board*, [1947] 1 K.B. 930. The particular regulation there in question was regulation 3 of the Pedestrian Crossing Places (Traffic) Regulations. The gist of the case is thus put in the headnote to the report:

The driver of an omnibus was approaching a crossing-place controlled by traffic lights, which were at the material time in his favour, when a foot passenger negligently attempted to cross against the light and emerged about nine feet in front of the omnibus, from behind a stationary vehicle which partially obscured the omnibus driver's view of the crossing. The driver at once applied his brakes, but was unable to avoid the foot passenger, who was injured. The omnibus came to rest with its wheels on the crossing place.

Held, (by Cohen and Asquith L.J.J., Lord Greene M.R. dissenting), that regulation 3 applied to controlled as well as to uncontrolled crossing-places, and that as the stationary vehicle was obscuring the driver's view of a part of the crossing-place he could not "see that there was no foot passenger thereon" and was under a statutory duty to approach the crossing at such a pace that he could if necessary stop before reaching it; and that, though the action was based on negligence, not on breach of statutory duty, the latter could be relied on as evidence of negligence if it sufficiently appeared from the particulars of negligence alleged by the plaintiff.

Though the members of the Court were considering both the question whether the evidence generally supported a finding of common law negligence in the defendant's bus driver, and the effect of a breach of regulation 3, and that causes a little difficulty in interpreting their language, I think it is sufficiently plain that Cohen L.J. and Asquith L.J., who formed the majority, did treat a breach of the regulation as conclusive evidence of negligence, while Lord Greene M.R., who dissented, did not.

Cohen L.J. said (p. 941):

It seems to me that in considering whether a party had been negligent the Court is entitled to have regard to what restrictions Parliament has thought it necessary to impose on motor traffic for the protection of pedestrians whether the relevant provisions are to be found in an Act of Parliament or in regulations made thereunder. That was the view, I think, taken by this Court in *Bailey v. Geddes*, where the claim was in negligence only, but this Court decided in favour of the plaintiff on the ground that the cause of the accident was the failure of the driver to observe the regulations . . . On the evidence it is plain that at all material times the presence of the stationary taxi prevented the driver having an uninterrupted view of the whole of the crossing. That being so, it was impossible for him to see that there was no foot passenger thereon and it was therefore his duty under the regulation to proceed at such a speed as to be able, if necessary, to stop before reaching the crossing. On the driver's own evidence he saw the plaintiff when she was nine feet away from the omnibus and when he stopped the front wheels of the bus were on the crossing. Had he been driving at such a pace as to enable him to stop short of the crossing, it must in my opinion follow that he could have stopped within those nine feet.

He then went on to consider two arguments advanced to rebut the suggestion that the driver's failure to comply with regulation 3 made the defendant liable in negligence. The second argument was that even if regulation 3 applied, on the facts of the case the driver's failure to comply with regulation 3 did not constitute negligence. This was based on two findings of the trial Judge, (a) the driver had the lights in his favour and was proceeding at a reasonable pace and had his bus under perfect control, (b) the plaintiff proceeded against the lights although she had seen the omnibus. His short answer to this argument was that finding (a) *did not alter the fact that the driver failed to comply with regulation 3* and finding (b) only established contributory negligence. He explained the decision in *Chisholm v. London Passenger Board* by quoting the words of Mackinnon L.J. in that case: "The driver of the bus, when approaching the crossing, could and did see that there was no foot passenger thereon. And so long as he could see that, the regulation imposed no duty upon him".

Asquith L.J. made his position still plainer saying (p. 945):

It is true that in this case breach of statutory duty is not pleaded as a separate cause of action. Nor was it so pleaded in *Bailey v. Geddes*, but that case, a decision binding on this Court, proceeded on the footing (1) that for the purposes of civil liability the common law duty is enhanced by the superaddition of the duty contained in the regulation, provided that duty is sufficiently pleaded, and (2) that the duty is sufficiently pleaded, if its substance is alleged as one of the particulars of the negligence relied on. There need not be a separate and independent averment of breach of statutory duty as such.

He then went on to say that breach of regulation 3 had not been pleaded, but if it had, "I personally should have felt bound for the reasons given by Cohen L.J. to hold that the driver had acted in breach of it, and that such breach had been a contributory cause of the accident". He added that as the case had been conducted on the footing that the point was open to the plaintiff the pleading should be treated as having been amended, and the appeal dismissed.

Lord Greene M.R. who dissented was of opinion that in the circumstances regulation 3 did not require the driver of the omnibus to drive in such a way as to be able to stop before reaching the crossing, and that even if there was a breach it was not the cause of the accident, but he also dealt with the question of the legal effect of a breach and took a different view thereon than the majority of the Court, holding as I understand him, that in an action of negligence conclusive effect could not be given to a breach of statute, whatever might be the effect of it had the action been framed as one for damages for breach of statute. "As the question", he said (p. 939), "is one of negligence and not of breach of an absolute statutory duty or of prosecution for an offence the regulation must be considered not in isolation but in relation to all the circumstances of the case. The alleged breach of the regulation is relied on as evidence of negligence and nothing more."

