The Appropriate Judicial Response to Evidence of the Violation of a Criminal Statute in a Negligence Action

David E. Seidelson
The Appropriate Judicial Response to Evidence of the Violation of a Criminal Statute in a Negligence Action

David E. Seidelson*

Strange things happen when a court hearing a negligence action is confronted with evidence of violation of a criminal statute. Frequently, the court blurs the distinction between a purely common law negligence action and one predicated on such a statutory violation. Almost certainly the court will recognize that, assuming its applicability, the statute supplants the reasonable person standard as the criterion by which the defendant's conduct is to be judged. But beyond this point the court may generate an awkward amalgam of legislative intent and common law concepts in resolving such matters as factual cause and effect, proximate cause, and contributory negligence. Perhaps such confusion is a predictable consequence of a court's determination that a criminal statute not explicitly creating any private cause of action may nevertheless serve as the basis for recovery in a negligence action. Given this basic (and, I believe, entirely appropriate) determination, the court must, to some extent, accommodate both the legislative in-

* Lyle T. Alverson Professor of Law, George Washington University.
1. See text at note 18.
2. See text at note 10.
3. See text at note 64.
4. There are, I believe, two basic justifications for permitting an applicable criminal statute to serve as the basis for recovery in a negligence action. First, such use does not impose upon the defendant any new burden of conduct since the defendant was under a pre-existing obligation to comply with the criminal statute. Second, because the defendant was required to comply, the plaintiff had a right to rely on such compliance. Applying the criminal statute in the negligence action vindicates the plaintiff's reliance.
tention underlying the criminal statute and judicial concepts of a legally sufficient case. In striking this accommodation the court often goes awry, and usually in the direction of diminishing the significance of legislative intent and enhancing common law principles. The court's apparent confusion is by no means a recent phenomenon. It was manifested in one of the earliest and best known negligence cases in which recovery was predicated on the defendant's violation of a criminal statute.

In Osborne v McMasters, plaintiff brought a wrongful death action against defendant, the proprietor of a drug store, alleging that, because of the failure of defendant's clerk to affix a poison label to a product sold to plaintiff's intestate, she ingested the material, unaware of its toxicity. The failure to affix a poison label to the product violated a criminal statute. In affirming judgment for the plaintiff, the court wrote:

The present is a common-law action, the gist of which is defendant's negligence, resulting in the death of plaintiff's intestate. Negligence is the breach of legal duty. It is immaterial whether the duty is one imposed by the rule of common law requiring the exercise of ordinary care not to injure another, or is imposed by a statute designed for the protection of others. The only difference is that in the one case the measure of legal duty is to be determined upon common-law principles, while in the other the statute fixes it, so that the violation of the statute constitutes conclusive evidence of negligence, or, in other words, negligence per se.

The court stated that

The action in the latter case is not a statutory one, nor does the statute give the right of action in any other sense, except that it makes an act negligent which otherwise might not be such, or at least only evidence of negligence.

I have no quarrel with the conclusion achieved by the court, its affirmance of the judgment for plaintiff, or with much of the above quoted language. Indeed, much of the language is notable for its precision and even elegance in a late-nineteenth century manner.

But portions of that language do disturb me. I think it is not

5. 40 Minn 103, 41 NW 543 (1889).
6. Osborne, 41 NW at 543. It is immaterial for present purposes whether section 329 of the Penal Code or section 14, c. 147, Laws 1885, or both, are still in force, and constitute the law governing this case. The requirements of both statutes are substantially the same, and the sole object of both is to protect the public against the dangerous qualities of poison. Id.
7. Osborne, 41 NW at 543-44.
8. Id at 544.
accurate to assert that "[t]he only difference"9 between a negligence action predicated on violation of a criminal statute and an action based on common law negligence is that, in the former case, the statute defines the standard of care. It does this, of course; but it does a great deal more. In such an action, I believe that the criminal statute, once deemed applicable by the court, determines not only the standard of care but also those to whom the duty to act in that manner is owed, the perils to be avoided by compliance with the duty, and that the statutory violation was a proximate cause of the victim's injury. Paradoxically, the court, earlier on in its opinion, wrote:

[W]here a statute . . . imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty, he is liable to those for whose protection or benefit it was imposed for any injuries of the character which the statute . . . was designed to prevent, and which were proximately caused by such neglect.10

This language implies, consistently with my own view, that the statute determines the class of persons intended to be protected and the perils from which they are intended to be protected. Simultaneously, however, the language suggests that, even if the victim was within the class of persons intended to be protected by the statute and even if the peril that occasioned the victim's injury was one the statute was intended to protect against, there remains the additional question of whether the defendant's violation was a proximate cause of the victim's injury. This, I think, cannot be correct.

The last quoted excerpt indicates that, in determining the applicability of a criminal statute to a particular negligence action, the court must decide whether (1) the victim was within the class intended to be protected by the statute, (2) the peril that occasioned the injury was one from which the statute was intended to protect, and (3) the statutory violation was a proximate cause of the victim's injury. The first two requirements are, I think, entirely appropriate. The third requirement, however, strikes me as being superfluous and, worse yet, potentially confusing. To put it another way, I believe that if the court asks and answers the first two questions intelligently, the proximate cause issue will necessarily be resolved. To require the third question to be answered independently may be to send the court on a fool's errand. As is often the

9. Id.
10. Id at 543.
case with such a chore, the results may be more harmful than helpful.

Why do I say this? Let’s consider a negligence action not involving any statutory violation. In order to make a legally sufficient case, the plaintiff must present evidence indicating (1) negligence attributable to the defendant, (2) a legally cognizable injury sustained by the plaintiff, (3) a factual cause and effect relationship between that negligence and such injury, and (4) that the negligence was a proximate cause of the injury. In determining the legal sufficiency of the proximate cause issue, the court, whatever verbalization it may employ, is likely to resolve the following questions: (1) could a reasonable jury find that defendant's negligence created a reasonably foreseeable risk of injury of any kind to this victim? And (2) could a reasonable jury find that the manner of injury that occurred was within the general manner of injury reasonably foreseeable as a result of defendant's negligence? If both of these questions are resolved affirmatively, the proximate cause issue will be deemed legally sufficient.

There is an obvious and striking similarity between these two proximate cause questions and the first two questions suggested by Osborne for determining the applicability of a criminal statute to a particular negligence action. Each set contains a “who” and a “what” question. In the negligence action not involving a statutory violation, the two questions must be asked and answered from the perspective of a reasonable person in defendant's circumstances. After all, what is being resolved in the proximate cause issue is whether injury of any kind to this victim was reasonably foreseeable as a result of defendant's negligence and whether the manner of injury was within the general manner of injury reasonably foreseeable as a result of defendant's negligence. In the negligence action involving a criminal statute, the two questions must be asked and answered from the perspective of the legislature that enacted the statute. After all, what is being resolved is whether the victim was within the class of persons intended to be protected by the statute and whether the peril that occasioned the victim's injury was one intended to be protected from by the statute. Notwithstanding this difference in perspective, the two sets of questions are aimed at resolving similar issues: who was within the

---

threatened or protected class of persons and from what general manner of injury or peril were these persons intended to be protected? Since the questions in the negligence action not involving a statutory violation are aimed at resolving the proximate cause issue, the similar questions in the action involving a statutory violation must necessarily resolve the proximate cause issue. Therefore, in the latter situation, if the court determines that the victim was within the class intended to be protected by the criminal statute and that the peril that occasioned the victim’s injury was one intended to be protected from by the statute, and assuming a factual cause and effect relationship between violation and injury, separate judicial consideration of the proximate cause issue would be superfluous.

Consequently, I believe that a court hearing a negligence action and compelled to determine the applicability of a criminal statute should ask the following questions: (1) Was the victim within the class of persons intended to be protected by the statute? (2) Was the peril that occasioned the victim’s injury one from which the statute was intended to protect? (3) Was there a factual cause and effect relationship between the violation and the injury? If these three questions are answered affirmatively, the criminal statute should be deemed applicable.

Indeed, if the court asks and answers these three questions intelligently and affirmatively, the court will have determined affirmatively the existence of each of the legally essential elements of a negligence action: negligence attributable to the defendant, a legally cognizable injury sustained by the victim, a factual cause and effect relationship between negligence and injury, and proximate cause. With regard to negligence, “the statute fixes”13 the duty to be imposed on the defendant. Thus, evidence of defendant’s violation of the statute demonstrates negligence. Evidence that the peril that occasioned the victim’s injury was one intended to be protected against by the statute indicates that the injury is legally cognizable. Evidence of a factual cause and effect relationship between statutory violation and injury of course satisfies the third element. As for proximate cause, we have already seen that affirmative answers to the first two questions, the “who” and the “what” inquiries, demonstrate proximate cause. Consequently, when the court asks and answers the three critical questions for determining the applicability of the criminal statute to the negligence action

13. Osborne, 41 NW at 544.
before the court, it will have determined legal sufficiency as to each requisite element of the action.

Moreover, in asking and answering those three critical questions, the court will be performing a judicial function, determining legislative intent.\textsuperscript{14} Whom the legislature meant to protect, and from what perils the legislature intended to afford protection, are matters of legislative intent, an area typically reserved for the court.\textsuperscript{15} Similarly, I believe that in resolving the factual cause and effect relationship between statutory violation and injury, the court, to a large extent, will be determining legislative intent. The kind and nature of the factual nexus between violation and injury necessary to impose liability predicated on the statute seem to be intimately related to legislative intent.\textsuperscript{16} Therefore, the court's answers to the three questions are not properly subject to jury reconsideration, at least not beyond that made necessary by the court's conclusion with regard to factual cause and effect.\textsuperscript{17} Indeed, to permit the jury to reconsider those questions would be an abdication of judicial responsibility.

