> danger, and whether the parties, Motts, t/a Motts Radiator, and Stewart, acted as reasonable men under the circumstances is for you the jury to decide. See Konchar v. Cebular, 333 Pa. 499, 3 A.2d 913 (1939).

The trial court denied this point of charge finding that it was "cumulative with respect to the standard charge given by the Court. . . ." *Stewart*, slip op. at 3. In this appeal, Stewart argues that the trial court erred in failing to read point of charge No. 4 to the jury because Pennsylvania law applies an "extraordinary" or "heightened duty of care" to those employing a dangerous agency.

We begin our discussion by reaffirming the principle that there is but one standard of care to be applied to negligence actions involving dangerous instrumentalities in this Commonwealth. This standard of care is "reasonable care" as well stated in the Restatement (Second) of Torts:

> The care required is always reasonable care. The standard never varies, but the care which it is reasonable to require of the actor varies with the danger involved in his act and is proportionate to it. The greater the danger, the greater the care which must be exercised. . . .

Restatement (Second) of Torts §298 comment b (1965).

This comment goes on to say that where the reasonable character of an actor's conduct is in question "its utility is to be weighed against the magnitude of the risk which it involves." Id. Thus, if an act involves risk of death or bodily injury, "the highest attention and caution are required. . . ." Therefore, the comment concludes, "those who deal with firearms, explosives, poisonous drugs or high tension electricity are required to exercise the closest attention and the most careful precautions . . ." Id.

Properly read, our cases involving dangerous agencies reaffirm these well accepted principles found in the Restatement. In Konchar v. Cebular, 333 Pa. 499, 3 A.2d 913 (1939), a case relied upon heavily by appellant in the case at bar, the plaintiff drove into a gas station and ordered a gallon of gasoline. The defendant began pumping gas into the motorcycle, but when three quarters of a gallon was placed in the tank, the gasoline overflowed and ran into the hot cylinders of the engine. The plaintiff, sitting on the motorcycle, was burned when the gasoline exploded. In the subsequent lawsuit for personal injuries, the jury returned a verdict to the defendant. The plaintiff claimed that the trial court erred in sending the question of his contributory negligence to the jury. In deciding the case, this Court noted that gasoline was a dangerous substance requiring a "high duty of care." *Konchar*, 333 Pa. at 501, 3 A.2d at 914. We affirmed, holding that, "[i]t was for the jury to decide whether, under all of the circumstances, [the plaintiff] had acted as a reasonably prudent man." Id. Thus, we recognized that the question of the plaintiff's contributory negligence was to be determined using the reasonable care standard in light of the particular circumstances of the case. One such circumstance, we acknowledged, was that gasoline, a dangerous substance, was involved requiring that the reasonably prudent person exercise a higher degree of care under these circumstances. Taken in context, our statement that the plaintiff was under a "high duty of care" did nothing more than reaffirm the general principle that the care employed by a reasonable man must be proportionate to the danger of the activity. . . .

Admittedly, this notion of a heightened level of "extraordinary care" for the handling of dangerous agencies has crept into our jurisprudence. In Kuhns v. Brugger, 390

Pa. 331, 135 A.2d 395 (1957), this Court considered the proper standard of care for negligence involving a handgun. The defendant in this case was a grandfather who had left a loaded handgun in an unlocked dresser drawer. While alone in the house, his grandchild found the gun and inadvertently shot another child. We affirmed the trial court's finding that the grandfather was negligent for permitting a highly dangerous instrumentality to be in the place where a child could come into contact with it. In so affirming, we found that the possession of a loaded handgun placed upon the defendant the duty of, "exercising not simply ordinary, but extraordinary care so that no harm might be visited upon others." *Kuhns*, 390 Pa. at 344, 135 A.2d at 403. This language in *Kuhns* on its face unfortunately suggests that this Commonwealth recognizes a separate standard of care, "extraordinary care," for dangerous instrumentalities above and beyond "ordinary care." We reject this suggestion. We note that the *Kuhns* Court adopted the above-quoted language without citation to or consideration of this Court's previous cases involving dangerous agencies or the Restatement (Second) of Torts. Since the *Kuhns* Court did not specifically overrule any of these previous cases, we choose to interpret *Kuhns* consistent with . . . *Konchar*. . . . We note that the *Kuhns* Court explained:

> We are not called upon to determine whether the possession of other instrumentalities or objects . . . would impose the same degree of care under similar circumstances; we are simply to determine the degree of care imposed upon the possessor of a loaded pistol, a weapon possessing lethal qualities, under the circumstances.

Kuhns, 390 Pa. at 344, 135 A.2d at 403.

