[HIGH COURT OF AUSTRALIA.]

HENWOOD AND ANOTHER . . . . APPELLANTS;
PLAINTIFFS,

AND

THE MUNICIPAL TRAMWAYS TRUST (SOUTH AUSTRALIA) . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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MELBOURNE, *Mar.* 2-4; *June* 30.

Latham C.J., Starke, Dixon and McTiernan JJ.

Negligence—Contributory negligence—Breach of by-law by plaintiff—Passenger on tram—Leaning out of tram.

Statute—By-law—Construction—Duty imposed in interests of safety—Effect on civil rights.

There is no general principle which denies to a person who is engaged in an unlawful act the protection of the general law imposing upon others duties of care for his safety.

A trust which controlled a tramway was authorized by the statute under which it was constituted to make by-laws "generally for regulating passenger traffic" and "generally as to such matters for carrying out the purposes of the Act as in the opinion of the trust might conveniently be made the subject of a by-law." The trust made the following by-law:—"No person shall project or lean his head or other portion of his body or limbs out of any window in any tram, or outside the barrier on the off side of the open portion of any tram. Penalty £5." A passenger on one of the trust's trams, being taken suddenly ill, leaned out over a guard rail on the off side of the tram, thereby committing a breach of the by-law; while he was leaning out, his head was struck by a standard carrying overhead wires, and he died as a result of the injuries received.

Held, in an action by the parents of the deceased against the trust under the *Wrongs Act* 1936 (S.A.), that the breach of the by-law by the deceased

was not in itself a conclusive answer to the plaintiffs' claim and was not conclusive evidence of contributory negligence on the part of the deceased, although it was material to the question of contributory negligence.

The construction of statutes and by-laws imposing duties in the interests of safety, and the relation of such provisions to civil rights, considered.

Decision of the Supreme Court of South Australia (*Napier* J.) reversed.

APPEAL from the Supreme Court of South Australia.

Alfred Edwin Henwood and Ethel Henwood, the parents of Alfred John Henwood deceased, brought an action in the Supreme Court of South Australia against the Municipal Tramways Trust of South Australia, claiming £800 damages under the *Wrongs Act* 1936 (S.A.) on account of the death of Alfred John Henwood, who died as a result of an accident while travelling on one of the defendant's tram-cars. While travelling on the tram the deceased became sick, left his seat, leaned out over a rail on the off side of the tram and vomited. His head struck in succession two steel standards which were in the middle of the street, and he died shortly afterwards. The top of the rail was forty-one and a half inches from the floor of the tram. The standards were seventeen inches from the side of the tram. The tram in which the deceased was injured was wider than those formerly in use, and the distance from the side of the tram to the steel standards was consequently diminished. Four similar accidents had previously happened. There was evidence that in three of the cases the persons injured had leaned out although they had seen warning notices posted on the trams or had been expressly warned of the danger. The trust was aware of these accidents before the accident to Henwood took place. A by-law made under sec. 74 of the *Municipal Tramways Trust Act* 1906 (S.A.) provided :—" 38A. No passenger shall project or lean his head or other portion of his body or limbs out of any window in any tram, or outside the barrier on the off side of the open portion of any tram. Penalty £5." There were eight conspicuous notices in the tram—two at each entrance—in the following terms :—" Danger. Do not lean over rail."

Napier J., who tried the action, held that the by-law afforded a conclusive defence to the plaintiffs' claim, but contingently assessed the damages at £250.

From that decision the plaintiffs appealed to the High Court.

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Hicks, for the appellants. The tram should have been made safe. Mere warning to passengers of danger is not sufficient. The fact that there was a by-law forbidding passengers leaning out of trams did not prevent the plaintiffs from recovering on the ground of negligence on the part of the defendant, nor is breach of the by-law any evidence of contributory negligence. There is no finding as to contributory negligence, and the by-law imposes no duty on the passenger towards the defendant. The tramway trust is under an obligation to carry any member of the public, and as a common carrier it is bound to carry the passengers safely. *Hillen and Pettigrew* v. *I.C.I. (Alkali) Ltd.* (1) was the case of a person going on to a prohibited part of a ship and thus becoming a trespasser (*Salmond* on *Torts*, 9th ed. (1936), p. 219 ; *Hickman* v. *Maisey* (2)). The mere fact that a person breaks a by-law is no criterion of negligence (*Grand Trunk Railway Co. of Canada* v. *Barnett* (3) ; *Cashmore* v. *Chief Commissioner for Railways and Tramways (N.S.W.)* (4)). The mere fact that the deceased knew of the regulation did not limit his right to recover (*Wilkinson* v. *Lancashire and Yorkshire Railway Co.* (5)). The tramway trust can take advantage of particular conditions only if it expresses them as part of the contract (*Leslie* on *The Law of Transport by Railway*, 1st ed. (1920), pp. 399, 433 ; *Jennings* v. *Great Northern Railway Co.* (6) ; *Grand Trunk Railway Co. of Canada* v. *Robinson* (7) ; *Hood* v. *Anchor Line (Henderson Bros.) Ltd.* (8)). Breach of a statutory duty does not necessarily constitute contributory negligence. It must be shown to be wilful or negligent (*Hutchinson and Shillington* on *Motor Law* (1925), pp. 81-83 ; *Grand Trunk Railway* v. *McAlpine* (9) ; *Bailey* v. *Geddes* (10) ; *Weld-Blundell* v. *Stephens* (11)). Where there is a breach of a statutory provision or by-law the maximum position is put in *Bailey* v. *Geddes* (12), that you have an absolute duty that a man transgresses at his peril (*Flower* v. *Ebbw Vale Steel Iron and Coal Co. Ltd.* (13)), but if the

(1) (1936) A.C. 65.
(2) (1900) 1 Q.B. 752, at p. 757.
(3) (1911) A.C. 361, at p. 365.
(4) (1915) 20 C.L.R. 1, at pp. 6, 12, 13.
(5) (1907) 2 K.B. 222, at p. 230.
(6) (1865) L.R. 1 Q.B. 7.
(7) (1915) A.C. 740.
(8) (1918) A.C. 837, at pp. 843, 844.
(9) (1913) A.C. 838, at p. 846.
(10) (1937) 3 All E.R. 671, at pp. 674, 675 ; (1938) 1 K.B. 156.
(11) (1920) A.C. 956, at p. 980.
(12) (1937) 3 All E.R. 671 ; (1938) 1 K.B. 156.
(13) (1934) 2 K.B. 132, at p. 139; (1936) A.C. 206.

duty is not as high as that, it is all a matter of fact for the jury (*Halsbury's Laws of England*, 1st ed., vol. 26, pp. 363, 364, note *p*). The mere breach of the by-law is not necessarily evidence of negligence (*Forby* v. *Laucke* (1)). The tramway trust should have had the car in such a state that the deceased could not have committed the act (*King* v. *Victorian Railways Commissioners* (2)). The trial judge did not find negligence against the deceased apart from the breach of the by-law. The onus of proving contributory negligence lies on the defendant. Regard must be paid to the condition of the deceased at the time of the alleged act, and the question is : What would a reasonable man in the position of the defendant, who was overcome by nausea, do ? (*Bond* v. *South Australian Railway Commissioner* (3)). A vehicle is a " place " within the rule of *Indemaur* v. *Dames* (4) (*Smith* v. *Steele* (5) ; *Salmond* on *Torts*, 9th ed. (1936), p. 543 ; *Halsbury's Laws of England*, 2nd ed., vol. 23, p. 603). There were several serious accidents previously of a similar nature on the trams, and the trust was in a position to prevent further accidents. The duty of the trust was not merely to warn passengers of traps; it should have put the tram into a safe condition (*Hall* v. *Brooklands Auto Racing Club* (6) ; *Maclenan* v. *Seager* (7) ; *Smith's Leading Cases*, 13th ed. (1929), vol. I., pp. 857-859 ; *Clarke* v. *West Ham Corporation* (8)).