This does not mean, of course, that the jury has no role to play

\textsuperscript{14} E. J. Kionka, \textit{Torts in a Nutshell, Injuries to Persons and Property} 72-73 (West 1977).

When is the statute a relevant standard? The fundamental limitation is legislative purpose. The court must first find that the statute was intended, at least in part, to protect a class of persons which includes the plaintiff (or defendant, as the case may be) against the particular hazard and kind of harm which resulted. . . . If the legislature's standard is to be adopted, then the court must also adopt the limits of the purpose for which the statute was intended, for those are presumably the limits of its validity. . . . Legislative purpose is, of course, whatever the courts say it is, and their predilections vary.


The avowed purpose of statutory interpretation is to reach a result consonant with "legislative intention." But most situations present questions of genuine doubt as to what the legislature may have intended. Frequently, too, it is obvious that the non-nomniscient legislature did not specifically anticipate, nor provide for, the situation that subsequently arose.

The court cannot call on the legislature for an advisory opinion as to what it meant. The court must decide for itself what the legislature must have meant, or would have meant had it been confronted with the issue presented for judicial decision.

\textsuperscript{16} See text at note 18.

\textsuperscript{17} Id.
in such an action. When the court asks and answers the three questions, it must do so accepting as true the plaintiff’s evidence, as the jury may. But the jury may not accept the plaintiff’s evidence. For example, the jury may not accept the evidence of the plaintiff placing the victim within the class intended to be protected by the statute, or the evidence demonstrating that the peril that occasioned the victim’s injury was one intended to be protected against by the statute, or the evidence indicating that the factual cause and effect relationship deemed necessary by the court existed, or the evidence offered to prove that defendant violated the statute. These matters rest quite properly within the province of the jury, properly instructed by the court. The legislative intent underlying the criminal statute, however, is for judicial determination exclusively.

How does all of this apply to Osborne? Let’s assume that plaintiff presents evidence that Mrs. Osborne purchased the product from defendant and subsequently ingested it, unaware of its toxic quality. Plaintiff also presents evidence that defendant’s clerk failed to affix a poison label to the product and that such a label would have informed Mrs. Osborne of its toxic quality. Then plaintiff offers in evidence the criminal statute making it unlawful to sell such a product without affixing a poison label thereto. In determining whether the statute is applicable to this negligence action, the court should ask and answer three questions: was Mrs. Osborne within the class intended to be protected by the statute? Was the peril that occasioned her death one from which the statute was intended to protect? Was there a factual cause and effect relationship between the statutory violation and Mrs. Osborne’s death-producing injury?

Because Mrs. Osborne purchased and ingested the product unaware of its toxic quality, she certainly would have been within the class intended to be protected by the statute. Because her death was occasioned by her ingestion of the product, unaware of its toxic quality, the peril that occasioned her death was certainly one intended to be protected against by the statute. Moreover, plaintiff’s evidence that a poison label affixed to the product as required by the statute would have informed Mrs. Osborne of the toxic quality demonstrates a factual cause and effect relationship between statutory violation and injury. Once the court answers these three questions affirmatively, there is no remaining proximate cause issue. The affirmative answers to these questions compel an affirmative finding as to proximate cause. Moreover, these affirma-
tive answers compel the conclusion that plaintiff's case is legally sufficient with regard to each of the requisite elements. Consequently, plaintiff would be entitled to a jury instruction to the effect that, if the jury accepts the plaintiff's evidence, it must find for the plaintiff.

This does not mean, of course, that the defendant is precluded from presenting controverting evidence or that the jury may not accept that controverting evidence. For example, the defendant could present evidence that, at all relevant times, Mrs. Osborne had been aware of the toxic quality of the product. The court, unable to determine whether the jury will accept plaintiff's or defendant's evidence, must instruct the jury accordingly. We have already concluded that, if the jury accepts the plaintiff's evidence, it must find for the plaintiff. But suppose the jury accepts the defendant's evidence. How would that affect the applicability of the statute to this case?

If Mrs. Osborne had been aware of the toxic quality of the product at all relevant times, even absent a poison label affixed thereto, she would not have been a member of the class intended to be protected by the statute. This would compel the conclusion that the statute was not applicable to this case since, if any of the three critical questions is answered negatively, the statute is inapplicable. Moreover, if Mrs. Osborne had been aware of the toxic quality, the peril that occasioned her death, knowing ingestion of the poison, would not have been one of the perils intended to be protected against by the statute. Therefore, the second question, too, would require a negative answer. In addition, assuming Mrs. Osborne's knowledge of the toxic quality, there would have been no factual cause and effect relationship between statutory violation and injury. Thus the third question would require a negative answer. It becomes obvious that, if the jury accepts defendant's evidence, the jury should be instructed to disregard the criminal statute. Moreover, if plaintiff's evidence fails to generate any alternative theory of liability, the jury should be instructed that, if it accepts defendant's evidence, the jury should find for the defendant. This conclusion, like the earlier one instructing the jury to find for the plaintiff if it accepts the plaintiff's evidence, requires no separate consideration of proximate cause.

Let's fashion a wholly hypothetical spin-off of Osborne. Let's assume that plaintiff presents evidence that Mrs. Osborne, unaware of its toxic quality, purchased the product from defendant and subsequently placed the product on the kitchen table. Sometime
thereafter, her three-year-old daughter took the product from the kitchen table, ingested its contents and died. Mrs. Osborne testifies that, had she been aware of its toxic quality, she would not have left the product in a position where it was readily accessible to her daughter. Plaintiff presents evidence that defendant's clerk failed to affix a poison label to the product and that such an affixed label would have informed Mrs. Osborne of the toxic quality. Plaintiff then offers the criminal statute into evidence. Once again, to determine the applicability of the statute to this action, the court must answer the three questions. Was the illiterate child within the class intended to be protected by the statute? I think the answer must be yes. Although the child could not read and therefore would have been uninformed by the label, the label would have informed the mother who, thus informed, would not have left the product in a place readily accessible to the child. Was the peril that occasioned the child's death one from which the statute was intended to protect? Again, I think the answer must be yes. The peril that occasioned the death was the accessibility of the toxic product to the child, an accessibility resulting from the mother's ignorance of its toxic quality. That ignorance was intended to be eliminated by the statute. Was there a factual cause and effect relationship between statutory violation and injury? Plaintiff's evidence indicates an affirmative answer. Had the poison label been affixed, Mrs. Osborne would have been informed of the toxic quality and would not have permitted the product to be readily accessible to her daughter. Because all three questions have been answered affirmatively, the statute is applicable to the case. Once this determination is made based on the evidence presented by the plaintiff, there is no remaining proximate cause issue to be resolved. Plaintiff would be entitled to a jury instruction to the effect that, if the jury accepts the plaintiff's evidence, the jury must find for the plaintiff.

Again, this does not mean that the defendant is precluded from presenting controverting evidence or that the jury may not accept such controverting evidence. For example, the defendant could present evidence that, at all relevant times, Mrs. Osborne had been aware of the toxic quality of the product. The court, unable to determine whether the jury will accept plaintiff's or defendant's evidence, must instruct the jury accordingly. We have already concluded that, if the jury accepts the plaintiff's evidence, the jury must find for the plaintiff. But suppose the jury accepts the defendant's evidence. How should this affect the applicability of the statute to this case?
If Mrs. Osborne had been aware of the toxic quality of the product even absent a poison label affixed thereto, her three-year-old daughter would not have been within the class intended to be protected by the statute. The illiterate child's statutory right to be protected from her mother's ignorance would not have been implicated. This would compel the conclusion that the statute is not applicable to this case because, if any of the three questions is answered negatively, the statute is inapplicable. Once again, however, let's consider the other two questions for the sake of completeness. If Mrs. Osborne had been aware of the product's toxic quality, the peril that occasioned the child's death would not have been one intended to be protected against by the statute. It would have been the mother's informed conduct in leaving the product on the kitchen table that generated the death-producing peril. Therefore, the second question, too, would require a negative answer. Moreover, had Mrs. Osborne been aware of the toxic quality, there would have been no factual cause and effect relationship between the statutory violation and injury. All three questions would be answered negatively. It becomes apparent that, if the jury accepts the defendant's evidence, the jury should be instructed to disregard the now inapplicable criminal statute. Moreover, if plaintiff's evidence fails to generate any alternative theory of liability, the jury should be instructed that, if it accepts defendant's evidence, the jury must find for the defendant. And, once again, this conclusion, like the earlier one instructing the jury to find for the plaintiff if it accepts the plaintiff's evidence, requires no independent consideration of proximate cause.

