

1967

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### Recommended Citation

Otto J. Danker, Brake Failure as Negligence Per Se, 16 Clev.-Marshall L. Rev. 131 (1967)

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## Brake Failure as Negligence Per Se

Otto J. Danker\*

**A**LTHOUGH NUMEROUS AUTOMOBILE ACCIDENTS have been caused by brake failure, the courts have yet to concur on a rule as to the drivers' liability when the brakes fail without the driver's knowledge that they were defective. In Ohio, the driver is held to be *negligent per se* for the injuries resulting from an unforeseen brake failure. This rule was adopted in a recent case<sup>1</sup> when the driver applied the brakes to stop the car for a traffic light. As the brakes were applied, a brake system fluid leak suddenly rendered the braking system of the auto inoperable, in spite of the fact that the driver had taken reasonable care to assure its proper performance. This brake failure resulted in an accident, when the defendant's car collided with the rear of an automobile which had stopped for the traffic light, causing injury to an occupant of the second car. The Ohio court held that the brake failure was a self-created emergency which did not excuse the defendant for failing to comply with the assured-clear-distance-ahead statute, even though a jury had previously found the standard of care accorded the braking system did not constitute negligence, and that the driver operated the vehicle as a reasonable person would under an emergency condition.

In another accident with substantially the same circumstances, an opposite opinion was held by a Mississippi court.<sup>2</sup> A truck driver, while slowing down his vehicle on a highway, found his brakes were suddenly inoperable. His truck hit the rear of the vehicle in front of him, with resulting injuries. Inspection indicated the cause of the failure to be defective brake fittings. The driver was not held negligent or liable for the injuries arising from this incident. Instead, the court held that an operator is liable only if he is found to be guilty of negligence for not discovering the defect. The court permitted the defendant to present evidence of proper inspection of his vehicle and to prove that the unforeseeability of the failure made it impossible for him to comply with the adequate-brake statute.

When one is cognizant of the fact that each state has statutes which require adequate braking systems and an assured-clear-distance-ahead, one must question the disparity in the holdings of these two recent decisions. The explanation lies in the individual attitude of each state towards the *negligence per se*

\* B.S.M.E., Indiana Inst. of Technology; Project Engineer, T.R.W., Inc.; Special Student at Cleveland-Marshall Law School of Baldwin-Wallace College.

<sup>1</sup> Bird v. Hart, 2 Ohio St. 2d 9, 205 N. E. 2d 887 (1965).

<sup>2</sup> Southwest Mississippi Electric Power Ass'n. v. Harragill, 182 So. 2d 220 (Miss. 1966).

rule, and each court's interpretation of the effect of the adequate brake statutes on the ability of a person to comply with their strict requirements.

At common law, the owner of a vehicle did not owe an absolute duty to keep it in a safe and proper condition, but he was responsible for its good operation and was generally liable for injuries which resulted from his failure in this respect.<sup>3</sup> Today, nearly all jurisdictions have statutes which supersede the common law and impose a duty on the owner to maintain motor vehicles in use on public highways with adequate brakes.<sup>4</sup> Ohio statutes, for example, state,

No person shall operate a vehicle without due regard for the safety and rights of pedestrians and drivers and occupants of all other vehicles, trackless trolleys, and street-cars, so as to endanger the life, limb or property of any person while in the lawful use of the streets or highways.<sup>5</sup>

And,

Every motor vehicle, when upon the highway shall be equipped with brakes adequate to control the movement of and to stop and hold such . . . motor vehicle, including two separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least two wheels. . . .<sup>6</sup>

The courts have found the failure of a person to comply with such statutes to be (1) *negligence per se*, (2) prima facie evidence of negligence which would justify a finding of negligence unless excused by other evidence in the case, or (3) some evidence of negligence.<sup>7</sup>

Most courts agree that a violation of a penal or criminal statute constitutes *negligence per se* or negligence as a matter of law.<sup>8</sup> However, there is much diversity about non-penal statutes. *Negligence per se* is usually loosely used and does not necessarily mean the violator is liable for all injuries resulting in all circumstances. Therefore, it is difficult to determine if the cases are decided on *negligence per se* or on the *evidence of negligence* rule.<sup>9</sup>

<sup>3</sup> 3 Proof of Facts § Brakes p. 4 (1959).