This language strongly suggests that the *Kuhns* Court did not create a standard of "extraordinary care" for all dangerous instrumentalities as advocated by the appellant. Instead, we believe that the *Kuhns* Court considered the danger of an unattended hand gun under the circumstances of this case and fashioned a standard of care proportionate to that danger. . . .

In summation, this Commonwealth recognizes only one standard of care in negligence actions involving dangerous instrumentalities—the standard of reasonable care under the circumstances. It is well established by our case law that the reasonable man must exercise care in proportion to the danger involved in his act. See MacDougall [v. Pennsylvania Power and Light, 311 Pa. 387, 396, 166 A.2d 589, 592 (1933)] ("Vigilance must always be commensurate with danger. A high degree of danger always calls for a high degree of care."); Lineaweaver v. John Wanamaker Philadelphia, 299 Pa. 45, 49, 149 A. 91, 92 (1930) ("The care required increases with the danger."). Thus, when a reasonable man is presented with circumstances involving the use of dangerous instrumentalities, he must necessarily exercise a "higher" degree of care proportionate to the danger. Our case law has long recognized this common sense proposition that a reasonable man under the circumstances will exert a "higher" degree of care when handling dangerous agencies. . . .

With these principles in mind we must next examine the jury instructions in this case. In examining these instructions, our scope of review is to determine whether the trial court committed clear abuse of discretion or error of law controlling the outcome of the case. . . .

Reviewing the charge as a whole, we cannot conclude that it was inadequate. The trial judge explained to the jury that negligence is "the absence of ordinary care which a

reasonably prudent person would exercise in the circumstances here presented." Transcript of Testimony 10/7/92 at 158. The trial judge further explained:

> It is for you to determine how a reasonably prudent person would act in those circumstances. Ordinary care is the care a reasonably prudent person would use under the circumstances presented in this case. It is the duty of every person to use ordinary care not only for his own safety and the protection of his property, but also to avoid serious injury to others. What constitutes ordinary care varies according to the particular circumstances and conditions existing then and there. The amount of care required by law must be in keeping with the degree of danger involved.

Id. at 158-59. . . .

We find that this charge, when read as a whole, adequately instructed the jury. The charge informed the jury that the proper standard of care was "reasonable" or "ordinary" care under the circumstances in accordance with the law of this Commonwealth. The charge properly instructed the jury that the level of care required changed with the circumstances. The charge also informed the jury that the level of care required increased proportionately with the level of danger in the activity. We find nothing in this charge that is confusing, misleading, or unclear. From these instructions, the jury had the tools to examine the circumstances of the case and determine that the defendant was required to exercise a "higher degree of care" in using the dangerous agency of gasoline. . . .

Appellant argues that the language in his point for charge was nearly identical to Pennsylvania Suggested Standard Civil Jury Instruction 3.16 which sets forth the standard of care to be employed on inherently dangerous instrumentalities. PSSCJI 3.16 provides that anyone using a dangerous instrumentality is "required by law to use the highest degree of care practicable."[3] Assuming the applicability of this instruction to the case at bar, we find nothing in it inconsistent with our holding today. The "highest degree of care practicable" is simply another way of phrasing reasonable or ordinary care under the circumstances. We note that this standard jury instruction and point of charge No. 4 are completely consistent with our law. In fact, the use of such an instruction may very well have made the issue clearer to the jury. However, our standard of review is not to determine whether the jury had the best or clearest instructions, but whether they had adequate instructions. We find the jury instructions given in this case to be adequate. The trial judge rejected the plaintiff's point for charge No. 4 as "cumulative" of other jury instructions. We find no abuse of discretion or error of law on the part of the trial court in making this determination.

For the reasons set forth above, we affirm the order of the Superior Court.

NOTES TO STEWART v. MOTTS

1. ***Reasonable Care and Extraordinary Care.*** The court discusses its earlier *Konchar* opinion, which referred to a "high duty of care" and its *Kuhns* opinion,

[3] PSSCJI 3.16 states in full:

> Anyone who supplies or uses an inherently dangerous instrumentality, such as the high voltage current (acids, corrosives, explosives) provided (supplied) (used) by the defendant in this case is required by law to use the highest degree of care practicable to avoid injury to everyone who may be lawfully in the area of such activity.

referring to "extraordinary care." The court also refers to "the standard of reasonable care under the circumstances." What is the status of each of these standards of care, following the *Stewart* decision?

2. ***Ordinary Care and the "Highest Degree of Care."*** Footnote 3 of the court's opinion includes the text of a jury instruction. The opinion states that "ordinary care under the circumstances" is the same as the instruction's phrase "highest degree of care practicable." What analysis would a jury have to adopt in order to give those phrases equivalent meaning?