Let's take another hypothetical spin-off of Osborne. Mrs. Osborne, unaware of the toxic quality of the product purchased from defendant, nevertheless places the product on the top shelf of the bathroom medicine cabinet between the iodine and a bottle of rubbing alcohol. Sometime thereafter, her three-year-old daughter climbs up on the toilet, from there to the sink, and then opens the cabinet, ingests the product and dies. In the ensuing wrongful death action, Mrs. Osborne testifies that defendant's clerk failed to affix a poison label to the product and that, had such a label been affixed, it would have informed Mrs. Osborne of the product's toxic quality. Plaintiff then offers the criminal statute. Is it applicable to this negligence action? I think not. In order for the illiterate victim to have been within the class intended to be protected by the statute, she must have been placed in jeopardy by her mother's ignorance of the toxic quality. Here she was not. Despite Mrs. Os-
borne's ignorance of the toxic quality of the product, she placed it between two other toxic products in a place not readily accessible to the three-year-old. This would lead the court to conclude that the statute was inapplicable. For the sake of completeness, however, let's consider the other two questions. Was the peril that occasioned the victim's death one from which the statute was intended to protect? Again, I think the answer is no. First, the victim's ignorance of the toxic quality of the product she ingested would not have been affected by a poison label, because the victim was illiterate. Second, although Mrs. Osborne would have been informed by a label, there is nothing to suggest that she would have treated the product differently had she been informed. This latter conclusion indicates as well that there was no factual cause and effect relationship between the statutory violation and the victim's death. Clearly, the statute is inapplicable to the case and, if plaintiff presents no alternative theory of liability, the court should grant defendant's motion for directed verdict. And, once again, the determination of the statute's inapplicability requires no separate resolution of proximate cause.

Let's take one more spin-off of Osborne. Mrs. Osborne, unaware of its toxic quality, purchases the product from defendant, whose clerk fails to affix a poison label thereto. Mrs. Osborne places the product on the top shelf of the bathroom medicine cabinet between the iodine and a bottle of rubbing alcohol. Subsequently, Mr. Osborne awakes in the middle of the night with an acute attack of indigestion. He enters the bathroom, turns on the light and, mistaking the toxic product for an antacid, ingests the product and dies. In the wrongful death action against defendant druggist, plaintiff offers the criminal statute. In determining its applicability, the court should ask and answer the three questions. Was Mr. Osborne within the class intended to be protected by the statute? The answer must be yes. He was unaware of the toxic quality of the product and was capable of being informed by the required label. Was the peril that occasioned his death one the statute was intended to protect against? Again, I think the answer is yes. The death-producing peril was the unknowing ingestion of the poison. A warning label could have informed the victim. Was there a factual cause and effect relationship between statutory violation and death?\footnote{18. See text at note 16.}

No explicit evidence was presented that, had a poison label been
affixed, Mr. Osborne would have seen it before ingesting the toxic product. Because Mr. Osborne is dead, no such explicit evidence can be presented and no rational court would require it in such a case. But this still leaves the court with something of a quandary. There are at least three alternatives available to the court. First, the court could conclude that defendant’s violation of the statute creates a conclusive presumption that the victim, capable of being informed by the required label, would have been so informed. Second, the court could conclude that defendant’s violation of the statute creates a rebuttable presumption that the victim, capable of being informed by the required label, would have been so informed. Third, the court could conclude that defendant’s violation of the statute and the evidence presented create a permissible inference that the victim, capable of being informed by the required label, would have been so informed. Whichever of these three alternatives the court selects, plaintiff’s case would be legally sufficient with regard to a factual cause and effect relationship between the statutory violation and the victim’s death. But which alternative would be the most appropriate?

My own preference is for the first alternative: where the victim is dead or otherwise unavailable to testify, so that explicit evidence that the required label would have informed him cannot be presented, defendant’s violation of the criminal statute should result in a conclusive presumption that the victim, capable of being informed, would have been informed by the statutorily required label. I believe this choice most effectively fulfills the legislative intent underlying the criminal statute. This intent, I believe, is to assure the opportunity of informing those unaware of the toxic quality of the product. Moreover, the fact that it is a criminal statute that was utilized to effectuate that intent suggests that the legislature felt strongly about that purpose. If, in these circumstances, the court opted for the conclusive presumption, those whose conduct is intended to be regulated by the statute would be most influenced to act in accordance with the statutory mandate. Since no potential defendant could predict with certainty when the injured victim would survive and be able to testify at trial or when the victim would die or otherwise be unavailable to testify, the latter

19. Where the victim is alive and able to testify, I believe that the plaintiff should be required to present sufficient evidence of a factual cause and effect relationship between the statutory violation and the victim’s injury. Compare, David E. Seidelson, Lack of Informed Consent in Medical Malpractice and Product Liability Cases: The Burden of Presenting Evidence, 14 Hofstra L Rev 621, 641 (1986).
contingency triggering the conclusive presumption as to factual cause and effect, potential defendants would have an additional motive to comply with the criminal statute. Thus, the conclusive presumption would most effectively further the strongly held legislative intent. Should the court adopt this alternative, the appropriate instruction to the jury would be, if it accepts the plaintiff's evidence, it must find for the plaintiff.

If the court were to adopt the second alternative, a rebuttable presumption, the jury instructions would depend upon whether or not defendant presented evidence tending to rebut the presumption of factual cause and effect. If no such evidence was presented, the jury would be instructed that, if it accepts the plaintiff's evidence, it must find for the plaintiff. If such rebutting evidence was presented, the jury would be instructed to weigh the plaintiff's evidence against the defendant's evidence in resolving the cause and effect issue. Were the court to adopt the third alternative, the plaintiff's usual burden of presenting evidence that defendant-physician had failed to disclose to the patient the material risk that eventuated should be lifted from the shoulders of the plaintiff and that "the burden of presenting evidence of an informed consent should be on the physician and that burden should not be deemed satisfied by the uncorroborated testimony of the physician." Seidelson, 14 Duquesne L Rev at 345 (cited within this note). "Given such a rule of law, it seems fair to conclude that physicians would utilize the opportunity presented by the professional relationship with their patients to fashion some form of continuing evidence of an informed consent." Id. In the situation presented in the text, a conclusive presumption seems more appropriate than the suggestion made in the earlier article for two reasons. First, in the case considered in the text, defendant would have had no meaningful opportunity to know if the label had informed the victim; thus "shifting" the burden of proof would make little sense. Second, the duty violated by defendant was one imposed by a criminal statute. This suggests that the legislature felt strongly about that duty. In these circumstances, the conclusive presumption seems to me to be the most appropriate judicial reaction.

20. Compare, David E. Seidelson, Medical Malpractice: Informed Consent Cases in "Full-Disclosure" Jurisdictions, 14 Duquesne L Rev 309, 342 (1976). There I suggested that, if the patient was dead, plaintiff's usual burden of presenting evidence that defendant-physician had failed to disclose to the patient the material risk that eventuated should be lifted from the shoulders of the plaintiff and that "the burden of presenting evidence of an informed consent should be on the physician and that burden should not be deemed satisfied by the uncorroborated testimony of the physician." Seidelson, 14 Duquesne L Rev at 345 (cited within this note). "Given such a rule of law, it seems fair to conclude that physicians would utilize the opportunity presented by the professional relationship with their patients to fashion some form of continuing evidence of an informed consent." Id. In the situation presented in the text, a conclusive presumption seems more appropriate than the suggestion made in the earlier article for two reasons. First, in the case considered in the text, defendant would have had no meaningful opportunity to know if the label had informed the victim; thus "shifting" the burden of proof would make little sense. Second, the duty violated by defendant was one imposed by a criminal statute. This suggests that the legislature felt strongly about that duty. In these circumstances, the conclusive presumption seems to me to be the most appropriate judicial reaction.

21. See, for example, FRE 301:

[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Id.

[I]f the defendant offers no proof on this question[,] ... the jury will be instructed that if they find the existence of the facts as contended by plaintiff, they must find [consistently with the presumption].


[U]nder what is known as the Thayer or "bursting bubble" theory, the only effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact. If that evidence is produced by the adversary, the presumption is spent and disappears.
permissible inference, and if the defendant presented no evidence negating cause and effect, the jury would be instructed that, even if it accepted plaintiff's evidence, the jury would be free to accept or reject the permissible inference as to factual cause and effect. If the defendant presented evidence negating cause and effect, the last instruction would be augmented by an instruction that, in resolving the factual cause and effect relationship, the jury is to consider the defendant's evidence on this point.

But suppose that when Mr. Osborne entered the bathroom he had not turned on the light before ingesting the toxic product in the mistaken belief that it was an antacid. Let's suppose also that in the unlighted bathroom, it would not have been possible to see a poison label even if one had been affixed to the product. How would this affect the court's determination as to the applicability of the criminal statute to the case? Under these circumstances, the court would be compelled to rule that there had been no factual cause and effect relationship between the statutory violation and the victim's death. Hence, the statute would be inapplicable and, absent any other theory of liability generated by the plaintiff's evidence, the court would grant defendant's motion for directed verdict.

In analyzing Osborne and each of the hypothetical spin-offs of that case, we have been able to determine the applicability of the criminal statute to the particular case and the consequences of that determination by asking and answering three questions: was the victim within the class intended to be protected by the statute? Was the peril that occasioned the victim's injury one intended to be protected against by the statute? Was there a factual cause

---

Id.

23. Id at 965, 966 (footnote omitted). Inferences that a trial judge decides may reasonably be drawn from the evidence need no other description, even though the judge relies upon precedent or a statute rather than his own experiences in reaching his decision. In most instances, the application of any other label to an inference will only cause confusion. Id.

"Permissive" presumptions are those that never require the jury to do anything. A permissive presumption merely authorizes the judge to instruct the jury that it "may" infer the presumed fact if it finds the basic fact. (This is what, in the civil context, we referred to as a "permissive inference.")