Ligertwood K.C. (with him *D. B. Ross*), for the respondent. The deceased was the author of his own misfortune. His lack of knowledge of the by-law affords no excuse. The breach of the by-law is an absolute answer to the action because the act of the deceased in leaning over the guard rail was illegal and was the direct cause of the accident. The breach of the by-law constitutes negligence on the part of the breaker of it, and the observance of the by-law is imposed as a duty which cannot be waived. The by-law and the warning notices exhibited in the cars limited or qualified the contract between the trust and the passenger, and clearly pointed to the danger of leaning over the guard rail. The notice must have come to the

(1) (1933) S.A.S.R. 60, at pp. 64, 65.
(2) (1892) 18 V.L.R. 250 ; 13 A.L.T. 293.
(3) (1923) 33 C.L.R. 273, at p. 276.
(4) (1866) L.R. 1 C.P. 274.
(5) (1875) L.R. 10 Q.B. 125.
(6) (1933) 1 K.B. 205, at p. 212.
(7) (1917) 2 K.B. 325.
(8) (1909) 2 K.B. 858.

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knowledge of the passenger, and, knowing of the warning, the passenger's duty was to avoid the danger of which he was forewarned. If this was not a case of *Indermaur* v. *Dames* (1), it was a contract to carry, but such a contract does not imply that the passenger has a right to sit or stand in every part of the tram. The right is in the carrier himself to specify where the passenger is to be carried. The carrier can do this either before or after the passenger gets on the tram. There is nothing unreasonable in forbidding the passenger's leaning over the rail. This is not a denial of the passenger's right to be carried. The looking out over the rail is no part of the contract of carriage. The notice is an important modification of the trust's duty. As long as the trust informs the passenger of the danger it is under no obligation to make the tram safe (*Cashmore* v. *Chief Commissioner for Railways and Tramways (N.S.W.)* (2)). The danger is obvious to anyone. To those who may not know or who have forgotten, the trust gives a warning of their danger. The trial judge has found that the notices were sufficient (*Baker* v. *Elliston* (3); *Cahill* v. *London and North Western Railway Co.* (4)). The trust is not bound to protect passengers against illegal acts done by them, whether those acts are the result of accident, inadvertence, ignorance or carelessness. Even in the absence of the by-law the trust has been guilty of no negligence which will constitute a cause of action. [He referred also to *City of London* v. *Wood* (5); *Hanks* v. *Bridgman* (6); *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (7); *Grand Trunk Railway Co. of Canada* v. *Barnett* (8); *R.* v. *Broad* (9); *Lochgelly Iron and Coal Co. Ltd.* v. *M'Mullan* (10); *Bailey* v. *Geddes* (11); *Mersey Docks and Harbour Board* v. *Procter* (12); *Cahill* v. *Great South Western Railway Co.* (13); *English and Empire Digest*, vol. 8, p. 73.]

Hicks, in reply. A by-law should be so construed as not to alter common-law rights. It was the duty of the defendant to make the

(1) (1866) L.R. 1 C.P. 274.
(2) (1915) 20 C.L.R. 1, at p. 5.
(3) (1914) 2 K.B. 762.
(4) (1861) 10 C.B. N.S. 154, at p. 172; 142 E.R. 409, at p. 416.
(5) (1701) 12 Mod. Rep. 669; 88 E.R. 1592.
(6) (1896) 1 K.B. 253.
(7) (1910) 10 C.L.R. 266.
(8) (1911) A.C. 361, at p. 365.
(9) (1915) A.C. 1110, at p. 1120.
(10) (1934) A.C. 1.
(11) (1937) 3 All E.R. 671; (1938) 1 K.B. 156.
(12) (1923) A.C. 253, at p. 263.
(13) (1891) 26 Ir. L.T. 17.

car as safe as reasonable skill and care could make it, and the fact that there were notices posted on the car did not limit this liability.

Cur. adv. vult.

The following written judgments were delivered :—

June 30.

LATHAM C.J. This is an appeal from a judgment of *Napier* J. for the defendant, the Municipal Tramways Trust, in an action for negligence against the trust under the *Wrongs Act* 1936 (*Lord Campbell's Act*) of South Australia. The action was brought by the parents of Alfred John Henwood in respect of his death as the result of an accident when he was travelling on one of the defendant's trams. He was a passenger on the tram on 26th March 1937. He became sick, left his seat in the tram, leaned out over a rail on the off side of the tram and vomited. His head struck in succession two steel standards, which were in the middle of the street, and he died shortly afterwards. The standards were seventeen inches from the side of the tram. The negligence alleged depends upon the construction of the tram without, it is said, sufficient barriers to prevent or discourage passengers from leaning out, taken in conjunction with the nearness of the standards. Negligence was denied, and contributory negligence on the part of the deceased was alleged.

A by-law was made by the trust under the *Municipal Tramways Trust Act* 1906, sec. 74, and duly confirmed by the Governor in Council, in the following terms :—" 38A. No passenger shall project or lean his head or other portion of his body or limbs out of any window in any tram, or outside the barrier on the off side of the open portion of any tram. Penalty £5."

There were eight conspicuous notices in the tram-car—two at each entrance—in the following terms :—" Danger. Do not lean over the rail." All the witnesses called in the case (except one who was not asked any question on the matter) said that they were aware of the notices.

The tram upon which the deceased travelled was a drop-centre tram of a type introduced in 1922. It was wider than the former trams, and accordingly the danger to passengers who leaned over the rail of striking their heads against the standards had been

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increased. Four similar accidents had happened. There was evidence that in three of these cases the persons injured had leaned out although they had seen the notices or had been expressly warned of the danger. The trust was aware of these accidents before the accident to Henwood took place. Since the death of Henwood, a second and higher rail has been added for use on the off side of these trams, and it would now be difficult for persons to lean out so far as to be injured by the standards.

The first question which arises is that of the standard of duty owed by the trust to the deceased. A carrier of passengers does not insure the safety of passengers unless there is a contract to that effect. The duty of the carrier is to use due care to carry the passengers safely (*Readhead* v. *Midland Railway Co.* (1)). This duty exists independently of contract (*Austin* v. *Great Western Railway Co.* (2)). The present proceeding is an action under the South Australian equivalent to *Lord Campbell's Act*, the *Wrongs Act* 1936. It cannot yet be said to be quite settled that relatives are entitled to recover damages under such an Act for breach of a contract resulting in the death of a person upon whom they were dependent, though the Court of Appeal has indicated its inclination towards this opinion (*Grein* v. *Imperial Airways Ltd.* (3)).