3. ***Model or Pattern Jury Instructions.*** In *Stewart*, the court discusses a Pennsylvania Suggested Standard Civil Jury Instruction. In most states, *model* or *pattern* jury instructions are published to guide trial courts in creating instructions for the main issues that occur repeatedly in trials. In some states, these instructions are approved by the state's highest court or a committee appointed by the court. In other states they are created by bar committees. Model instructions are not statutes, and they have less force than a state's own decisional law. They do, however, represent authoritative interpretations of the current status of a state's law on most of the major issues in torts cases.

Perspective: Explicit and Implicit Overruling

On the way to stating that Pennsylvania recognizes only one standard of care, the court described its past opinions in ways that might not have been obvious to their authors. This allowed the court to reach its result without explicitly overruling those cases. Note, however, that the court failed to specify clear reasons for its doctrinal choice (rejecting a jury charge referring to a high degree of care). Would the court have been more likely to present clear reasons for its result if it had recognized a possible contradiction between that result and the results in the prior cases?

B. Emergencies

Sometimes injuries occur in situations that involve sudden emergencies. How should that context affect a jury's evaluation of an actor's conduct? Many jurisdictions have allowed a "sudden emergency" jury instruction to supplement the reasonable person test. As Myhaver v. Knutson shows, current tort law is divided on whether this type of instruction is a helpful addition to the reasonable person test.

MYHAVER v. KNUTSON

942 P.2d 445 (Ariz. 1997)

FELDMAN, J.

Plaintiffs Bruce and Barbara Myhaver sought review of a court of appeals' decision holding that the "sudden emergency" instruction was properly given in a case arising out of an automobile collision. We granted review to determine whether a sudden emergency instruction is ever appropriate. . . .

In November 1990, Elmo Knutson was driving north on 43rd Avenue near Bell Road in Phoenix when Theresa Magnusson entered 43rd Avenue from a shopping center driveway and headed south in Knutson's lane. Seeing Magnusson's car in his lane, Knutson accelerated and swerved left, avoiding what he perceived to be an impending head-on collision. In doing this, he crossed the double yellow line into oncoming traffic and collided with Bruce Myhaver's pickup. Magnusson continued south not realizing she was involved. A police officer who saw the accident stopped her a short distance away and asked her to return to the scene.

Myhaver was seriously injured as a result of the collision and brought a damage action against both Knutson and Magnusson. Magnusson settled and . . . the Myhavers proceeded to trial against Knutson. . . .

At trial, [the judge] ruled that the instruction was appropriate under the facts and instructed the jury as follows:

> In determining whether a person acted with reasonable care under the circumstances, you may consider whether such conduct was affected by an emergency.
>
> An "emergency" is defined as a sudden and unexpected encounter with a danger which is either real or reasonably seems to be real. If a person, without negligence on his or her part, encountered such an emergency and acted reasonably to avoid harm to self or others, you may find that the person was not negligent. This is so even though, in hindsight, you find that under normal conditions some other or better course of conduct could and should have been followed.

RAJI (Civil) 2d Negligence 6.

The jury found Knutson not liable. On appeal, the Myhavers argued that the sudden emergency doctrine . . . be abandoned. . . .

[T]he sudden emergency instruction tells the jury that in the absence of antecedent negligence, a person confronted with a sudden emergency that deprives him of time to contemplate the best reaction cannot be held to the same standard of care and accuracy of choice as one who has time to deliberate. Criticism of this doctrine has focused on its ability to confuse a jury as to . . . whether the reasonable person standard of care or some lower standard, applies in an emergency. . . .

Commentators on Arizona's negligence law have described the problem and the present state of our law as follows:

> Conceptually, the emergency doctrine is not an independent rule. It is merely an application of the general standard of reasonable care; the emergency is simply one of the circumstances faced. Arguably, giving a separate instruction on sudden emergency focuses the jury's attention unduly on that aspect of a case. The Arizona Supreme Court has expressly declined to decide the question of the propriety of a separate emergency instruction.

Jefferson L. Lankford & Douglas A. Blaze, The Law of Negligence in Arizona §3.5(1), at 43 (1992). . . .

[I]t is often the case that "despite the basic logic and simplicity of the sudden emergency instruction, it is all too frequently misapplied on the facts or misstated in jury instructions." W. Page Keeton et al., Prosser and Keeton on the Law of Torts §33, at 197. As a result, some states hold that the instruction should never be given. Other states do not require the instruction be given, leaving it to the trial judge's discretion. . . .

One of the more careful analyses of the subject was made in McKee v. Evans, 380 Pa. Super. 120, 551 A.2d 260 (Pa. Super. 1988). The Pennsylvania court found that the

instruction had been improperly given in favor of a driver involved in a ten-mile pursuit. The court concluded that the instruction was not favored and should be given only in those cases in which evidence showed that (1) the party seeking the instruction had not been negligent prior to the emergency, (2) the emergency had come about suddenly and without warning, and (3) reaction to the emergency was spontaneous, without time for reflection. While these factors are certainly not all inclusive, we believe they help describe the situations to which the instruction should be confined.