The court . . . may mean merely that once B [basic fact] is established (and in the absence of any direct proof about whether P [presumption] does or does not exist), the jury may (but need not) conclude that P exists. This is the weakest link between B and P that is ever contemplated by the term "presumption." More commonly, this weak link is referred to as a "permissible inference" rather than a presumption. Emanuel, Evidence at 445 (cited within this note).
and effect relationship between the statutory violation and the victim's injury? If all three questions were answered affirmatively, the statute was applicable. If any one of the three was answered negatively, the statute was inapplicable. In none of the cases was it necessary or even appropriate to make an independent determination of proximate cause. Intelligent answers to the "who" and "what" questions complemented by an intelligent answer to the factual cause and effect question will invariably determine the applicability issue without separate consideration of proximate cause. At best, such separate consideration would be superfluous. At most, it can be downright confusing.

In *Ney v Yellow Cab Co.*, defendant's employee "permitted [his] taxicab to remain unattended on a Chicago street without first stopping the engine or locking the ignition or removing the key... [A] thief stole the taxicab and while in flight ran into plaintiff's vehicle causing property damage." Illinois law provided that: "[n]o person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key." Plaintiff recovered damages based on defendant's employee's violation of the statute. On appeal, defendant argued that the statute was not applicable to this case. The court began its examination of that issue with this language:

> [T]he issue presented requires our determination of the following questions: (a) What was the legislative intent? (b) Is the violation of the statute the proximate cause of the injury? (c) Is the act of the thief an intervening, independent, efficient force which breaks the causal connection between the original wrong and the injury?

Simply to read these three questions, the last two of which must be superfluous if the first is answered intelligently, strongly suggests that the court's opinion will be confusing. The court did not disappoint.

The court quite properly directed its attention to legislative intent. However, the court did not specifically ask and answer: (1) Was the plaintiff within the class of persons intended to be protected by the statute? (2) Was the peril that occasioned the plaintiff's injury one from which the statute was intended to protect?

24. 2 Ill 2d 74, 117 NE2d 74 (1954).
25. *Ney*, 117 NE2d at 76.
27. *Ney*, 117 NE2d at 77.
(3) Was there a factual cause and effect relationship between defendant's statutory violation and plaintiff's injury? Instead, the court attempted to determine the legal consequences of the "illegal or criminal"\textsuperscript{28} intervening act of the thief on common law grounds. This led to a long exegesis on the growing use of automobiles, "[t]he man who once walked a mile now drives a block,"\textsuperscript{29} the incidence of car thefts and injuries therefrom which "frequently shocks the readers of the daily press,"\textsuperscript{30} and the growing disregard for property rights apparently contributed to by "[t]hree major wars during the lifetime of this generation."\textsuperscript{31} All of this was followed by this encomium to the right to trial by jury:

Questions of negligence, due care and proximate cause are ordinarily questions of fact for a jury to decide. The right of trial by jury is recognized in the Magna Charta, our Declaration of Independence and both our State and Federal constitutions. It is a fundamental right in our democratic judicial system. Questions which are composed of such qualities sufficient to cause reasonable men to arrive at different results should never be determined as matters of law. The debatable quality of issues such as negligence and proximate cause, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness and necessity of leaving such questions to a fact-finding body. The jury is the tribunal under our legal system to decide that type of issue. To withdraw such questions from the jury is to usurp its functions. . . .

For the foregoing reasons, it is our opinion that the Appellate Court was correct in affirming the judgment [for the plaintiff] of the municipal court of Chicago.\textsuperscript{32}

This can't be right. I bow to no one in my respect and admiration for the jury system. (I challenge some court to top this cliche.) Juries regularly demonstrate extraordinary competence and conscientiousness. But the issue before the court in \textit{Ney} was whether the criminal statute was applicable to the particular negligence action. The question of legislative intent is for the court; it cannot rationally be fopped off on a jury.\textsuperscript{33}

Let's attempt to resolve this issue by asking the three relevant questions: was the plaintiff within the class of persons intended to be protected by the criminal statute? Was the peril that occasioned his injury one from which the statute was intended to pro-

\begin{itemize}
  \item 28. Id.
  \item 29. Id at 79.
  \item 30. Id.
  \item 31. Id.
  \item 32. Id at 80.
  \item 33. See text at notes 14 and 15.
\end{itemize}
tect? Was there a factual cause and effect relationship between statutory violation and injury? In this instance, the first two questions, the "who" and the "what" questions, are intimately related. The plaintiff's injury was a product of a combination of the conduct of the inadvertent employee who parked the car and of the cab thief. Did the legislature, in enacting the statute, intend to protect users of the roadway from that combination of conduct? On this question, reasonable courts can and do differ. Some, giving such statutes a relatively restrictive reading, conclude that the legislative intent was to protect against only accidental starting or moving of the parked vehicle or, to the extent that the legislature intended to protect against vehicle theft, it intended to do so only for the benefit of vehicle owners or law enforcement agencies. Other courts, giving the statute a relatively broad reading, conclude that the legislature intended to deter vehicle theft and to do so for the benefit of other users of the roadway who may be jeopardized by the negligent driving of the thief. Under this broader interpretation, the plaintiff in Ney would be within the protected class and the peril that occasioned his injury would be one against which the statute was intended to protect. Was there a factual cause and effect relationship between statutory violation and plaintiff's injury? Of course; the cabbie's failure to remove the ignition key caused or greatly facilitated the theft of the cab. Once having so decided, the court would confront no separate proximate cause issue, much less a proximate cause issue to be fopped off on a jury. And, once having so decided, the court would instruct the

34. W. Page Keeton, ed, Prosser & Keeton on Torts 224-25 (West 5th ed 1984). "Sometimes the courts have disagreed over a broad and a narrow construction of similar statutes, as where provisions requiring that parked cars shall be locked and the keys removed have been held to be intended, and not to be intended, for the protection of a person run down by a thief escaping with a stolen car." Id.

One of the best known of the cases giving such a statute a broad interpretation is Ross v Hartman, 139 F2d 14 (DC Cir 1943). A narrow interpretation was given in Liberto v Holfeldt, 221 Md 62, 155 A2d 698 (1959). For a case involving a choice-of-law problem arising out of the divergent conclusions by the District of Columbia and Maryland courts, see Gaither v Myers, 404 F2d 216 (DC Cir 1968).

35. See, for example, Gower v Lamb, 282 SW2d 867, 871 (Mo App 1955): "In the case at bar the defendant's car was not placed in operation by a curious intermeddler, but by a thief."

"[T]he purpose of the council was largely for the protection of car owners themselves and as an aid in proper law enforcement in the discouragement of theft and pilferage. It is one thing to say that the ordinance is designed to prevent thefts and quite another to say that it is aimed at preventing negligent driving from the scene of the theft." Anderson v Theisen, 231 Minn 369, 43 NW2d 272, 273 (1950).

36. Ross, 139 F2d at 15.
jury that, if the jury accepted the plaintiff's evidence, the jury should find for the plaintiff. Should the court embrace the more restrictive reading of the statute, it would find that the plaintiff was not within the protected class and the peril that occasioned his injury was not one from which the statute was intended to protect. Consequently, the statute would be inapplicable to the case. Once again, there would be no separate proximate cause issue and certainly none to be imposed on the jury. Rather, assuming that the plaintiff's evidence generated no alternative theory of liability, the court would grant defendant's motion for a directed verdict.

If the court, employing the broader statutory interpretation, finds the statute applicable, and if the jury accepts the plaintiff's evidence, the jury would be instructed to find for the plaintiff. This doesn't mean, of course, that there may be no further function for the jury. The court's determination that the statute is applicable to the action is necessarily based on the plaintiff's evidence which the jury could accept. But the defendant remains free to present controverting evidence and the jury remains free to accept this evidence. For example, the defendant could present evidence that the cabbie had turned off the engine and removed the ignition key before leaving the cab. The thief stole the cab with no inadvertent assistance from the cabbie. If the jury accepts this evidence, the statute would become inapplicable to the case and, assuming that plaintiff's evidence generated no alternative theory of liability, the jury would be instructed to disregard the statute and find for the defendant. This factfinding function is for the jury. Determining legislative intent, Ney to the contrary notwithstanding, is for the court. The court should not abdicate its responsibility for determining the applicability of the statute, accepting the plaintiff's evidence as true as the court must since the jury may, and attempt to impose that responsibility on the jury. Neither should the court usurp the jury's function as ultimate factfinder in determining what evidence to credit. Since the court cannot know whose evidence the jury will accept, the court must instruct the jury on the applicability and effect of the statute, depending on the jury's ultimate factual conclusions.

In Ney, the court surrendered its obligation and imposed upon the jury the ultimate judicial responsibility of determining the applicability of the statute, even accepting the plaintiff's evidence. This is just the sort of confusion that may occur when a court fails to appreciate the full legal significance of asking and answering the three critical questions for determining the applicability of a crimi-
nal statute to a particular negligence action. If the court erroneously believes that there remains a separate proximate cause issue, the court may out of ill-considered habit lapse into a treatment of this issue that would be appropriate absent the statute.