This action is framed as an action of tort, but the relevant duty is the same as if the action were framed in contract. The duty of the defendant arises out of the fact that the deceased was a passenger on the defendant's tram-car, and that the standards on the roadway were placed by the trust at such a distance from the tram-lines that there was serious danger of injury to any person who leaned out of the car.

The next question which arises, therefore, is whether the defendant was, in all the circumstances of the case, guilty of a breach of the duty to take care. If there was a breach of this duty, the question of contributory negligence would then arise. The learned trial judge, however, determined the case upon one point and one point only. He held that the existence and the breach by the deceased of the by-law prohibiting leaning outside the barrier on the off side

(1) (1869) L.R. 4 Q.B. 379.
(2) (1867) L.R. 2 Q.B. 442.
(3) (1937) 1 K.B. 50.

of the tram afforded " a conclusive answer to the claim in any form in which it could be presented." It is contended for the appellant that this decision of the learned judge is wrong in law.

This is an interesting and important question upon which there is not very much authority in English law. There is much to be said for the view that, where a provision of the law is directed towards securing the safety of persons by penalizing acts of carelessness, no person can recover damages when the injury of which he complains was directly brought about by his own act in breach of the law. A by-law is a law in every sense, binding upon all persons to whom it applies (*Hopkins* v. *Mayor &c. of Swansea* (1); see also *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (2)). This by-law was made in order to secure the safety of passengers (of whom the deceased was one), and it established a standard of conduct to which he was bound by law to conform. It imposed upon passengers a duty, in their own interests, to take care. Negligence may consist in the failure of a person to take due care of himself (*Symons* v. *Stacey* (3)). Passengers cannot be heard to say that a precaution prescribed by law is unnecessary and that it is open to a court or jury to disagree with the standard of conduct set up by law. The act of the deceased in leaning over the guard rail was a voluntary act dictated by a natural impulse. The fact that a person obeys a natural impulse in committing an act does not deprive that act of its voluntary character. Thus, the deceased committed a breach of a by-law which was made in order to protect him and which established a standard of conduct which he was bound by law to observe. Further, the act which constituted the breach of the by-law was the direct cause of the injury which brought about his death. In circumstances which, in the particulars mentioned, were substantially identical with those in the present case, *Salmond* J. held in *Canning* v. *The King* (4) that a defendant was not liable in damages. All these considerations unite to constitute an impressive argument to support the decision of the learned judge.

(1) (1839) 4 M. & W. 621; 150 E.R. 1569.
(2) (1892) 3 Ch. 242.
(3) (1922) 30 C.L.R. 169, at p. 172.
(4) (1923) G.L.R. (N.Z.) 595; (1924) N.Z.L.R. 118.

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But there are other considerations which are, in my opinion, sufficiently weighty to displace those to which I have referred. In the first place, there is no general principle of English law that a person who is engaged in some unlawful act is disabled from complaining of injury done to him by other persons, either deliberately or accidentally. He does not become *caput lupinum*. Other persons still owe to him a duty to take care, the extent of that duty being determined by the circumstances of the case which create the duty. The person who is injured in a motor accident may be a child playing truant from school, an employee who is absent from work in breach of his contract, a man who is loitering upon a road in breach of a by-law, or a burglar on his way to a professional engagement—but none of these facts is relevant for the purpose of deciding the existence or defining the content of the obligation of a motor driver not to injure them. Thus, it cannot be held that there is any principle which makes it impossible for a defendant to be liable for injury brought about by his negligence simply because the plaintiff at the relevant time was breaking some provision of the law.

The general principle stated will probably not be questioned, but it is argued that a breach of a law which is directed towards securing the safety of a particular person by controlling his conduct necessarily amounts to negligence on the part of that person, and that, if it contributes to the accident, it is necessarily contributory negligence. In some cases a 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, a breach of the duty may be described as "statutory negligence," and a person within the protection of the statute, who is injured by the breach of duty, would (unless upon its true construction the statute showed a contrary intention), have an action for damages for negligence. Such a case was *Lochgelly Iron and Coal Co.* v. *M'Mullan* (1). In such cases the plaintiff is able to show that the law imposes a duty to take care in the interests of a class of persons of which the plaintiff is a member. The duty is, therefore, a duty which is owed to the plaintiff. The principle applied for the purpose of determining

(1) (1934) A.C. 1.

whether a statute creates such a duty is that which is stated in such decisions as in *Groves* v. *Wimborne* (1) and *Atkinson* v. *Newcastle Waterworks Co.* (2). In order to determine whether the breach of a particular statute falls within the category mentioned, it is necessary to consider the nature, objects, and purposes of the statute (*Phillips* v. *Brittania Hygienic Laundry Co.* (3)).

But the case is different when the statute (or by-law) is not enacted for the purpose of prescribing some duty of care owed by one person to another person. The present by-law affords a good illustration of the distinction. The by-law in question is directed towards securing the safety of passengers themselves by punishing them if they are careless of their own safety. It is not directed towards the relations between the tramway trust and passengers. It is not a provision designed to protect the trust against damage which might be caused to the trust by passengers leaning out of the vehicles. The by-law was not concerned with duties of passengers to the trust. The by-law provides its own remedy for breach, namely, a penalty of £5. It does not provide that the result of a breach of the by-law shall be that the offending passenger shall not be entitled to recover damages against the trust or that his breach of the by-law shall necessarily amount to contributory negligence.

It is useful in this connection to refer to the case of *Weir* v. *Victorian Railways Commissioners* (4). In that case the Full Court of the Supreme Court of Victoria considered the validity of a by-law which was in similar terms to the by-law in the present case but which contained also the following provision : " The commissioners will not be liable for injury which a passenger may sustain in consequence of the non-observance of this regulation." In *Weir's Case* (4) the by-law was made under a power to make by-laws for " regulating generally the travelling and traffic . . . upon the railways." In the present case the *Municipal Tramways Trust Act* 1906, sec. 74, provides that the trust may make by-laws " generally for regulating passenger traffic." In *Weir's Case* (4) it was held

(1) (1898) 2 Q.B. 402.
(2) (1877) 2 Ex. D. 441.
(3) (1923) 1 K.B. 539, at p. 547; (1923) 2 K.B. 832.
(4) (1919) V.L.R. 454; 41 A.L.T. 7.

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that the portion of the by-law purporting to relieve the Railways Commissioners from liability was not within the power mentioned, because that portion of the by-law dealt, not with the regulation of travelling and traffic, but with the limitation of the liability of the commissioners, "which liability, apart from the regulation, it was assumed would exist." If, in the present case, it were held that the effect of the by-law as it at present stands was to protect the trust from liability, the result would be that a provision so protecting the trust, which, on the reasoning in *Weir's Case* (1), would be invalid if expressly stated in the by-law, would be regarded as effective if introduced by way of implication. I am clearly of opinion that, if a limitation or exclusion of liability on the part of the trust had been expressly stated, the by-law, *pro tanto*, would have been invalid. It would be quite inconsistent with this view to allow the by-law to operate by implication so as to bring about a result which could not have been achieved by express provision to the same effect.