<sup>4</sup> Anno., 170 A. L. R. 615, at 615 (1947).

<sup>5</sup> Ohio Rev. Code § 4511.20.

<sup>6</sup> Ohio Rev. Code § 4513.20.

<sup>7</sup> *Supra* n. 3.

<sup>8</sup> *Supra*, n. 4, at 660; *Rentscher v. Hall*, 117 Ind. App. 255, 69 N. E. 2d 619 (1946). "Negligence per se" and "negligence as a matter of law" are substantially interchangeable, "negligence as a matter of law" sometimes being used to aid the jury in understanding the effect of the statute.

<sup>9</sup> *Supra*, n. 4, at 660.

The fact that some decisions hold that the failure of the individual to perform according to statutory requirements may be excused by the evidence in the particular case does not necessarily conflict with the rule that violation of a statute is *negligence per se*. The *prima facie negligence* approach may be held to be merely the assertion of the rule that the statutes are to be interpreted in a reasonable manner, and that statutory duties may be modified by the particular circumstances of each cause of action.<sup>10</sup> In Missouri, for instance, violation of the statute for two adequate sets of brakes is *negligence per se*. But along with this rule, the courts have developed a doctrine labeled *factors of excuse, justifiable violation, or excused violation* which allows the defendant to present evidence that he was without fault and was unable to comply with the statutory requirements and is thereby allowed to present his question of negligence to the jury.<sup>11</sup>

Therefore, although the weight of authority holds that it is *negligence per se* if the cause of injury is due to the violation of a statute or ordinance containing specific requirements, and such violation precludes the violator from recovery for damages,<sup>12</sup> many courts hold that the violation is merely evidence of negligence which may be disproved by evidence to the contrary. This rule was followed by a West Virginia court which held that violation of the statute dealing with adequate brakes constitutes *prima facie negligence*, not *negligence per se*. The court held that reasonable men may differ as to the driver's guilt and the injured claimant's guilt of contributory negligence. The court left it to a jury to determine whether the driver was charged with notice that the brakes were defective after he knew the brakes jerked the car when applied.<sup>13</sup>

Due to the various state courts' differences in interpreting the adequate-brake statutes, a review of the effect of the violator's conduct on the *evidence of negligence* and the *negligence per se* rule is required.

### Evidence of Negligence

Many American courts follow the rule that the owner of a vehicle is not liable if it can be shown that the failure to comply with the statute was through no fault of his own.<sup>14</sup> Even though statutes require vehicles to be equipped with adequate brakes to control the movement and stop the vehicle, violation does not

<sup>10</sup> 65 C. J. S. 426 (1950).

<sup>11</sup> Allied Mutual Casualty Corp. v. General Motors Corp., 279 F. 2d 455 (10th Cir. 1960).

<sup>12</sup> McCoy v. Courtney, 25 Wash. 2d 956, 172 P. 2d 596 (1946).

<sup>13</sup> Spurlin v. Nardo, 145 W. Va. 408, 114 S. E. 2d 913 (1960).

<sup>14</sup> Albers v. Ottenbacher, 79 S. D. 637, 116 N. W. 2d 529 (1962); Kohler v. Sheffert, 250 Iowa 899, 96 N. W. 2d 911 (1959).

charge the owner of the vehicle with *negligence per se*, but it is only evidence of a statute violation which is to be considered by the jury in determining if there is sufficient ground to find the failure was not due to any fault of the defendant.<sup>15</sup> These courts hold that statutes are designed for the protection of the public,<sup>16</sup> and must be given reasonable interpretation to promote their intended purpose.<sup>17</sup> A New York case<sup>18</sup> recently held that the owner is not absolutely liable for noncompliance with the statute, but must take reasonable steps to inspect and ascertain the safety of the brake system. As such, he is chargeable with notice of any defect that reasonable inspection would disclose.<sup>19</sup> If, however, the motorist can show an emergency not of his making and over which he had no control, which made it impossible for him to comply with the statute regardless of the degree of care he may have exercised,<sup>20</sup> or if nothing indicates that the vehicle could have stopped in time to avoid the mishap even with good brakes, and the driver was traveling within the proper speed, the driver is not negligent merely because of defective brakes.<sup>21</sup>