Let's tinker with the facts of *Ney*. Let's assume that plaintiff's evidence indicates that defendant's employee left the cab parked at three o'clock in the morning on a public street in a disreputable part of town where vehicle thefts are common. The cabbie left the key in the ignition and entered a diner for a cup of coffee and a doughnut. Fifteen minutes later, while the cabbie was still in the diner, a thief stole the cab and, in making his getaway, negligently caused the cab to strike plaintiff's car. Plaintiff sued defendant to recover for the property damage thus sustained. Plaintiff offers the criminal statute into evidence. Let's assume that the court, giving the statute a narrow interpretation, concludes that the statute is inapplicable to the case. Should the court then grant defendant's motion for a directed verdict? I think not. Even disregarding the (inapplicable) statute, but accepting the plaintiff's evidence as true, a reasonable jury could find: (1) negligence attributable to the defendant, (2) a legally cognizable injury sustained by the plaintiff, (3) a factual cause and effect relationship between negligence and injury, and (4) that the negligence had been a proximate cause of the plaintiff's injury. The evidence suggests that a reasonable jury could find that the cabbie's conduct had been inconsistent with that of a reasonable person in like circumstances and created a reasonably foreseeable risk of injury to others. The property damage to plaintiff's car is certainly a legally cognizable injury. A reasonable jury could find that the cabbie's failure to remove the ignition key caused or greatly facilitated the theft; therefore there existed a factual cause and effect relationship between negligence and injury. Finally, a reasonable jury could find that such negligence had been a proximate cause of plaintiff's injury. Given the environment in which this negligence occurred, a reasonable jury could conclude that the intervening theft was reasonably foreseeable, thereby making it reasonably foreseeable that defendant's negligence would cause injury of some kind to this plaintiff, a user of the roadway, and that the manner of injury (negligent driving by the escaping thief) was within the general manner of injury reasonably foreseeable as a result of defendant's negligence. 37

---

37. For a discussion of when an intervening criminal act may not be superseding, see Seidelson, 19 Duquesne L Rev at 23 (cited in note 11).
There is an obvious lesson to be drawn from this spin-off of *Ney*. When the court concludes that the criminal statute offered by the plaintiff is inapplicable to the case, the court should not automatically grant defendant’s motion for a directed verdict. Rather, the court should determine whether or not plaintiff’s evidence generates a legally sufficient negligence action on wholly common law grounds. If the evidence does generate such a legally sufficient case, defendant’s motion should of course be denied and the case submitted to the jury. This spin-off of *Ney* suggests another, perhaps less obvious moral. The court found the criminal statute inapplicable because of the relatively narrow interpretation the court gave the statute and its underlying legislative intention. Every time a court is confronted with plaintiff’s assertion that a criminal statute is applicable to a particular negligence action, the court, bearing the responsibility for determining legislative intent, also has the inherent capacity to give the statute and the underlying legislative intent a relatively broad or a relatively narrow reading. This inherent capacity should overcome any reluctance the court may have about fulfilling its obligation to determine legislative intent. No litigant, plaintiff or defendant, can force a finding as to legislative intent on the court. Of course, counsel on both sides can and should attempt to enlighten and influence the court with regard to the underlying intent. Ultimately, however, it is the court that must make the determination and, in doing so, the court has significant room for maneuver in affording the statute and the legislative intent a relatively broad or narrow interpretation, assuming there is no binding precedent. This inherent judicial capacity should deter any court from throwing its hands up in despair and imposing the judicial function of determining legislative intent upon the jury, as the *Ney* court did.

Let’s take another case, one presenting a more sophisticated problem than *Ney*. In *Orner v Mallick*,38 the minor plaintiff attended three high school graduation parties, at each of which he was served intoxicating beverages. At the third party, the intoxicated plaintiff “fell over a second floor railing and sustained serious head injuries.”39 To recover for his injuries, plaintiff sued all three hosts. The second host demurred to the complaint. At that point, legal chronology became important. When the trial judge sustained the defendant’s demurrer, the intermediate appellate
court had refused to impose liability on a social host for injuries resulting from the serving of intoxicating beverages to a visibly intoxicated guest, even a minor.\textsuperscript{40} Subsequently, the highest appellate court reversed that decision,\textsuperscript{41} holding "that social host liability could exist for service of intoxicants to minors."\textsuperscript{42} Still, the intermediate appellate court affirmed the trial court's sustaining of defendant's demurrer in \textit{Orner}, concluding that the case was not covered by the decision of the highest appellate court.\textsuperscript{43}

The opinion of the highest appellate court had imposed liability on the social host who had served alcohol to a minor "to the point of intoxication."\textsuperscript{44} In \textit{Orner}, the plaintiff did not allege that the second social host had served alcohol to him "to the point of intoxication." This was the reason for the intermediate appellate court's affirmance of the trial court's order sustaining defendant's demurrer. The highest appellate court allowed the plaintiff's appeal, thus confronting the court with this issue: may a social host who serves intoxicating beverages to a minor be held liable for injuries sustained by that minor as a result of his subsequent intoxication even though the intoxicants served by her did not render the victim intoxicated?

Resolution of this issue depended on judicial interpretation of two criminal statutes. One of those statutes made it unlawful for a minor to ingest intoxicating beverages.\textsuperscript{45} The second made it unlawful to act as an accomplice of another in committing a criminal offense.\textsuperscript{46} In \textit{Congini v Portersville Valve Co.},\textsuperscript{47} the Pennsylvania Supreme Court had concluded that, on the basis of those two statutes, minor plaintiff had a legally sufficient case against social host defendant, which had served intoxicants to the minor to the point of intoxication, for injuries sustained by the minor in a collision. Although \textit{Congini} recognized such liability, the opinion contained this language:

\begin{itemize}
  \item \textit{Congini v Portersville Valve Co.}, 312 Pa Super 461, 458 A2d 1384 (1983), rev'd, 504 Pa 157, 470 A2d 515.
  \item \textit{Orner}, 527 A2d at 522.
  \item Id. "Nevertheless, the superior court affirmed the order of the lower court in this case, finding that even under our decision in \textit{Congini}, . . . Mr. Orner had failed to state a cause of action against Ms. Bonsall." Id.
  \item \textit{Congini}, 470 A2d at 518.
  \item 18 Pa Cons Stat § 6308 (Purdon 1983) (amended 1988 in a manner not relevant to use in this text).
  \item 504 Pa 157, 470 A2d 515 (1983).
\end{itemize}
We find that defendant [was] negligent per se in serving alcohol to the point of intoxication to a person less than twenty-one years of age, and that it can be held liable for injuries proximately resulting from the minor's intoxication.48

That language was immediately followed by this footnote:

A finding of negligence per se does no more than satisfy plaintiff's burden of establishing that a defendant's conduct was negligent . . . . However, the burden remains upon plaintiff to establish that his complained of injuries were proximately caused by the statutory violations.49

Well, here we go again. Another court apparently concluded that a criminal statute was applicable to the negligence action before the court, but that proximate cause was a separate issue. In Congini, the appellate court was able to walk away from this conclusion by remanding the case to the trial court "for proceeding not inconsistent with our opinion."50 But this kind of confusion doesn't just disappear; it came back to haunt the appellate court in Orner. In Orner, the second social host challenged the legal sufficiency of the minor plaintiff's complaint, absent an allegation that the intoxicants served by her had caused his intoxication. The appellate court concluded that the statutory violation, and therefore defendant's negligence, "occur[red] with the service of any alcohol to a minor, not just an amount sufficient to intoxicate the minor."51 But then the court added:

We readily acknowledge that the question of whether an adult defendant is responsible for a minor's intoxication is a relevant one. However, it is a question which goes to the issue of causation, not to the question of whether a defendant had a duty and/or breached a duty to the plaintiff.52

To "corroborate" this conclusion, the court cited to Congini where "we emphasized that the mere breach of a duty does not mandate a finding of liability, for the plaintiff still bears the burden of proving that the breach resulted in his injury."53 Reversing the order of the intermediate appellate court, which had affirmed the sustaining of defendant's demurrer, the highest appellate court remanded the case to the trial court "for proceeding consistent with this opinion."54

48. Congini, 470 A2d at 518 (footnotes omitted).
49. Id at 518 n.4.
50. Id at 519.
51. Orner, 527 A2d at 524.
52. Id (footnote omitted).
53. Id at 524 n.2.
54. Id at 524.
The dissent in *Orner* wasn't having any. It had its own view of the legal significance of the statutory violations:

Today the majority suggests that there is no requirement of a nexus between the amount consumed as a result of the furnishing by the social host who is sought to be held liable and the subsequent injury. Under this theory one who permits a twenty-year old person to have a tablespoonful of an intoxicating substance would be responsible for any further conduct without any demonstration that that conduct was influenced by the consumption of the substance provided by the host. To me this is an unreasonable position and I therefore register my dissent.\(^5\)

But wait a minute. The majority didn't suggest that. Rather, the majority sought to limit the significance of the statutory violation to negligence, treating causation (and, I think, proximate cause) as separate issues. How would the dissent have resolved this matter of causation? "I would not . . . adopt the term 'intoxication' as the test. . . . It is sufficient in my judgment to find liability if there is any degree of impairment that can be found to have occasioned [the minor's] subsequent imbibing which resulted in this tragic injury."\(^5\) And this language is immediately followed by this footnote:

> Again I remind the majority . . . where the duty is defined by statute the court is not permitted to apply rules of foreseeability and causation based upon judicial policy, but rather must strictly track the legislative intent in creating the duty in the first instance.\(^6\)

I think this language in the footnote is precisely correct. I also think, however, that it is inconsistent with the text of the dissent which would condition "liability" on a finding of "impairment" resulting from the intoxicants served by the host. The dissent would have "remand[ed] the matter to the trial court giving the plaintiff an opportunity to amend his pleading to accord with the requirements herein set forth,"\(^7\) presumably intending that the plaintiff's complaint would have added to it an allegation that the intoxicants served by the second host had "impaired" the minor plaintiff. Somehow, both the majority and the dissent seem to have lost track of the significance of a legal determination that a criminal statute is applicable to a particular negligence action.