I therefore reach the conclusion that the breach of the by-law is not in itself a conclusive answer to the plaintiff's claim and that the breach is not in itself conclusive evidence of contributory negligence. Later I shall deal with the significance of the by-law in relation to the subject of contributory negligence.

The learned judge did not reach a definite decision upon any other question than that of the effect of the by-law as an answer in itself to the plaintiff's claim. In my opinion the two questions of negligence on the part of the defendant and contributory negligence on the part of the plaintiff were left undecided. The learned judge dealt with the warnings displayed in the trams reading :—"Danger. Do not lean over the rail," and said : "I think that I should be bound to hold that the defendant had done what was reasonably necessary to insure that passengers were apprised of the danger and were instructed how to avoid it." But he further states : "If I could hold that the duty of the defendant to use reasonable care to carry its passengers safely was unqualified by any term or stipulation imported into the contract, or by any legal duty imposed upon the passengers, I should be disposed to find that there had been a breach

(1) (1919) V.L.R. 454 ; 41 A.L.T. 7.

of that duty." Thus, it is seen, it has not been definitely decided that the defendant committed any breach of any duty. Before there can be a judgment for the plaintiff there must be a clear finding of a breach of duty on the part of the defendant. That duty, as already stated, is a duty to take reasonable care to carry passengers safely. It is a question of fact whether or not, in all the circumstances of the case (including the knowledge by the trust of former accidents), the warning notices and the existence of the guard rail were sufficient to discharge that duty in view of the fact that the standards were within seventeen inches of the side of a rapidly moving tram. That question of fact has not yet been determined.

Further, the learned judge stated no conclusion upon the subject of contributory negligence on the part of the deceased. In considering this question the existence of the by-law is a relevant circumstance. *McCardie* J. said in *Phillips* v. *Britannia Hygienic Laundry Co.* (1): "I agree . . . that the breach of a statutory regulation will usually afford prima facie evidence of negligence." So also *Isaacs* J. in *Fraser* v. *Victorian Railways Commissioners* (2): 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." This his Honour describes as "one circumstance of the highest importance." It is true that the regulation in that case was directed towards the securing of the safety of other persons than that of the negligent person who was bound to observe the regulation. But it was also directed towards the safety of persons travelling on the train. In determining whether the act of the plaintiff in leaning out of the tram-car amounted to contributory negligence it would also be necessary to take into account the notices displayed in the tram and the fact that a rail was provided for the purpose of preventing passengers from getting out and at least of limiting their leaning out on the off side of the tram, and the further fact that, apart from notices and the by-laws, it is obviously dangerous to lean out of a rapidly moving vehicle in a public highway without taking some care to see whether there are obstacles which may come into contact with the person leaning out. As there has been no definite finding on the subject of the

(1) (1923) 1 K.B., at p. 548. (2) (1909) 8 C.L.R. 54, at p. 77.

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negligence of the defendant, and no finding at all on the subject of contributory negligence, in my opinion the case should be remitted to the learned judge for the purpose of making findings on these matters so that he may give judgment in accordance with his findings.

The appeal should be allowed and the case remitted for the purpose stated.

Latham C.J.

All the members of the court agree that the judgment of the Supreme Court should be set aside, but there is an equal division of opinion as to the order which this court should otherwise make upon the appeal. My brothers *Dixon* and *McTiernan* are of opinion that this court should enter judgment for the plaintiff for £250. My brother *Starke* and myself are of opinion that the case should be remitted to the learned trial judge for him to make findings of fact and to give judgment in accordance with those findings. We are all agreed that, in the circumstances, the result is that the appeal should be allowed with costs and the case remitted to the learned trial judge, who will have power to deal with the whole matter, including all questions as to costs of proceedings in the Supreme Court.

STARKE J. This action was brought under the *Wrongs Act* 1936 (S.A.) by the parents of Alfred John Henwood in respect of the death of their son as the result of an accident on a tram belonging to the defendant, the Municipal Tramways Trust.

The deceased was a passenger on a large drop-centre tram from Adelaide to Fullarton. On the way out of Adelaide the tram was running along Wakefield Street, where overhead wires supplying the power are supported by steel standards placed in the centre of the street. The evidence suggested that the deceased was overcome by nausea. He left his seat in the centre compartment and went to the rear gangway, where he leaned out over a guard rail on the off side. Whilst in that position his head came into contact with one of the steel standards. He was stunned and fell forward over the guard rail. Before the tram could be stopped he was struck again by another standard. He never recovered consciousness, and died. The standards were erected in the streets by the defendant pursuant to its powers under the *Municipal Tramways Act* 1906.

The clearance between the type of tram in which the deceased was travelling and the steel standards was only seventeen inches, and there was a guard rail on the tram thirty-nine inches from the floor of the gangway to the bottom of the guard rail and forty-one and one-half inches to the top of the rail. Notices had been placed in the tram plainly visible to passengers warning them not to lean over the guard rail. Further, the defendant, acting or purporting to act in pursuance of its Act, sec. 74, had made a by-law in the following terms : " No passenger shall project or lean his head or other portion of his body or limbs out of any window in any tram or outside the barrier on the off side of the open portion of any tram. Penalty £5."

The evidence does not disclose whether the deceased knew of the by-law, but his ignorance of it would not protect him from its penal consequences. Evidence was given that somewhat similar accidents had previously happened on the defendant's trams, but the evidence adduced rather suggests that the passengers themselves were more or less in fault. However, at an inquest on one of these passengers the City Coroner expressed the hope that the defendant would seriously consider more effective protection to passengers against accidents of the nature referred to. Since the accident the defendant has adopted a more effective guard for drop-centre trams in the form of a double rail. The top of the upper rail is four feet four inches and the bottom of the lower rail is three feet five and a half inches from the floor of the gangway. It is apparently effective in practice.

The defendant is not an insurer of its passengers but is bound to exercise care and forethought for securing their safety. Passengers are entitled " to reasonably safe provision for their safety, not only as regards the construction of the carriage itself, but as regards its safety in relation to other appliances . . . in connection with which it is intended to be used " (*Pollock* on *Torts*, 10th ed. (1916), p. 537 ; *Readhead* v. *Midland Railway Co.* (1) ; *Foulkes* v. *Metropolitan District Railway Co.* (2)). " The duty of a carrier of passengers," said *Blackburn* J. in *McCawley* v. *Furness Railway Co.* (3), " is to take reasonable care of a passenger, so as not to expose him to danger, and if they negligently expose him to

(1) (1869) L.R. 4 Q.B. 379.
(2) (1880) 5 C.P.D. 157.
(3) (1873) L.R. 8 Q.B. 57, at p. 59.