Authorities generally have adhered to the practice of allowing expert opinion on the condition of the automobile or truck as admissible when the facts are such that the opinion of an expert can be of material assistance to aid the jury in considering the evidence.<sup>22</sup> If the violator can offer proof that something occurred without his fault, which due care and prudence could not have prevented, and which made it impossible for him to comply with the statute, the question must be put before a jury to determine if his technical but unintentional violation of the statute amounted to actionable negligence. The burden of proving this legal excuse is on the defendant,<sup>23</sup> and if the violation is admitted and no legal excuse is offered, negligence can be established as a matter of law.<sup>24</sup> Violation of a statutory regulation, caused by a sudden and unforeseen failure is not, as a matter of

<sup>15</sup> *Green v. Werven*, 275 F. 2d 134 (8th Cir. 1960); *Dayton v. Palmer*, 1 Ariz. 184, 400 P. 2d 855 (1965); *Houston v. Adams*, 389 S. W. 2d 872 (1965); *Yance v. Hoskins*, 225 Iowa 1108, 281 N. W. 489 (1938).

<sup>16</sup> *Dayton v. Palmer*, *supra* n. 15.

<sup>17</sup> *Stephens v. Southern Oil Company of North Carolina*, 259 N. C. 456, 131 S. E. 2d 39 (1963).

<sup>18</sup> *Alfano v. Amclir*, 23 A. D. 2d 659, 257 N. Y. S. 2d 2 (1965).

<sup>19</sup> *Curtis v. Blacklaw*, 403 P. 2d 358 (Wash., 1965); *Southwest Mississippi Electric Power Ass'n. v. Harragill*, *supra* n. 2.

<sup>20</sup> *Brush v. Harvey Transfer Co.*, 146 Ohio St. 657, 67 N. E. 2d 851 (1946); *McConnell v. Herron*, 402 P. 2d 726 (Ore., 1965).

<sup>21</sup> *Lively v. Atchley*, 36 Tenn. App. 399, 256 S. W. 2d 58 (1952).

<sup>22</sup> *Vedder v. Bireley*, 92 Cal. App. 52, 267 P. 724 (1928).

<sup>23</sup> *Lehman v. Haynam*, 164 Ohio St. 595, 133 N. E. 2d 97 (1956).

<sup>24</sup> *Lochmoeller v. Kiel*, 137 S. W. 2d 625 (Mo. App. 1940).

law, an inexcusable violation resulting in civil liability.<sup>25</sup> An accident occurred involving a vehicle which had both brakes and rehoned drums, and the brakes had been operating in a proper manner until inclement weather conditions rendered them ineffective. Again, a jury was asked to decide whether these facts were sufficient to excuse the violation of the statute.<sup>26</sup> If no such legal excuse exists, the owner is held to be negligent.<sup>27</sup>

Courts have held that, by statute, the motorist is not an insurer that his brake system is safe,<sup>28</sup> adequate,<sup>29</sup> and mechanically perfect under all conditions.<sup>30</sup> Nor is the owner of an automobile usually in the class of a supplier of a dangerous instrument with a duty to inspect, but he is required to take reasonable steps to inspect the car and ascertain its safety before operating on a highway,<sup>31</sup> and act with care and diligence to see that his brakes meet the standard of the statute.<sup>32</sup> The driver cannot rely on the presumption that the brakes are safe, but if he performs a test, such as applying foot pressure on the brake pedal, and such a test does not indicate any defect, he may not be held to be negligent.<sup>33</sup> However, the mere fact that the owner drives his car carefully does not insulate him from negligence liability if he knew or should have known that the automobile had defective brakes.<sup>34</sup>

When it is held that mere inadequacy of brakes is *prima facie* evidence of a statute violation, the driver may not be charged with violating the statute unless he had knowledge or should have had knowledge, by the use of reasonable care,<sup>35</sup> and the driver may defend by showing proper inspection and sudden failure without warning.<sup>36</sup> If the driver knew or should have known of the defective brakes, the courts hold this knowledge to be a material element of negligence or contributory negligence which can prevent recovery for injury.<sup>37</sup> When a person drives with the knowledge that his brakes are so defective that they will not operate properly, he is acting with heedless or reckless disregard for others' rights, and he may be held to be grossly

<sup>25</sup> Pollack v. Olson, 20 Wis. 2d 394, 122 N. W. 2d 426 (1963).