Let's attempt our own analysis of *Orner*. The first of the two criminal statutes provides in part: "A person commits a summary
offense if he, being less than 21 years of age, . . . consumes . . . any liquor or malt or brewed beverages.”59 The second reads in part:

A person is legally accountable for the conduct of another when . . . he is an accomplice of such other person in the commission of the offense. . . . A person is an accomplice of another person in the commission of an offense if . . . with the intent of promoting or facilitating the commission of the offense, he . . . aids . . . such other person in . . . committing it. . . .60

Should the combination of these two statutes be deemed applicable to Orner? Given the obvious generality of the accomplice statute, a reasonable court might very well answer that question negatively. Since the accomplice statute makes no specific reference to the act of providing intoxicants to a minor, the court might well conclude that the statute evidences no legislative intent whatsoever with regard to the civil liability of one who so provides intoxicants. This relatively narrow reading of the accomplice statute would lead the court to conclude that the minor plaintiff was not within the class intended to be protected by the statute and that the peril that occasioned his injury was not one from which the statute was intended to protect. Consequently, the court would conclude that the two statutes taken together were not applicable to the action.

Before sustaining (or affirming the sustaining of) the defendant’s demurrer, however, the court should determine whether the well-pleaded facts in the complaint generate a legally sufficient case wholly apart from the statute. Absent an allegation that the intoxicants served by the second host caused or contributed to the minor plaintiff’s intoxication and injury, the answer would be no. In these circumstances, the complaint would be inadequate to allege a legally sufficient common law cause of action. But, emulating the dissent, let’s afford the plaintiff an opportunity to amend the complaint to allege that the intoxicants served him by the defendant did cause or contribute to the plaintiff’s intoxication and injury. This, I think, would constitute a legally sufficient assertion of a common law negligence action. Let’s assume the trial court would agree and that the case proceeds to trial. At trial, plaintiff presents evidence consistent with the allegations in his amended complaint. At the close of plaintiff’s case in chief, defendant moves for a non-

59. 18 Pa Cons Stat § 6308 (Purdon 1983) (amended 1988 in a manner not relevant to use in this text).
Criminal Acts in Negligence

suit. How should the court rule?

From the evidence presented, could a reasonable jury find that the conduct of the defendant, the second social host, was inconsistent with the conduct of a reasonable person in like circumstances and created a reasonably foreseeable risk of injury to another? I think the answer is yes. A reasonable jury could find that serving intoxicants to a minor created a reasonably foreseeable risk of injury to the minor or to others, even though the intoxicants served did not themselves produce intoxication. A reasonable jury could find that a reasonable person in defendant’s circumstances would have recognized that serving intoxicants to a minor could result in an enhanced likelihood that the minor would subsequently ingest additional intoxicants, become intoxicated, and thereby create a risk of injury to himself or to others. That a reasonable jury could so find is suggested even more strongly by the specific facts of the case. “[The minor had been a] guest at a series of high school graduation parties which took place during the night of June 12, 1981, and the early morning hours of June 13, 1981. . . . [At the first party, the minor] was allegedly served intoxicating beverages.”61 Obviously, the “serious head injuries”62 sustained by the plaintiff constituted a legally cognizable injury. Could a reasonable jury find a factual cause and effect relationship between the second host’s negligence and plaintiff’s injury? Again, I think the answer is yes. From the evidence presented, a reasonable jury could conclude that the intoxicants served by the defendant, while not alone causing the minor’s intoxication, contributed to the minor’s subsequent ingestion of more intoxicants and therefore to his ultimate intoxication, the cause of his injuries. Could a reasonable jury find that the second host’s negligence had been a proximate cause of the minor’s injury? I think a reasonable jury could find that the second host’s negligence created a reasonably foreseeable risk of injury of some kind to this plaintiff and that the manner of injury that occurred, the minor’s intoxication causing him to “f[all] over a second floor railing,”63 was within the general manner of injury reasonably foreseeable as a result of the second host’s negligence. It would appear that the plaintiff’s evidence generated a legally sufficient common law negligence action and thus defendant’s motion for nonsuit should be denied.

61. Orner, 527 A2d at 522.
62. Id.
63. Id.
There is, however, one further problem to be considered. Should the jury, as a condition precedent to finding for the plaintiff, be required to find that the intoxicants served him by the second host directly contributed to the minor's intoxication or only that the intoxicants served by the second host impaired the minor's judgment and thereby led him to ingest additional intoxicants that occasioned his intoxication? This is the problem that separated the majority and dissent in *Orner*. As we shall note subsequently, this distinction may have been wholly spurious in the actual case where liability was asserted on the basis of the two criminal statutes. It may, however, have some legitimacy in this spin-off of *Orner* where the court, having concluded that the statutes are inapplicable, must determine legal sufficiency and, ultimately, appropriate jury instructions, based wholly on common law. To focus as precisely as possible on the distinction, let's assume that from the evidence presented by the plaintiff, a reasonable jury could find either that the intoxicants served by the second host directly contributed to the minor's ultimate intoxication or merely that those intoxicants impaired the minor's judgment and thereby led him to ingest additional intoxicants at the third party that caused his intoxication. In order to satisfy the factual cause and effect relationship between the negligence of the second host and the injuries sustained by the minor plaintiff, which finding should the jury be required to make? Obviously, the court must answer that question in determining the proper instructions to give the jury.

To me, the question is a fairly easy one. If the jury finds that the intoxicants served by the second host impaired the minor's judgment and thereby led him to consume additional intoxicants that caused his intoxication, the jury should be free to conclude that there existed a factual cause and effect relationship between the second host's negligence and the plaintiff's injuries. This jury finding does indeed encompass a factual cause and effect relationship; impaired judgment leading to the consumption of the ultimately intoxicating beverages does not break the chain of factual cause and effect between the second host's conduct and the minor's injuries. Therefore, it should be deemed adequate to satisfy this legally essential element of the plaintiff's common law action. Moreover, treating such a jury finding as sufficient to satisfy the factual cause and effect relationship spares the jury the task of drawing what may be a nearly metaphysical distinction and avoids affording the culpable defendant a litigation reward if the jury draws that abstruse distinction in a particular manner. Consequently, the evi-
dence presented by the plaintiff would generate a legally sufficient common law case of negligence. The jury, considering the plaintiff's evidence and the defendant's evidence and properly instructed by the court, would then be required to make factual determinations with regard to each element of the case: negligence attributable to the defendant, a legally cognizable injury sustained by the plaintiff, a factual cause and effect relationship between such negligence and that injury, and whether such negligence had been a proximate cause of that injury. In this common law action, each of these factors is entirely appropriate for factual determination by the jury. In *Orner*, where the court concluded that the two statutes were applicable, both the majority and dissent apparently would permit unfettered jury determinations as to each of these elements except negligence. This, I think, reflects a certain judicial confusion as to the legal significance of a finding that a criminal statute is applicable to a particular negligence action.64

64. Given the apparent conclusions of both the majority and the dissent in *Orner* that the jury should determine each of these elements except negligence, perhaps the court should have concluded, as we did hypothetically, that the statutes did not give rise to a cause of action. Rather, plaintiff's cause rested entirely on common law principles. Then jury consideration of each of these elements would be entirely appropriate. Of course, in *Orner* the court was confronted with its own earlier determination in *Congini* that the cause of action did arise out of the criminal statutes. Was that conclusion in *Congini* necessary? To a significant extent, that conclusion in *Congini* resulted from the court's effort to distinguish *Congini* from *Klein v Raysinger*, 504 Pa 141, 470 A2d 507 (1983), in which the court refused to impose common law liability on a social host who had served intoxicants to an adult guest beyond intoxication, even though the host knew that the guest would be driving, for injuries sustained by victims of the guest's drunken driving. The court distinguished *Congini* from *Klein* in this manner:

In *Klein* . . . we held that there exists no common law liability on the part of a social host for the service of intoxicants to his adult guests. In arriving at this decision we relied upon the common law rule that in the case of an ordinary able bodied man, it is the consumption of alcohol rather than the furnishing thereof, that is the proximate cause of any subsequent damage.

However, our legislature has made a legislative judgment that persons under twenty-one years of age are incompetent to handle alcohol. Under Section 6308 of the Crimes Code, . . . a person "less than 21 years of age" commits a summary offense if he "attempts to purchase, purchases, consumes, possesses or transports any alcohol, liquor or malt or brewed beverages." Furthermore, under Section 306 of the Crimes Code . . . an adult who furnishes liquor to a minor would be liable as an accomplice to the same extent as the offending minor.

This legislative judgment compels a different result than *Klein*, for here we are not dealing with ordinary able bodied men. Rather, we are confronted with persons who are, at least in the eyes of the law, incompetent to handle the affects [sic] of alcohol. *Congini*, 470 A2d at 517 (footnote omitted).

Thus the court distinguished *Congini* from *Klein* in two respects: (1) in *Congini* the guest had been a minor and (2) therefore the two criminal statutes applied. But was this second distinction legally necessary? I think not. In our hypothetical treatment in the text, based
Let's attempt our own analysis of Orner, accepting the court's conclusion (apparently shared by majority and dissent) that the combination of the two statutes is applicable to the action. This conclusion must mean that the minor plaintiff is within the class intended to be protected by the statutes and that the peril that occasioned his injuries is one intended to be protected against by the statutes. Stated more specifically, this conclusion must mean that the minor plaintiff as one under twenty-one years of age is within the class intended to be protected by the statutes and that the peril that occasioned his injuries, his intoxication, is one intended to be protected against by the statutes.