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danger, and he is killed . . . they would certainly be liable to the relatives of the deceased in damages." In short the duty of a carrier of passengers is to carry them safely so far as reasonable care can do it. *Indermaur* v. *Dames* (1), and cases of that type, were relied upon in argument. But those cases have no bearing upon the present case, for the duty stated in them arises out of the occupation or possession of property (Cf. *R.* v. *Broad* (2); *Municipal Tramways Trust Act* 1906, sec. 35). Here it arises from the carrying of the deceased as a passenger. It may be that the result in this case would not be different, but it is unnecessary to discuss the question. The learned trial judge said that if he could hold that the duty of the defendant to use reasonable care to carry its passengers was unqualified by any term or stipulation imported into the contract or by any legal duty imposed upon the passengers he would be disposed to find that there had been a breach of that duty. But he held that the by-law afforded a conclusive answer to the plaintiffs' claim. "Can it be held," said the learned judge, "that the invitation to use the trams extended to a manner of use which was illegal, or that the passenger was acting with a due regard for his own safety when his act was an offence? I think not." Again:—"Passengers must be taken to be cognizant of the law which regulates their conduct upon the trams, and to contract upon that basis." "But lastly," citing *R.* v. *Broad* (3), "if it was (the passenger's) legal duty (not to lean over the barrier) and if by voluntarily (leaning over) he met his death he would be no less the author of his own injury than if his breach of duty had been a breach of a common-law duty to do whatever was reasonably careful and not a breach of a prescribed duty (not to do) a particular thing."

The by-law was not challenged, and I see no reason why this court should not therefore assume its validity for the purposes of the case. In my opinion, the question is whether the prohibition contained in the by-law is imposed as a duty for the protection of the trust or really as a matter of policy for the protection generally of the travelling public. As was said in the converse class of case,

(1) (1866) L.R. 1 C.P. 274; (1867) L.R. 2 C.P. 311.

(2) (1915) A.C., at p. 1116.

(3) (1915) A.C., at p. 1120.

much must depend on the purview of the by-law and the language employed (Cf. *Atkinson* v. *Newcastle Waterworks Co.* (1)). The manifest purpose of the by-law is to prohibit acts that are or are regarded as dangerous or careless acts on the part of passengers. It is a punitive provision. It does not in so many words relieve or purport to relieve, and perhaps could not directly relieve, the tramways trust of the consequences of its own negligent or wrongful acts. Nor does it, in express words, deprive passengers of their civil rights against the trust in case of a breach of its duty to exercise care and forethought for securing their safety. All that can be inferred from the terms of the by-law is that it prohibits certain acts and provides a specific penalty. It no doubt creates a duty but not a duty upon which the trust can found any right of action or any conclusive defence for breach of any duty which it owed to the deceased. The only remedy for the breach of the by-law is the sanction imposed by the by-law itself (Cf. *Street, Foundations of Legal Liability* (1906), vol. I., " Tort," pp. 172 et seq., where a full citation of American cases may be found ; *Canning* v. *The King* (2)).

The by-law is not conclusive of the matter, though its contravention in relevant circumstances would afford evidence of a want of reasonable care and caution on the part of a person who so acted. The case for the plaintiffs rests, therefore, upon the application of the principles of the law relating to negligence to the facts of the case. As already stated, the learned judge has not explicitly found negligence on the part of the tramways trust but only that he was disposed to do so if the by-law were not conclusive. In my opinion, there was evidence of negligence on the part of the trust fit for the consideration of the learned judge. Its duty was to use the care and skill that a prudent person or authority would have used in all the circumstances. It cannot regulate its duty on the assumption that careful people only will be met with on its trams. It must take into consideration that not only careful but careless people use its trams, that aged and infirm persons use them, that children use them, and so forth. Now, its steel standards were in dangerous proximity to the tram rails and the trams running thereon, and despite the warning notices in the trams it may well

(1) (1877) 2 Ex. D. 441.

(2) (1924) N.Z.L.R. 118.

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be found that the warning notices and the guard rail were not a reasonably sufficient protection for passengers who were incautious or were overcome by sickness or some other emergency. And, in my opinion, there was also evidence of contributory negligence on the part of the deceased fit for the consideration of the learned judge apart from the by-law altogether and in the contravention of the by-law itself. The learned judge did not consider this question, because he held that the by-law was a conclusive answer to the action. Whether the deceased was guilty of contributory negligence is a question of fact which must be determined upon a consideration of all the circumstances of the case (*Cashmore* v. *Chief Commissioner for Railways and Tramways (N.S.W.)* (1)). Did the deceased act without ordinary care and caution, having regard to his sickness, which may have rendered him insensible to or forgetful of his own danger ? And there may be other facts and considerations which would also appeal to a judge of facts (Cf. *King* v. *Victorian Railways Commissioners* (2)). The so-called doctrine of the " last chance " or " opportunity " seems inapplicable to this case, for the acts or omissions of the deceased and the tramways trust appear to be contemporaneous (*Swadling* v. *Cooper* (3)). The ultimate question in this case is really one of fact and resolves itself into an inquiry whether the substantial or efficient or decisive cause of the accident was (1) want of proper care and forethought on the part of the trust, or (2) want of proper care and caution on the part of the deceased, or (3) want of proper care and caution and forethought on the part of both combined so that both the trust and the deceased are substantially to blame for the accident. In cases 2 and 3 the plaintiffs cannot recover (*Swadling* v. *Cooper* (3) ; *M'Lean* v. *Bell* (4) ; *The Bernina* (5), per *Lindley* L.J. ; *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (6), per Lord *Shaw*).

The passage from *R.* v. *Broad* (7) which was cited by the learned trial judge certainly creates difficulty. The observations are based, I think, upon the construction given to the by-law there in question.

(1) (1915) 20 C.L.R. 1.
(2) (1892) 18 V.L.R. 250 ; 13 A.L.T. 293.
(3) (1931) A.C. 1.
(4) (1932) 48 T.L.R. 467.
(5) (1887) 12 P.D. 36, at p. 89.
(6) (1918) A.C. 350, at p. 369.
(7) (1915) A.C., at p. 1120.

It imposed a duty upon the deceased in favour of the railway authority. It must be accepted that the construction put upon that by-law was correct, whatever meaning one might have been disposed to give it but for the decision. But this court is not bound to construe the by-law in the present case in the same sense. Each case must rest upon the particular statute or by-law and the language employed.

The result is that the appeal should be allowed, but this court should not make any affirmative finding of fact. The case should go back for further consideration by the learned judge on the evidence as it stands. He is in a much better position than this court to arrive at a proper and just conclusion.

DIXON AND MCTIERNAN JJ. We shall first consider this case apart from the effect of the statutory by-law. The injury bringing about the deceased's death was sustained by him because, when he leaned over the rail to vomit, the moving tram-car brought his head into contact with the post or standard carrying the overhead wires. Should the constructional design of the tram and tramway which made this possible be treated as a condition of the premises occupied by the defendant trust in respect of which they owed a duty to persons like the deceased coming upon them as passengers ? If so, the measure of the primary duty of the trust to him would depend upon the description which he filled among the well-known classification of persons coming upon the premises of another. As he paid his fare as a passenger, we should suppose that a contractual relationship existed between him and the trust. Thus, in respect of the state of the premises, he would be entitled to expect that they should be as safe as reasonable care and skill could make them. But we are disposed to think that the liability of the trust for such a thing as befell the deceased should be determined, not by the rules governing the responsibility of the occupiers of structures or premises in respect of their unsafe condition when a stranger coming upon them is hurt, but by the legal duty resting upon a carrier of passengers to exercise due diligence to carry them safely.