<sup>26</sup> Amelsburg v. Lunning, 234 Iowa 852, 14 N. W. 2d 680 (1944).

<sup>27</sup> Iowa Mutual Insurance Company v. Combes, 131 N. W. 2d 751 (1964).

<sup>28</sup> Wheeler v. Rabine, 15 A. D. 2d 407, 224 N. Y. S. 2d 483 (1962).

<sup>29</sup> Stephens v. Southern Oil Company of North Carolina, *supra* n. 17.

<sup>30</sup> Alfano v. Amclir, *supra* n. 18.

<sup>31</sup> *Ibid.*; Martino v. Barra, 67 Ill. App. 2d 328, 215 N. E. 2d 12 (1965).

<sup>32</sup> Stephens v. Southern Oil Company of North Carolina, *supra* n. 17.

<sup>33</sup> *Id.*

<sup>34</sup> Chapman v. Blackmore, 39 Ohio App. 425, 177 N. E. 772 (1931).

<sup>35</sup> People v. Pulizzi, 199 Misc. 405, 106 N. Y. S. 2d 680 (1950).

<sup>36</sup> Sothoron v. West, 180 Md. 539, 26 A. 2d 16 (1942).

<sup>37</sup> Marks v. Stolts, 165 A. D. 462, 150 N. Y. S. 952 (1914).

negligent,<sup>38</sup> reckless,<sup>39</sup> willful or wanton,<sup>40</sup> and is guilty of more than slight want of ordinary care.<sup>41</sup> However, if the only question of negligence is based on the suggestion that the brakes may have been in a defective condition, it may not be held to be recklessness.<sup>42</sup> These courts have held that, although an unexcused omission to comply with the statute is negligence in itself, notice, either actual or constructive,<sup>43</sup> of the defect, is essential in order to hold the owner in violation of the statute.<sup>44</sup> If the defect in the brakes is readily discoverable, the failure is not "latent,"<sup>45</sup> and the owner whose servant is driving with defective brakes may be held to be *negligent per se*.<sup>46</sup> When a power brake system is used which will not function when the motor is not operating, the owner of the automobile is charged with knowledge of a brake defect.<sup>47</sup> If one borrows a car and then discovers that the brakes are not in proper working order, it becomes a jury decision to determine whether the driver was negligent in his continued use of the car.<sup>48</sup> If the driver's carelessness causes liability, he is guilty of negligence,<sup>49</sup> but he may be excused from negligence as a matter of law if the accident resulted from causes beyond his control and not by his misconduct.<sup>50</sup>

The "reasonable and prudent person" consideration has also been applied by the courts to the question of negligence.<sup>51</sup> In *Dayton v. Palmer*<sup>52</sup> the owner had his power brakes checked eight months prior to their failure. The brakes had operated properly one quarter of a mile prior to their failure, which was due to a diaphragm rupture. The court stated,

Before a person can be guilty of negligence, he must have knowledge of his failure to do something that a reasonable and prudent person would do or not do under the circumstances.

<sup>38</sup> *Bryll v. Bryll*, 114 Conn. 668, 159 A. 884 (1932); *Walters v. DuFour*, 132 Cal. App. 72, 22 P. 2d 259 (1933).

<sup>39</sup> *Bryll v. Bryll*, *supra* n. 38.

<sup>40</sup> *Rawlins v. Lory*, 44 Cal. App. 2d 20, 111 P. 2d 973 (1941).

<sup>41</sup> *Puhr v. Chicago N. W. R. R.*, 171 Wis. 154, 176 N. W. 767 (1920).