Comparing the regulations considered by the Court of Appeal in these three cases with regulations 8 and 11 of the Road Traffic (Country) Regulations 1944, I am encouraged to treat the latter as giving a right of action to a person damaged by their non-observance. The former is made under a power to make regulations "with respect to the precedence of vehicles and foot-passengers respectively and generally with respect to the movement of traffic (including foot-passengers) at or in the vicinity of a crossing". The latter under a power to make regulations "with respect to the control of traffic on roads and matter incidental thereto". In each case the regulation-making authority is authorised to

fix a fine for the breach with a limit in the case of the English authority of 5*l.*; in the Victorian authority 50*l.* Regulation 3 of the English regulations imposes a limit of speed on vehicles approaching a crossing for foot passengers; our regulation 8 imposes a limit of speed on drivers approaching and crossing an intersection. Regulation 4 under the English Act requires the driver of a vehicle to give the right of way to a foot passenger at a crossing; regulation 10 of the Victorian regulations requires a driver at an intersection to give the right of way to a driver on his right.

Both sets of regulations have obviously two aims, to regulate generally the flow of traffic, and to secure the safety of those using the roads. In each case also the regulating authority exercised its powers of fixing a fine for breach of the regulations.

The one thing that has made me hesitate to rely on the cases in the Court of Appeal was that I had had some doubt whether the Judges were applying the tests approved of in *Henwood v. Municipal Tramways Trust* (S.A.), [1938] 60 C.L.R. 438, tests which I, of course, must apply. However from the course of the arguments and the language of the Judges, more particularly in *Bailey v. Geddes* and *Upson v. London Transport Board*, I am satisfied that in admitting the breaches as evidence of negligence the Court was allowing them a similar effect to that they would have had in an action expressly based on them.

Encouraged by these English decisions I am prepared to conclude, as my inclination would have been in the absence of authority, that a breach of regulation 10 at any rate, and I think also of regulation 8, is conclusive proof of negligence.

That being so it is obvious that the learned trial Judge's charge on the matter amounted to a misdirection.

What he did say to the jury about the regulations was this:

You may think that in a case of this kind a breach of the regulations as such is not a matter of great importance and that accidents of this kind really happen because somebody is travelling too fast and not keeping a proper lookout, and of course the faster you travel the more necessary it is to keep a careful lookout for any other vehicle which may be in the vicinity. But it is for you to say as to all these things, and there are those three heads of negligence alleged. (Firstly a breach of the regulations, secondly excessive speed, and thirdly not keeping a proper lookout).

Later in answer to a question put by the jury he said:

The regulations are only one element, and are only one thing for you to consider in deciding whether the defendant was guilty of negligence causing the accident in the sense I explained to you this morning.

After the jury retired the learned Judge recalled them and told them that the regulations were only one element in the case: "If", he said, "the only fault alleged were a breach of the regulations then the question of breach or no breach might be decisive, but where you have, as you have here allegations of travelling at excessive speed without keeping a proper lookout then you have to consider those allegations too". This was the sum of his instructions to the jury on the effect they should give to a breach of the regulations, and, assuming that the breach of regulation 10 should be treated as conclusive evidence of negligence this charge could not but leave an erroneous impression of their duty on the jury's minds and, therefore, it amounted to a misdirection.

I do not propose, therefore, to further consider the question of what test is to be applied to determine if breaches are to be admitted as *prima*

facie evidence of negligence and whether the breaches relied on here were properly admissible, and if so whether the matter was adequately dealt with in the Judge's charge. Nor do I propose to consider further the details of the appellant's complaint that the learned Judge did not properly direct the jury on the meaning of the regulations, save to say two things; firstly that a Judge has a duty when the regulation requires explanation to tell the jury what the meaning is—*Salter v. Delandra*, [1920] 20 S.R. (N.S.W.) 468—and regulation 8 at least certainly requires explanation. It cannot be complied with literally, but it must be given a meaning and that meaning made plain to the jury, though in view of the opinion of the other members of the Bench it would not be helpful to say what I think that meaning is; secondly that whenever the jury may have to consider the fact that a driver at a cross-road has not looked to his left, full effect should be given to *McAsey v. Lobban*, [1938] V.L.R. 140, by making it clear to them that such a driver is, in the absence of any indication to the contrary, at liberty to assume that other drivers who may be about to cross the intersection from his left will obey the law and give him the right of way, and that therefore a mere failure to look to the left to see whether in fact they are doing so cannot amount to negligence. In an appropriate case facts in evidence, over and above the mere omission of the driver to look to his left, which may make the driver's conduct negligent, would no doubt be drawn to the jury's attention.

Since the Chief Justice and my brother Lowe are of opinion that this appeal should be dismissed no good purpose would be served by my considering the other question raised by the appeal, that is to say whether there was evidence on which the jury's verdict can be justified.

I think this appeal should be allowed.

Appeal dismissed.

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P. E. J.