It has long been settled that a carrier of passengers incurs no higher responsibility than that of exercising reasonable skill and

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care for the purpose of carrying them safely and securely. A high degree of precaution is necessary before, in such a matter, the standard of reasonable skill and prudence is attained. But carriers of passengers, even if by statute they be common carriers, do not insure safety, and their duty in respect of the transportation of passengers is measured by no exceptional rule.

As we read the reasons given by *Napier* J. for the judgment under appeal, his Honour was prepared to find that the defendant trust had not discharged its duty defined in this manner. That is to say, if all that is to be considered is whether the defendant trust took reasonable care to avoid inflicting upon passengers injury of the kind suffered by the deceased, the learned judge was disposed to answer that it did not. It may, perhaps, be open to doubt whether, in expressing this view, his Honour took into account the notices in the tram-cars warning passengers of the danger, treating them simply as a precaution, that is, a circumstance relevant to negligence; but we do not think that his Honour excluded the warning for this purpose. In any case, we are of opinion that the danger to passengers who lean out or project any part of their bodies is so serious and, among the many carried, the likelihood of a passenger doing so instinctively, or impulsively, or forgetfully, or as a result of illness or other physical condition, is high enough to make mere warning insufficient to discharge the duty of care.

The adequacy of the notice, as a warning, has been found in favour of the defendant trust; it has been found that the defendant trust did what was reasonably necessary to ensure that passengers were apprised of the danger and instructed how to avoid it. There is no finding that, in acting as he did, the deceased was guilty in fact of contributory negligence. That is to say, it is not found that in reference to his own safety his behaviour was not that of a reasonable man in the circumstances. Accepting the view that without fault on his part the deceased was overcome by sickness, it would not be easy to find contributory negligence affording an answer to the defendant's primary neglect to take precautions to prevent part of the body of a passenger coming into contact with a standard. The very thing against which the precautions must be taken is the projection by a passenger of his head or limbs.

For these reasons we think that, if the case be considered apart from the by-law, the plaintiffs should succeed. *Napier* J. was of opinion that the by-law afforded a conclusive answer to the plaintiffs' claim, and it appears to us that the case depends altogether upon the effect of the by-law.

The by-law was made by the trust in 1920. Its powers to make by-laws are defined by a list of subjects. The relevant portion consists in the concluding words of one head of power, viz., " generally for regulating passenger traffic," and perhaps in another head, viz., " to make by-laws generally as to such matters for carrying out the purposes of the Act as in the opinion of the trust might conveniently be made the subject of a by-law " (See sec. 74 of the *Municipal Tramways Trust Act* 1906).

The by-law which has defeated the plaintiffs' cause of action is framed in the form of a penal provision :—" No person shall project or lean his head or other portion of his body or limbs out of any window in any tram, or outside the barrier on the off side of the open portion of any tram. Penalty £5."

The prohibition is absolute and unqualified, and, although upon ordinary principles a conscious act of volition is necessary to a breach, yet it is difficult to see why the act of the deceased did not offend against the by-law. Further, the direct and immediate cause of his injury was the act which is penalized. The by-law, made as it is under a statutory power, has the force of law.

Here then is an injury brought about by the combination of two things. On the one side, there is on the tramway a state or arrangement of standards, and, on the tram-car, insufficiently guarded gangways or openings, together constituting a source of danger to the passengers carried because a passenger may project part of his body and receive a blow from the standard. This is not consistent with reasonable care to avoid injury to passengers carried upon the tram-cars. On the other side, there is an act on the part of the passenger forbidden by law.

When the harm complained of is otherwise the proximate consequence of the defendant's negligence, is it a sufficient answer to the cause of action that, but for the illegal act of the party sustaining the injury, it would not have happened ? It is important to notice

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in the present case that, apart from the effect of the illegality, the injury is, as a matter of causation, occasioned by the defendant's negligence. In discussions of contributory negligence, there constantly recurs the tendency to describe the act of contributory negligence as the cause, or the real cause, of the damage and in doing so to treat the initial negligence of the defendant as excluded as a cause. In the same way, in the discussion of the question whether, if the plaintiff's illegal act contributes to his injury, he cannot recover for the defendant's negligence, there is a tendency to treat the illegality as affecting the causation.

The existence of the rule of law making contributory negligence a defence is justified or explained by some on the ground that, once an act or omission on the part of the plaintiff contributing to his injury is found to exhibit a want of reasonable care, then from the standpoint of the law that act is to be fixed upon as the cause, or the real cause, of the occurrence. As an hypothesis the adoption of this explanation by those to whom it commends itself is not a matter of practical significance. In the same way, if it be the law that a plaintiff whose unlawful act contributes to the hurt of which he complains cannot recover, there can be little or no objection to explaining the legal phenomenon on the ground that the law fixes on the illegality as for its purposes the cause or real cause. But it is necessary to remember that the explanation means no more than that the law which affixes the quality of negligence to the one act done by the plaintiff or of illegality to the other act done by him, also affixes to it a potency in causation or a causal exclusiveness which, considered as matter of fact, does not belong to it. This is well brought out by the facts of a case such as the present. For the position in which the standards are placed and the manner in which the gangway is left unfenced, on the one hand, and, on the other hand, the act of the deceased in leaning over the rail would be no less and no more causes of the deceased's injury if the act of the deceased were found negligent, or if it were found not to be negligent, and if the by-law were valid, or if it were invalid.

Another feature of the present case that demands notice is the direct connection between the illegal act and the injury. Little or no English authority is to be found upon the illegality of a plaintiff's

own conduct as a disqualification from recovery for tort. But there is much case law upon the subject in the United States, and from it the directness of the connection between the illegality and the injury seems to have emerged as the *discrimen* more generally adopted. If the immediate cause of the injury is the unlawful act of the plaintiff, he cannot recover; but, if the unlawful act does no more than create a prior state of affairs upon which the defendant's negligence operates, he may recover. In Massachusetts the rule against recovery by a plaintiff himself acting unlawfully was carried to great extremes in the application of a law forbidding the driving of vehicles on Sunday. The decisions were not all consistent, but, for the most part, the plaintiff was held to have suffered no actionable wrong where, but for his driving on Sunday, the injury would not have occurred. Thus, a plaintiff who was injured by a defective highway was held disentitled to recover from the highway authority, because the injury arose from his driving upon the highway on Sunday (*Bosworth* v. *Swansey* (1)). A plaintiff who had ridden his horse on Sunday and tied it up at the edge of the road was held disentitled to recover from a defendant who negligently drove into the standing horse (*Lyons* v. *Desotelle* (2)). These decisions have been disapproved in other States, but a learned writer has supported the first, though denying the correctness of the second:—"In *Bosworth* v. *Swansey* (1), as has been seen, the defendant's negligent act served only to create a dangerous passive condition; the plaintiff's unlawful act of driving was the active agency which finally produced the result. In *Lyons* v. *Desotelle* (2), on the other hand, the unlawful act served only to create a passive antecedent condition, from which damage could result only when some further act was done. Thus it would appear that the unlawful act of driving to the place where the horse was hitched was but a remote cause, whereas the defendant's act of driving negligently was the efficient immediate cause" (*Harold S. Davis, Harvard Law Review*, vol. 18, at p. 513). This serves to illustrate the point of distinction adopted. The doctrine which he maintains is that, if the plaintiff's unlawful act does no more than create a condition upon which the defendant's wrongful

(1) (1845) 10 Met. (Mass.) 363.