<sup>42</sup> *Fleming v. Thornton*, 217 Iowa 183, 251 N. W. 158 (1933).

<sup>43</sup> *Alfano v. Amclir*, *supra* n. 18.

<sup>44</sup> *Lepke v. Sclafani & Son Inc.*, 20 Misc. 2d 50, 192 N. Y. S. 2d 58 (1959).

<sup>45</sup> *John W. Simmons Trucking Co. v. Briscoe*, 373 P. 2d 49 (Okla., 1962).

<sup>46</sup> *William E. Harden v. Harden*, 29 Ala. App. 411, 197 So. 94 (1940).

<sup>47</sup> *Woods v. Goodson*, 349 P. 2d 731 (Okla., 1960).

<sup>48</sup> *Landry v. Hubert*, 101 Vt. 111, 141 A. 593 (1928).

<sup>49</sup> *Southall v. Smith*, 151 La. 967, 92 So. 402 (1922).

<sup>50</sup> *Albers v. Ottenbacher*, *supra* n. 14.

<sup>51</sup> *Savage v. Blancett*, 47 Ill. App. 2d 355, 198 N. E. 2d 120 (1964).

<sup>52</sup> *Dayton v. Palmer*, *supra* n. 15.

The court held that the statute does not ignore absolute liability for a technical violation of the statute provision regardless of fault. The court differentiated this case from the *Womack v. Preach*<sup>53</sup> case in which it held that the violation of the statute was *negligence per se* due to the fact that in that case the driver knew of the defective brakes and the question of whether the violation was within the intended meaning of the statute and could be excused by showing the lack of fault was not a question before the court.

### Negligence Per Se

Recently several courts have employed the *negligence per se* rule in an attempt to reduce the increasing number of automobile accidents. These courts hold that the motor vehicle statutes impose a strict duty on the owner to maintain the brakes in a proper condition, and if he fails to meet these standards, he is not excused, but is guilty of negligence.<sup>54</sup> An Indiana court held that the violation of the statute is *negligence per se* rather than only a circumstance to be considered in addition to the driver's conduct on the question of negligence. The court held that the statute fixes a mechanical standard for brakes, and not a standard of care, and that it remained for the jury to decide if the brakes met the standard required by the statute.<sup>55</sup> This standard must not only be met at the time when the vehicle is registered, but also must be maintained during any highway operation.<sup>56</sup> If the proximate cause of injury is due to the owner's noncompliance with the statute requirement of good and sufficient brakes, he is held liable,<sup>57</sup> and a directed verdict may be obtained.<sup>58</sup> A summary judgment may also be given in a rear-end collision if the defendant has no explanation except that his brakes failed, since no proximate cause or negligence issue is present.<sup>59</sup>

Because the owner is bound to take notice that he may be called upon to make emergency stops, he is held to be negligent if he does not keep the brakes in proper condition for such possibilities.<sup>60</sup> Violation of the provisions regarding brakes is held to be a self-created emergency which does not provide an excuse for failing to comply with the assured-clear-distance-ahead

<sup>53</sup> *Womack v. Preach*, 63 Ariz. 390, 163 P. 2d 280 (1945).

<sup>54</sup> *Ferran v. Jacquez*, 68 N. M. 367, 362 P. 2d 519 (1961).

<sup>55</sup> 170 A. L. R. 660 (1947).

<sup>56</sup> *Turner v. Scanlon*, 146 Conn. 149, 148 A. 2d 334 (1959).

<sup>57</sup> *Southall v. Smith*, *supra* n. 49.

<sup>58</sup> *Bird v. Hart*, *supra* n. 1.

<sup>59</sup> *Hamill v. Smith*, 25 Conn. Sup. 183, 199 A. 2d 343 (1964).