Was there a factual cause and effect relationship between the second host's violation of the accomplice statute and the minor's injuries? I think that in determining that the peril that occasioned the minor's injuries, his intoxication, was one intended to be protected against by the statutes, we have already answered the factual cause and effect question affirmatively. It would be anomalous to conclude that the minor's intoxication, the peril that occasioned his injuries, was one intended to be protected against by the statutes, but that the second host's violation of the accomplice statute, serving intoxicants to the minor, was not a factual cause of the minor's injuries. Let's attempt to prove this conclusion.

The first statute makes it unlawful for a minor to consume any amount of intoxicating beverages. The second statute makes it unlawful to provide any amount of intoxicating beverages to a minor. Why? The underlying legislative rationale must be that a minor, lacking the mature judgment of an adult, once provided and having consumed any amount of an intoxicating beverage will be likely
to consume sufficient additional intoxicating beverages to become intoxicated and be a threat to his own well-being and the well-being of others. Therefore, the legislature, in enacting the two statutes, intended to preclude the minor from ingesting any amount of intoxicating beverages because of the likelihood that any such ingestion would produce ultimate intoxication and peril to the minor and others. Given this legislative intent, the second host's providing any amount of an intoxicant to the minor must be considered a factual cause of the minor's ultimate intoxication and intoxication-caused injuries. Consequently, once concluding from the plaintiff's pleadings or evidence, (depending on the stage of the case) that the two statutes are applicable to the action, the court must conclude that there was a factual cause and effect relationship between the second host's violation of the accomplice statute and the minor's injuries. To conclude otherwise would be inconsistent with the legislative intent underlying the two statutes.

Let's assume that at trial plaintiff presents evidence of the facts set forth in the court's opinion. During the course of the night and early morning hours, minor plaintiff attended three graduation parties. He was served intoxicating beverages at all three. At the third party, his intoxicated condition caused him to "fall over a second floor railing and sustain[] serious head injuries." Accepting the court's conclusion that the two statutes apply to the action, plaintiff would be entitled to a jury instruction to the effect that, if the jury accepts the plaintiff's evidence, the jury must find for the plaintiff. This instruction would not require the jury to make a separate finding that the intoxicants served by the second host had directly caused the minor's intoxication or had impaired the minor's judgment leading him to consume additional beverages that caused his intoxication. The legislature has already determined that serving intoxicants to a minor will so impair his judgment leading him to consume additional beverages that caused his intoxication. The legislature has already determined that serving intoxicants to a minor will so impair his judgment. To require a separate jury finding on this point would be to ignore this aspect of legislative intent.

There is, of course, a factual situation, apparently not involved in Orner, where such a jury determination would be appropriate. If from the evidence presented, a reasonable jury could find that the impairing effect of the intoxicants served the minor by the second host had completely disappeared before the minor consumed the additional beverages that directly caused his intoxication, the jury should be required to determine this issue. If the jury finds that

65. Orner, 527 A2d at 522.
the impairing effect had so disappeared, liability under the statutes would be inappropriate. If, for example, there had been a time lapse of some hours between the second host's violation of the accomplice statute and the minor's ingestion of the additional beverages that directly caused his intoxication, and the jury finds factually that during the time lapse the impairing effect caused by the second host's conduct had entirely disappeared, there would be no factual cause and effect relationship between second host's statutory violation and minor's injuries. In a case where such a factual conclusion would be reasonable, the dissent's requirement of a finding of impairment would be entirely appropriate.

This, in turn, raises the question: who should bear the burden of proof and the ultimate burden of persuasion as to whether the intoxicants served by the particular defendant impaired the judgment of the minor, thus contributing to his ultimate intoxication? Given the already noted apparent legislative determination that any amount of intoxicating beverage will impair the judgment of a minor and thus make him susceptible to subsequent ingestion of intoxicants and ultimate intoxication, it would seem appropriate to impose upon the defendant the burden of eliciting evidence, either in the course of cross-examining the plaintiff and his witnesses or in the presentation of the defense case, that the impairing effect of the intoxicants served by the defendant had terminated prior to the minor's subsequent ingestion of intoxicating beverages and ultimate intoxication. For the same reason, it would appear appropriate to impose upon the defendant the ultimate burden of persuasion as to this point. The imposition of these dual burdens upon the defendant seems most consistent with the apparent legislative determination and intent, and best calculated to effect the legislative goal: deterring hosts from serving any intoxicants to minors.

There is another problem lurking in Orner, one not addressed by the majority or dissenting opinion. Let's assume, as suggested by both opinions, that the evidence indicates that the second host's serving of intoxicants to the minor plaintiff impaired his judgment to the point of leading him to consume additional intoxicants at the third party, ultimately resulting in his intoxication and injuries. We have already noted that if the jury accepts this evidence, the jury's verdict should be for the plaintiff and against the second host defendant. But suppose that the defendant requests the court to instruct the jury on the minor plaintiff's contributory negligence, such instruction to be complemented by the criminal statute
making it unlawful for a minor to consume any intoxicating beverage and by the state’s comparative negligence statute. Should the court grant defendant’s request?

Ordinarily, of course, the negligent defendant, even one whose negligence arises out of his violation of an applicable criminal statute, is entitled to a comparative negligence defense. In this instance, the defendant presumably would argue there is an a fortiori reason for permitting that defense: the minor’s conduct was in violation of an applicable criminal statute. Is the statute prohibiting a minor from consuming any alcoholic beverage applicable to this case? We can ask the three critical questions with only minor variations reflecting the fact that the statute is being offered to demonstrate contributory negligence. Was the minor plaintiff within the class of persons intended to be protected by the statute, in the sense of self-protective care? The answer would seem to be yes. The very fact of his minority would place him within the class. Was the peril that occasioned the minor plaintiff’s injury one the statute was intended to protect against, in the sense of self-protective care? Again the answer would seem to be yes. The evidence indicates that the impaired judgment of the minor led to his subsequent ingestion of intoxicants, his intoxication, and his injuries. Was there a factual cause and effect relationship between the minor’s violation of the statute and his injuries? Given the evidence indicated, clearly a factual relationship existed. Thus, the statute would appear to be applicable to the case and the minor’s violation contributory negligence, indeed contributory negligence per se. Therefore, defendant would request that the court instruct the jury that if the jury accepts the evidence, it must find the plaintiff contributorily negligent and, through application of the comparative negligence statute, either reduce the damages accordingly or find for the defendant. Should the court so instruct the jury?

---

66. 42 Pa Cons Stat § 7102(a) (Purdon 1982).

In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

Id.

67. Under the comparative negligence statute, the plaintiff can recover nothing if his contributory negligence was “greater than the causal negligence of the defendant or defendants against whom recovery is sought.” See note 66.
I think the appropriate answer is no. In our earlier determinations that the two criminal statutes were applicable to the case, we concluded not only that the minor plaintiff was a member of the class intended to be protected but that the legislative intent had been to protect that class of minors even from its own inability to exercise self-protective care. This is why the legislature made it unlawful to provide any amount of intoxicating beverage to a minor. The legislature recognized that any amount of intoxicants would impair the judgment of one lacking the maturity of an adult. Because the legislature intended to protect the class even from its own inability to exercise self-protective care, it would be inconsistent with this legislative intent to permit the defendant either to diminish the amount of damages or to avoid liability entirely through a finding of contributory negligence.

Indeed, both the intermediate appellate court and the highest appellate court of the state had arrived at just this conclusion in analogous cases. In *Schelin v Goldberg*, the defendant, a bar owner, served intoxicating beverages to an already visibly intoxicated patron who was subsequently injured as a result of his intoxication. Liability was imposed upon the defendant because of his violation of a criminal statute prohibiting licensees from providing intoxicants to visibly intoxicated patrons. The trial court then granted defendant's motion for a new trial, concluding that it had erred in failing to charge the jury with regard to the patron's contributory negligence. The intermediate appellate court reversed the order granting the defendant a new trial, finding that the class in-

68. *In Zerby v Warren*, 297 Minn 134, 210 NW2d 58 (1973), defendant, in violation of a “glue-sniffing” statute, sold two pints of glue to a thirteen-year-old who, with his fourteen-year-old friend, sniffed the glue. Because of the injurious effects on the latter’s central nervous system, he fell into a creek and drowned. In the ensuing wrongful death action, the defendant alleged that the decedent’s conduct, also in violation of a criminal statute, constituted contributory negligence; therefore, defendant asserted the state’s comparative negligence statute. The court, finding that the minor had been a member of a class unable to exercise self-protective care, disallowed the comparative negligence defense. But compare *Spragg v Shuster*, 398 NW2d 683 (Minn Ct App 1987), where, in a dramshop action against defendant, the court concluded that the minor plaintiff would be barred from recovery if guilty of “complicity.” *Spragg*, 398 NW2d at 686. “The doctrine of complicity holds that one who provides liquor for another, whose intoxication then causes the provider’s injuries, cannot recover damages from the liquor vendor.” Id. The court reversed a summary judgment for defendant, finding that there existed a genuine issue of material fact as to whether the minor plaintiff had provided beer for the minor driver whose conduct caused the plaintiff’s injuries.