(2) (1878) 124 Mass. 387.

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act intervenes or forms with the defendant's wrongful act a combination of agencies simultaneously operating to produce the injury, the plaintiff may recover. But, if the defendant's wrongful act creates a dangerous antecedent condition and the plaintiff's unlawful act is that from which by reason of this dangerous condition damage results, the plaintiff cannot complain.

In the present case the act constituting the breach of the by-law is not only an indispensable condition of the resulting injury, but it is the final act which produces it. The tram-car is rapidly moving with the posts alongside, and the passenger in that condition by leaning over completes the conditions necessary to cause the injury.

In *Canning* v. *The King* (1) *Salmond* J. lays down a further condition which is also fulfilled. The condition is that a purpose of the statute broken by the plaintiff must have been to prevent the kind of accident which actually occurred.

We wish to make it clear that the facts of the present case fulfil the conditions which we have mentioned because, notwithstanding that they do so, we have formed the opinion that breach of the by-law on the part of the deceased does not disable the plaintiff from recovering in respect of his death. We do not think that, in the absence of English authority requiring us to do so, we ought to adopt as part of the law of torts a general principle that, if the damage suffered by the plaintiff has been directly brought about by an act of his which is unlawful, he can never complain of a wrongful or negligent act or omission on the part of the defendant from which the damage otherwise flows as a reasonable and probable consequence. It appears to us that in every case the question must be whether it is part of the purpose of the law against which the plaintiff has offended to disentitle a person doing the prohibited act from complaining of the other party's neglect or default, without which his own act would not have resulted in injury. The condition proposed by Sir *John Salmond* in the case cited does not go so far as this, although it goes in the same direction. According to his view, it is enough that the penal provision had for its purpose the prevention of the kind of accident that happened. He treats such a statute as

(1) (1924) N.Z.L.R. 118; (1923) G.L.R. (N.Z.) 595.

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. 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 (*Blamires* v. *Lancashire and Yorkshire Railway Co.* (1)). 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* (2)). 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 penalized. 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. In the same way, we think that, unless the statute so intends, no penal provision should receive an operation which deprives a person offending against it of a private right of action which in the absence of such a statutory provision would accrue to him.

In a mechanical age there are many provisions made by or under the authority of statute regulating in their own interests the conduct of persons pursuing occupations or activities attended with danger. Probably the last thing intended by the framers of such legislation or subordinate legislation is that a failure on the part of such a person to observe a specified precaution, although penalized, shall result in absolving from civil liability to him another person whose negligence is a cause of the disaster. If a traffic law, as a precaution

(1) (1873) L.R. 8 Ex. 283, at p. 289.

(2) (1934) A.C. 1.

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against street accidents, penalizes an owner of a motor car who permits an unlicensed person to drive it, should the provision be understood to intend that such an owner may not recover damages if he or his car is injured in a street accident through the negligence or unskilfulness of an unlicensed driver to whom he has entrusted the car? If a regulation as to hoists and scaffolding were to forbid anyone to stand beneath a lifting hoist, does it *ipso facto* or *ipso jure* relieve a master who provides defective tackle from liability in damages to a servant who in breach of the regulation is beneath the hoist when the tackle fails? In each example it may have been the legislative intention to disqualify the person offending from complaining of an injury to which he contributed by acting in breach of the regulation. If so, the intention is operative. But it may have been intended to do no more than add another expedient to lessen the risk of accident. Whichever be the intention, the same result would ensue if a general rule be adopted by which no one can complain of an injury although brought about by the negligence of the defendant if the injury was also the consequence of the plaintiff's own breach of a statutory provision introduced for the purpose of lessening the risk of such an accident. This appears to us to be unsound. It involves a corollary to the established rule that the contributory negligence of the plaintiff affords an answer to a cause of action based upon the defendant's negligence unless, notwithstanding the plaintiff's negligence, the peril might have been further avoided by the exercise of reasonable care on the part of the defendant. One statement of the corollary would be that the failure to observe any precaution required by or under statute amounts to contributory negligence, or has the same legal consequence. In our opinion, neither recognized principle nor English authority requires the adoption of such doctrine. It is true that part of the substantive law of contracts invalidates agreements to do an illegal act or to achieve an illegal purpose. When an act or purpose is made unlawful by statute it at once follows that contracts involving the doing of the act or tending to effect the unlawful end are invalidated. But there is no rule denying to a person who is doing an unlawful thing the protection of the general law imposing upon others duties of care for his safety. As the consideration the subject has received in America and by Sir *John*

Salmond shows, the question cannot be whether the plaintiff was engaged in an illegal act when he was injured, or would not have been injured but for the commission of the illegality. If through the negligence of the occupier of premises fronting a street a verandah roof falls upon those standing upon the footpath, as in *Hoyts Pty. Ltd.* v. *O'Connor* (1), it cannot be an answer to the complaint of a person so injured that but for his loitering upon the footpath beneath in violation of a municipal by-law or other police provision he would not have been hurt. But when it is seen that the question is narrowed to the consideration of the effect of non-compliance with some provision made by or under statute for the purpose of minimizing such dangers as that from which the harm was sustained, then it appears to us that sound principle remits the inquiry to the actual intention of the provision.

It may be that, in ascertaining whether it is the intention of a given statutory provision to make the doing of the act penalized conclusive of contributory negligence or a ground of disqualifying the offender from recovering for negligence or other tort, the court should pursue the methods of interpretation which have been followed in some of the decided cases where an intention has been found in a penal statutory provision to give a private remedy in damages for breach of the duty it imposes. In *Martin* v. *Western District of the Australasian Coal and Shale Employees' Federation* (2) and in *Whittaker* v. *Rozelle Wood Products Ltd.* (3) *Jordan* C.J. collected and discussed the authorities upon the latter question, and in *O'Connor* v. *S. P. Bray Ltd.* (4) it received some consideration in this court, and we shall not repeat what was there said (5). We think that it would be a matter for regret if the courts carried into another field depending on statutory interpretation, although perhaps a neighbouring field, such a method of discovering in a penal provision an intention to affect private rights.

In the present case, however, the nature of the by-law and of the power under which it was made supply considerations which make this question irrelevant. These considerations not only

(1) (1928) 40 C.L.R. 566.
(2) (1934) 34 S.R. (N.S.W.) 593, at pp. 596 et seq.
(3) (1936) 36 S.R. (N.S.W.) 204, at pp. 207 et seq.
(4) (1937) 56 C.L.R. 464.
(5) (1937) 56 C.L.R., at pp. 477-479.