<sup>60</sup> *Allen v. Schultz*, 107 Wash. 393, 181 P. 916 (1919).



statute.<sup>61</sup> In *Kehrer v. McKittrick*,<sup>62</sup> the operator failed to stop at an intersection due to a brake failure caused by a small crack in the diaphragm of a power brake cylinder. The emergency brake system was tested and found to be inoperable. The court held that the specific requirements of the statute relating to brakes replaced the rule of ordinary care and, in order to preclude liability for injury, the offender had to show that the accident was unavoidable and outside of her control, and not merely that she was acting as a reasonable and prudent person under the circumstances. The court further reasoned that the violator had control over the brake system and its care and maintenance. If one system fails due to lack of proper maintenance, the operator cannot claim an unavoidable accident, even though the other system failed through no fault of the operator. The fact that a driver is within the assured-clear-distance-ahead statute or the center-line statute does not excuse the violation, nor do the facts that the operator had used ordinary care and that he had had the brakes serviced less than six months prior to the failure constitute a legal excuse.<sup>63</sup> Sudden failure of the brakes is not an unavoidable failure, but is attributed to negligence, which constitutes the proximate cause of the collision.<sup>64</sup> Though failure to comply with the statute is held to be *negligence per se*,<sup>65</sup> if the brakes are in good condition but the emergency is caused by the wrongful conduct of a third person,<sup>66</sup> or failure to control the vehicle is due to a break in another unrelated structure, the owner may not be held liable.<sup>67</sup>

### Secondary Brake System

The fact that a statute sets up specific standards for the capabilities of foot brakes<sup>68</sup> does not exclude there use also of a standard for the capabilities of a secondary brake system.<sup>69</sup> By statute, "adequate brakes in good working order" include emergency and foot brakes.<sup>70</sup> The emergency brake system is considered a safety device which the motorist should employ if

<sup>61</sup> *Bird v. Hart*, *supra* n. 1.

<sup>62</sup> 176 Ohio St. 192, 198 N. E. 2d 669 (1964).

<sup>63</sup> *Spalding v. Waxler*, 2 Ohio St. 2d 1, 205 N. E. 2d 890 (1965).

<sup>64</sup> *Bird v. Hart*, *supra* n. 1.

<sup>65</sup> *Hamill v. Smith*, *supra* n. 59.

<sup>66</sup> *Satterthwaite v. Morgan*, 141 Ohio St. 447, 48 N. E. 2d 653 (1943).

<sup>67</sup> *Allied Mutual Casualty Corp. v. General Motors Corp.*, *supra* n. 11; *Smith v. Finkel*, 130 Conn. 354, 34 A. 2d 209 (1943).

<sup>68</sup> Ohio Rev. Code § 4513.20.

<sup>69</sup> *Paulson v. B & L Motor Freight*, 106 Ohio App. 530, 145 N. E. 2d 364 (1957).

<sup>70</sup> *McCoy v. Courtney*, *supra* n. 12; *Spalding v. Waxler*, *supra* n. 63; Ohio Rev. Code § 4513.20; *People v. Cigardo*, 250 N. Y. S. 477 (1931).

he is exercising ordinary care, if the foot brakes fail.<sup>71</sup> Failure of the motorist to maintain an effective dual braking system is actionable negligence when it is the proximate cause of injury.<sup>72</sup> Due to this interpretation of the statute, it is mandatory that both means of applying the brakes be kept in good working order at all times, so that in the event the foot brake fails without warning, the emergency brake can control the vehicle movement.<sup>73</sup>

In *Paulson v. B & L Motor Freight*,<sup>74</sup> the air brake line broke without advance warning and left the tractor trailer substantially without any means of being brought to a stop. The secondary hand brake system was unable to stop the vehicle within the adequate-brake requirements of the statute. The noncompliance with the statute was viewed as the proximate cause of the accident, for which the violator was held liable. However, if both brake systems are inoperable due to the failure of an unrelated third item, the operator is not held to be negligent even though the state holds the violation of the adequate brake statute to be *negligence per se*. In *Stump v. Phillians*,<sup>75</sup> the owner was not liable for the complainant's injury when a brake failure occurred due to a weakness of a weld in the flange and axle housing. The housing weld broke and pulled the hydraulic fluid line and emergency cable, causing both to rupture, which left the vehicle with an inoperable brake system. The court excused both the violation of the adequate-brake and assured-clear-distance-ahead statutes, in view of the fact that the unforeseeable housing failure had rendered both brake systems useless.