69. 188 Pa Super 341, 146 A2d 648 (1958).

tended to be protected by the criminal statute, visibly intoxicated patrons, was unable to exercise self-protective care and that the statute had been intended to protect members of that class from this very inability.\textsuperscript{71} In Majors v Brodhead Hotel,\textsuperscript{72} the supreme court, confronted with a defendant’s violation of the same criminal statute and a similar effort to invoke the patron’s contributory negligence, concluded that such a defense was not available.\textsuperscript{73}

But then a funny thing happened. In Congini, the foundation upon which Orner rests, the Pennsylvania Supreme Court, after concluding that a social host who provides intoxicants to a minor may be held liable for injuries sustained by the intoxicated minor pursuant to the two criminal statutes found applicable in Orner, wrote:

Thus, although we recognize that an eighteen year old minor may state a cause of action against an adult social host who has knowingly served him intoxicants, the social host in turn may assert as a defense the minor’s “contributory” negligence. Thereafter, under our Comparative Negligence Act . . . it will remain for the fact finder to resolve whether the defendant’s negligence, was such as to allow recovery.\textsuperscript{74}

It’s obvious from the court’s opinion in Congini that the (potential) liability of the social host was not the result of the application of common law:

In [1983] . . . we held that there exists no common law liability on the part of a social host for the service of intoxicants to his adult guests. In arriving at this decision we relied upon the common law rule that in the case of an ordinary able bodied man, it is the consumption of alcohol rather than the furnishing thereof, that is the proximate cause of any subsequent damage.\textsuperscript{75}

Rather, the liability considered in Congini was that arising from the two criminal statutes found applicable to the case by the court: the first making it unlawful for a minor to consume any intoxicating beverage and the second making any adult who furnishes intoxicants to a minor an accomplice. “This legislative judgment

\textsuperscript{71} “[T]he Liquor Code . . . , making it unlawful to sell . . . liquor to any person visibly intoxicated was enacted to protect society generally, but to protect specifically intoxicated persons ‘from their inability to exercise self-protective care.’” Schelin, 146 A2d at 652, quoting in part from Restatement of Torts § 483 (1934).
\textsuperscript{72} 416 Pa 265, 205 A2d 873 (1965).
\textsuperscript{73} Majors, 205 A2d at 876. “The statute was intended to protect persons when they are visibly intoxicated regardless of how they got that way. Accordingly, the trial judge was correct in not instructing the jury on contributory negligence.” Id.
\textsuperscript{74} Congini, 470 A2d at 518-19 (footnote omitted).
\textsuperscript{75} Id at 517.
compels a different result than [the one we achieved in 1983]..., for here we are not dealing with ordinary able bodied men. Rather, we are confronted with persons who are, at least in the eyes of the law, incompetent to handle the affects [sic] of alcohol.\textsuperscript{76} Then why did the court in Congini resurrect the contributory negligence defense explicitly rejected in Schelin and Majors?

The only potentially relevant difference in Pennsylvania law between the repudiation of the contributory negligence defense in Schelin and Majors and its resurrection in Congini was the enactment of a comparative negligence statute.\textsuperscript{77} Does that legislative decision justify recognition of contributory negligence in Congini and, by extension, in Orner? I think the answer is no. The basic reason for the enactment of a comparative negligence statute is to ameliorate the harshness of the common law rule that any degree of contributory negligence on the part of the plaintiff will preclude any recovery from the negligent defendant.\textsuperscript{78} I do not think it was the legislative purpose in enacting a comparative negligence statute to create a contributory negligence defense where no such defense existed prior to the enactment.\textsuperscript{79} I can understand the "equitable" appeal of concluding judicially in Congini and Orner that if the defendant's violation of criminal statutes aimed at protecting against the consumption of intoxicants by minors can lead to the imposition of liability on the defendant, the minor's violation of one of those statutes having that very same purpose should lead to a diminished recovery or no recovery at all, depending on the degree of the minor's contributory negligence. But I think that equitable appeal should be subordinated to a judicial desire to effectu-
Criminal Acts in Negligence

We have already noted that the underlying legislative conclusion is that minors lack the mature judgment necessary to make the consumption of any amount of alcoholic beverage acceptable. The legislature apparently has recognized that, with regard to intoxicants, minors constitute a class unable to exercise self-protective care. The enactment of a comparative negligence statute does nothing in fact or in law to undermine or alter that legislative recognition. Even after the enactment of the comparative negligence statute, the legislature continues to view minors as comprising a class of persons unable to exercise self-protective care after the ingestion of any amount of intoxicating beverage. It is this legislative view that provides the foundation for Congini and Orner. To apply the comparative negligence statute to those cases vitiates this legislative view.

Then why does the legislature criminalize the minor's ingestion of intoxicants? Presumably, in the hope that such a criminal statute will deter minors from consuming intoxicants. Then would not the application of the comparative negligence statute, diminishing or eliminating any recovery the minor might enjoy, complement that policy of deterrence? I think not. I believe that subjecting the host to undiminished liability for serving intoxicants to a minor is the more efficient way of accomplishing the deterrent effect. The social host, not laboring under the minor's lack of mature judgment, is more likely to be sensitive to potential civil litigation consequences in deciding whether or not to serve intoxicants to a minor. Consequently, a judicial conclusion that the comparative negligence statute is inapplicable to cases like Congini and Orner seems more likely to achieve the desired legislative goal than does the application of comparative negligence. Ultimately, then, I think the court in Congini erred in concluding that the comparative negligence statute should be applied and that Orner, to the extent that it permits the same result, is in error.

This conclusion may be corroborated by a potential pragmatic consequence generated by Congini and Orner. The minor plaintiff,

---

80. Compare Zerby v Warren, discussed in note 68.
81. In Congini, the court seems to have failed to recognize the inconsistency between its application of comparative negligence and its own language describing the legislative view of minors and alcohol: "[W]e are confronted with persons who are, at least in the eyes of the law, incompetent to handle the affects [sic] of alcohol." Congini, 470 A2d at 517.
82. See Zerby v Warren, discussed in note 68. "If [the comparative negligence defense] were permitted, the evident purpose of such statutes would be defeated. Consequently, the legislature must have intended that no defense would displace the responsibility imposed by the statute." Zerby, 210 NW2d at 62.
eager to avoid a significantly diminished recovery or no recovery at all, may be motivated to testify that, although the intoxicants served him by the second host did impair his judgment, that impaired judgment did not result in subsequent intoxication. This testimony, if credited, might indeed suggest that the minor had not been contributorily negligent. After all, the peril to be protected against by the statute prohibiting a minor from consuming any intoxicants is impaired judgment leading to the consumption of additional intoxicants and ultimate intoxication. If the minor never became intoxicated, he may indeed have been free of contributory negligence. But that conclusion, in turn, suggests another. If the minor's impaired judgment did not result in his subsequent intoxication, then the peril to be protected against by the accomplice statute applicable to the second host never eventuated. Bear in mind that we have concluded that the accomplice statute, too, was intended to protect against the peril of the minor's impaired judgment leading to his subsequent intoxication and ultimate injuries. If the minor's testimony that he never became intoxicated is credited, it follows that the peril that occasioned his injuries was not one intended to be protected against by the accomplice statute. This means the accomplice statute would be inapplicable to the case and the second host's motion for nonsuit or directed verdict would be granted, since no analogous common law liability is to be imposed.83 There is something intuitively discomfiting about a situation in which the minor's effort to exculpate himself from contributory negligence simultaneously exculpates the second host from any liability. This discomfiture would be a product of the Congini and Orner conclusion that the host may invoke the comparative negligence defense.

CONCLUSION

When a court hearing a negligence action is confronted with evidence of violation of a criminal statute, the court must determine if that statute is applicable to the case before the court. To make this determination, the court should ask and answer these three

83. This seems to be precisely what happened at trial in Orner after the decision of the Supreme Court of Pennsylvania. The minor plaintiff's claim against the hotel where he was injured was settled before trial. At trial against the two social hosts, the minor plaintiff testified that he had not become intoxicated. At the close of plaintiff's case-in-chief, the court granted the motions of the defendants for nonsuit. A motion to strike the nonsuits was filed and is pending. Telephone conversation with Avram Adler, plaintiff's counsel, (Oct 2, 1990).
questions: (1) was the victim within the class of persons intended to be protected by the statute? (2) Was the peril that occasioned the victim’s injury one from which the statute was intended to protect? (3) Was there a factual cause and effect relationship between the statutory violation and the victim’s injury? If the court answers all three questions affirmatively, the court will have determined that the statute is applicable to the action. Once this determination is made, there is no separate issue of proximate cause to be resolved; affirmative answers to the three questions compel an affirmative answer to proximate cause. If the jury accepts the evidence that led the court to answer the three questions affirmatively, thus determining that the statute was applicable, the jury must find for the victim of the statutory violation.

In answering the three questions, the court should be sensitive to and guided by the legislative intent underlying the criminal statute. The court should not abdicate its judicial responsibility for determining legislative intent and attempt to impose any part of that function upon the jury. Nor should the court improperly commingle common law concepts with the underlying legislative intent, creating spurious issues of proximate cause or factual cause and effect, where the underlying legislative purpose and intent point to the resolution of these issues. And, in determining the availability of a contributory or comparative negligence defense, the court should determine if the class intended to be protected by the statute was, in the legislative view, one unable to exercise self-protective care so that the legislative intent would have been to preclude such a defense. If the court follows those precepts, its determinations of the applicability of the criminal statute to the action before the court, the consequences of such applicability, and the availability of the defense of contributory or comparative negligence are likely to represent an accurate reflection of the underlying legislative intent. And this, after all, should be the goal of every court in such circumstances.