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afford a very good example of the difference between taking legislative intention as a criterion and adopting some positive rule as part of the law of torts or of contributory negligence. For we venture to think that the question may be seen in its true light if it is supposed that, instead of making it an offence for a passenger to project his head, the by-law had in terms provided that the negligence of the trust should not be actionable if to the injury caused by that negligence the party had directly contributed by projecting his head from a moving tram. The power of the trust would not extend to the making of such a by-law. It may be true that the trust is not expressly made by statute a common carrier of passengers. The considerations which led the Supreme Court of Victoria in *Weir's Case* (1) to deny to the Victorian Railways Commissioners power to make a by-law limiting their liability to passengers do not directly apply, at all events in their entirety. But it could scarcely be supposed that under the limited subjects of power we have mentioned the trust could validly prescribe and delimit by by-law the grounds of its civil liability to passengers. It is not a question of defining in the by-law the terms of the contract of carriage which the trust offers to intending passengers. The question what terms may be imposed by public carriers as conditions of a contract of carriage has engaged the attention of courts and legislatures in many common-law jurisdictions. But to limit liability in this manner, it is not enough for a carrier to make valid regulations : he must show that the passenger gave his assent to the terms so as to make them conditions of the contract of carriage.

The trust has proceeded by direct regulation, not by contract. If a by-law had expressly provided that the trust should incur no liability to a passenger projecting his head from a tram-car, we think that the by-law would have been beyond the powers of the trust. By confining its by-law to penalizing a passenger who projected his head or other portion of his body out of the window or outside the barrier on the off side, the trust kept within its by-law-making powers. But the reason why the by-law is valid is that it regulates the conduct of passengers, a thing which falls within the subject of passenger traffic. To prescribe what the passengers shall

(1) (1919) V.L.R. 454 ; 41 A.L.T. 7

or shall not do in the use of a tram-car is something altogether different from attempting to affect the trust's liability to the passenger in any given state of circumstances. An intention to do the latter is not, in our opinion, discoverable in the by-law and ought not to be ascribed to it.

It will be seen that the subordinate nature of the legislation which in the present case penalizes the failure to observe the precaution prescribed makes it at once necessary and comparatively easy to distinguish between the intention to affect civil liability and the intention to forbid a particular act involving danger. But we think that in all legislative provisions, whether made under a subordinate or a plenary authority, the distinction must be made, because it governs the question whether a penal provision operates to give an affirmative defence or answer to a liability otherwise actionable.

It is, perhaps, desirable to point out that there are many other grounds upon which a plaintiff in an action of negligence may be defeated when he has contributed to his own injury by an act which is forbidden by law or is wrongful. In many, if not in most, cases the illegal act will be found also to amount to a failure to take reasonable care for the plaintiff's own safety and on that simple ground it will constitute contributory negligence. In some cases the illegal act will be the substantial or real cause of the damage suffered and the alleged negligence of the defendant will turn out to be too remote a cause or no cause at all. Further, many duties arise only out of relations which could not subsist when one of the parties is a wrong-doer or is engaged in an illegality. This is exemplified in the judgment of *Scrutton* L.J. in *Hillen* v. *I.C.I.* (*Alkali*) *Ltd.* (1):—"A owns a house to which his confederates, B and C, bring smuggled kegs of brandy, to be lowered into A's cellar by a rope which A knows to be defective. It breaks and injures B waiting in the cellar for the keg. It seems to me clear that B could not sue A for not warning him of the trap in the rope, under the authority of *Indermaur* v. *Dames* (2), because the whole transaction is known by each party to be illegal, and there is no contribution or indemnity between joint wrong-doers. Though it would also be

(1) (1934) 1 K.B. 455, at p. 467; affirmed, (1936) A.C. 65.
(2) (1866) L.R. 1 C.P. 274.

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true, as suggested, that a burglar could not sue the house owner for a defect in the staircase known to the householder but not to the burglar, and a cat burglar could not sue the house owner for non-disclosure of the added risk of a defect in the water-pipe up which he was climbing, but which he did not know of, these analogies, though amusing, do not help, as there was no invitation bringing the burglar on the premises or common interest between house owner and burglar raising reciprocal duties."

In his reasons for the judgment under appeal, *Napier* J. relies upon the case cited in support of his view that the trust's invitation to use the tram-car did not extend to a manner of use which was illegal, that is, under the by-law. We think that the obligation of the trust was to exercise due care for the safety of passengers from dangers likely to arise out of the ordinary use of the tram which might reasonably be expected and that the case should not be treated as one where the danger consists in defective premises or a dangerous structure. The liability of the trust cannot, in our opinion, be determined simply by regarding its liability as that of an invitor and then by limiting the invitation according to the prohibition contained in the by-law. We realize that the further conclusion which his Honour expresses in the same passage, viz., that the passenger cannot be held to have been acting with a due regard for his own safety when his act was an offence, can claim the support of weighty opinion. The nature of that opinion will be found from a perusal of the paper of *H. S. Davis* to which we have referred and the judgment of Sir *John Salmond* in *Canning's Case* (1); see also *Pollock's Torts*, 7th ed. (1904), p. 173; Dr. *Winfield's Text-book of the Law of Tort* (1937), p. 44. Of English judicial authority, we think the passage from *Broad's Case* (2), cited by Sir *John Salmond* (3), is alone directly in point, and this passage, which, in any case, forms no part of the decision, may well mean no more than that Lord *Sumner* interpreted the particular provision there under consideration as meaning to constitute failure to stop at the level crossing contributory negligence. The Supreme Court of the United States has rejected the view adopted in Massachusetts and other

(1) (1924) N.Z.L.R. 118; (1923) G.L.R. (N.Z.) 595.
(2) (1915) A.C., at p. 1120.
(3) (1924) N.Z.L.R., at pp. 124, 125; (1923) G.L.R. (N.Z.), at p. 597.

State jurisdictions that a plaintiff is disqualified from recovering if his own illegal act has contributed to the injury (*Philadelphia R.R.* v. *Philadelphia Towboat Co.* (1)).

In our opinion the true inquiry is whether it is the intention of the statute penalizing the particular conduct to affect civil responsibility. In the present case such an intention appears to us to be absent.

We think the appeal should be allowed: the judgment of the Supreme Court should be discharged and judgment in the action be entered for the plaintiffs for £250, the damages contingently assessed by the Supreme Court.

The plaintiffs sued as poor persons under Act No. 2322 of South Australia. Sec. 6 authorizes the court to make an order for costs in favour of such persons, and we think the power should be exercised in the circumstances of the present case. Accordingly, in our view, judgment in the action should be entered for the plaintiffs with costs. They have not, apparently, prosecuted the appeal *in forma pauperis*, and the appeal should be allowed with costs.

Appeal allowed with costs. Judgment of Supreme Court set aside. Case remitted to Napier J.

Solicitor for the appellants, *F. G. Hicks.*

Solicitors for the respondent, *Thomson, Buttrose, Ross & Lewis.*

H. D. W.

(1) (1860) 64 U.S. 209; 16 Law. Ed. 433.