### Third Party Liability

In general, a manufacturer or seller is liable for resulting injuries to persons or property when he sells a vehicle with defective or inadequate brakes,<sup>76</sup> or brakes made of inferior materials.<sup>77</sup> The driver of the vehicle is considered to be secondarily liable and the manufacturer primarily liable, under the concept that the manufacturer represents to the buyer that the brakes are in good working order and the owner buys the ve-

<sup>71</sup> *Curtis v. Blacklaw*, *supra* n. 19.

<sup>72</sup> *Davis v. New York Underwriters Ins. Co.*, 141 So. 2d 673 (La. App. 1962); *Robertson v. American Home Assurance Company*, 183 So. 2d 77 (La. App. 1966).

<sup>73</sup> *Spalding v. Waxler*, *supra* n. 63.

<sup>74</sup> *Paulson v. B & L Motor Freight*, *supra* n. 69.

<sup>75</sup> 2 Ohio St. 2d 209, 207 N. E. 2d 762 (1965).

<sup>76</sup> *Anno.*, 63 A. L. R. 398 (1931).

<sup>77</sup> *Ibid.*; *Quackenbush v. Ford Motor Co.*, 167 A. D. 433, 153 N. Y. S. 131 (1915).

hicle reasonably believing this to be a condition of sale.<sup>78</sup> In *Alfano v. Amclir*,<sup>79</sup> it was held that the owner of a vehicle with defective brakes is not *in pari delicto* with the creator of the brake defect, and that the owner may be passively negligent and the creator actively negligent. If the owner drives a vehicle with actual knowledge of the defect, he is guilty of negligent operation and is barred from indemnity. If, however, he had no actual knowledge of the defect, he is not actively negligent, and he may hold the manufacturer liable. In another New York case,<sup>80</sup> the automobile dealer obtained no indemnity for damages when he sold a new car with defective brakes. The court held that the manufacturer and seller of products which are inherently dangerous if defective, act negligently in carrying out their duty to the owner. Also, a buyer of a second hand car, rebuilt by the seller, may hold the seller in the same status as a manufacturer, liable for damages to a third party injured by the car, since the seller, with ordinary care, should have discovered such defect.<sup>81</sup>

However, some states have followed the strict rule that the automobile manufacturer who negligently equips the car with defective brakes is not liable for injuries to third persons, since no privity of contract exists.<sup>82</sup> In a recent Illinois case<sup>83</sup> it was further held that although the statutes impose a duty on the owner and seller to have adequate brakes to control the movement of the vehicle, there is no indemnity by the manufacturer of component parts or by the seller, but that it was the duty of the owner and operator to have adequate brakes, and the owner could not defend on the basis that the brakes were defective due to the fault of the manufacturer or seller.

Differences in court holdings also exist as to the indemnity of a mechanic. In an action by automobile passengers against the operator, the mechanic, and the owner who was not in the car at the time of the accident, it was held that if the driver had notice, he could be held liable to the passengers. The owner's liability is statutory, based on passive negligence, and he could hold the mechanic liable if the accident was caused by defective brakes due to his acts.<sup>84</sup> The opposite view was held in *Beauchamp v. B & L Motor Freight*,<sup>85</sup> in which case it was held that

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<sup>78</sup> *Allied Mutual Casualty Corp. v. General Motors Corp.*, *supra* n. 11.

<sup>79</sup> *Alfano v. Amclir*, *supra* n. 18.

<sup>80</sup> *Gilbert v. Barouch*, 10 A. D. 2d 984, 202 N. Y. S. 2d 429 (1960).

<sup>81</sup> *Flies v. Vox Bros. Buick Co.*, 198 Wis. 496, 224 N. W. 705 (1929).

<sup>82</sup> *Fuller v. Palazzolo*, 329 Pa. 93, 197 A. 225 (1938); *Dillingham v. Chevrolet Motor Co.*, 17 F. Supp. 615 (W. D. Okla. D. 1936).

<sup>83</sup> *Suvador v. White Motor Co.*, 51 Ill. App. 2d 318, 201 N. E. 2d 313 (1964).

<sup>84</sup> *Lipsam v. Warren*, 10 A. D. 2d 868, 199 N. Y. S. 2d 761 (1960).

<sup>85</sup> 106 Ohio App. 530, 152 N. E. 2d 334 (1958).

the owner's duty to exercise reasonable care in repairing brakes could not be delegated to a mechanic.

### Parked Cars

If brakes fail to hold a parked car, the question of negligence is raised.<sup>86</sup> The owner is guilty of negligence if the proximate cause of injury to a car,<sup>87</sup> a building or a person,<sup>88</sup> is due to defective brakes. Evidence tending to prove that the owner failed to set his brakes, or that the brakes were defective and would not hold the parked car and thereby allowed the vehicle to roll downhill and injure the complainant, provides sufficient cause to hold the operator guilty of negligence.<sup>89</sup>

### Criminal Liability

Violation of statutes as to unintentionally killing another while violating any law of the state that applies to the use of or regulation of traffic,<sup>90</sup> is generally only *prima facie negligence*, not *negligence per se*.<sup>91</sup> Criminal liability for a death ordinarily requires actual knowledge of a brake defect.<sup>92</sup> If the owner knows of the defect in his brakes, and that defect was the proximate cause of another's death,<sup>93</sup> or if the proximate cause was that he negligently did not maintain the secondary brake system and the regular system failed, he may be held criminally liable.<sup>94</sup> The evidence is not limited to a comparison of the owner's brakes with the express statutory requirements of the Motor Vehicle Code, but it can be viewed as wantonness amounting to criminal negligence if the brake failure is the proximate cause.<sup>95</sup> And if the owner had reason to know that the brakes were poor, and if this violation of the statute is the proximate cause of death, it is *negligence per se*, and the offender cannot use contributory negligence as a defense.<sup>96</sup>

<sup>86</sup> McCoy v. Courtney, *supra* n. 12.

<sup>87</sup> American Prod. Co. v. Villwock, 7 Wash. 2d 246, 109 P. 2d 570 (1941).

<sup>88</sup> Anno., 170 A. L. R. 623 (1947).

<sup>89</sup> Bundy v. Belue, 253 N. C. 31, 116 S. E. 2d 200 (1960).

<sup>90</sup> Ohio Rev. Code § 4511.18; 170 A. L. R. 615.

<sup>91</sup> Roeder v. Fisher Bakery Inc., 118 Ohio App. 339, 188 N. E. 2d 78 (1963).

<sup>92</sup> Commonwealth v. Tackett, 299 Ky. 731, 187 S. W. 2d 297 (1945).

<sup>93</sup> People v. Rauch, 252 A. D. 795, 299 N. Y. S. 155 (1937).

<sup>94</sup> State v. Kotapish, 171 Ohio St. 349, 171 N. E. 2d 505 (1960).

<sup>95</sup> West v. State, 139 Tex. Crim. 177, 139 S. W. 2d 90 (1940).

<sup>96</sup> State v. Medlin, 355 Mo. 564, 197 S. W. 2d 626 (1946); Womack v. Preach, *supra* n. 53.

### Conclusion

Although statutes have set standards for brakes, and failure to comply is *negligence per se*, the majority of courts generally hold that the statutes must be reasonably interpreted, and that a person may offer evidence to show that his failure to comply was not due to his lack of care. If, however, the owner had knowledge, or had reason to have knowledge, that the brake system was defective, he is liable. If the foot brake system inadvertently fails and the secondary system also is negligently inoperative, the owner is liable since the statute applies to both brake systems, unless it is the fault of the manufacturer, in which case he may be indemnified.

Several states, including Ohio, have recently held that the owner is liable for all brake failure damages resulting from the violation of the statute, and that such a brake failure does not result in an unavoidable accident, but is the proximate cause of the collision. While this may seem to be a harsh interpretation of the statute, such harshness is necessary in order to protect innocent victims of the numerous accidents caused by brake failure. Protection of the innocent is the responsibility of law; a safe, operable vehicle is the responsibility of the possessor.