Having noted that the instruction is but a factor to be considered in determining reasonable care, is subsumed within the general concept of negligence, is a matter of argument rather than a principle of law and can single out and unduly emphasize one factor and thus mislead a jury, we join those courts that have discouraged use of the instruction and urge our trial judges to give it only in the rare case. The instruction should be confined to the case in which the emergency is not of the routine sort produced by the impending accident but arises from events the driver could not be expected to anticipate.

We do not, however, join those courts that absolutely forbid use of the instruction. There are cases in which the instruction may be useful or may help to explain the need to consider a sudden emergency and the consequent reflexive actions of a party when determining reasonable care. We believe, however, that in those few cases in which the instruction is given, it would be important to explain that the existence of a sudden emergency and reaction to it are only some of the factors to be considered in determining what is reasonable conduct under the circumstances. Even though a judge may exercise his discretion and give a sudden emergency instruction in a particular case, it will rarely, if ever, be error to refuse to give it.

Applying these principles to the case at bench, we conclude that the trial judge did not abuse his discretion in giving the instruction. This is a case in which there was no evidence of antecedent negligence by Knutson, in whose favor the instruction was given. In light of the testimony of the various witnesses, there was no question about the existence of an emergency. Knutson was faced with a situation not ordinarily to be anticipated and one of imminent peril when Magnusson pulled out of the shopping center and suddenly turned toward him in the wrong lane of traffic. Finally, Knutson's reaction — swerving across the center line into the path of Myhaver's oncoming vehicle — was probably both reflexive in nature and the type of conduct that absent a sudden emergency would almost automatically be found as negligence. . . . Given these facts, the real and only issue was whether Knutson's conduct was reasonable under the circumstances of the emergency. We believe, therefore, the trial judge had discretion to instruct on the sudden emergency as a factor in the determination of negligence.

For the foregoing reasons, we approve the court of appeals' decision and affirm the judgment of the trial court.

ZLAKET, C.J., specially concurring. . . .

[T]oday's resolution fails to address the essential flaw in the instruction — that it overemphasizes and tends to accord independent status to what is but one of many elements in every negligence analysis. If drivers cannot "be expected to anticipate" certain events, they are by definition free from negligence. Standard instructions, particularly when supplemented by oral argument of counsel, should be more than sufficient to convey this idea without having a trial judge specifically suggest that one party might be excused because he or she faced an "emergency." . . .

However, because the instruction in question has not yet been specifically disapproved in Arizona, and appears to have been harmless under the particular facts of this case, I am unwilling to say that the trial judge abused his discretion. I therefore concur in the result.

NOTES TO MYHAVER v. KNUTSON

1. ***Significance of an Emergency.*** Proof that a person acted in an emergency could be given several different effects in a negligence case. It could absolve the actor of liability, it could entitle the actor to be judged with a standard of care that is less demanding that a typical standard of care, or it could be treated as just one factor among many that a jury considers in applying the reasonable person test. What position did the *Myhaver* court take on this issue?

2. ***The Learned Hand Test and Emergencies.*** The presence of an emergency could affect all of the elements of the Learned Hand test for negligence. How, for example, would it affect the "burden" of prevention?

3. ***Trial Court Discretion.*** A common result among courts that have considered this issue is to express dissatisfaction with the sudden emergency doctrine while refusing to treat a trial court's use of it as reversible error. Why might that result be attractive to many jurisdictions?

C. An Actor's Knowledge and Skill

In comparing how a person acted with how a reasonable person would have acted, two important questions about knowledge sometimes arise. Should the jury treat that person as if he or she knew what typical people know about the possibility of accidents? Also, if the person has knowledge or skill that is greater than the knowledge or skill that a typical person has, how should the jury deal with that fact? Cervelli v. Graves reflects typical treatment of these issues.

CERVELLI v. GRAVES

661 P.2d 1032 (Wyo. 1983)

RAPER, J.

This case arose when Larry B. Cervelli (appellant) filed a personal injury suit for injuries he sustained when a pickup truck driven by him collided with a cement truck owned by DeBernardi Brothers, Inc. (appellee). The cement truck was driven by DeBernardi's employee, Kenneth H. Graves (appellee) while acting in the course of his employment. After trial, a jury found no negligence on the part of appellees. Appellant argues the jury was incorrectly instructed and, as a result, found as it did thereby prejudicing him. He raises the following [issue] on appeal:

> Did the court err in instructing the jury that it was not to consider a person's skills in determining whether that person is negligent?

We will reverse and remand.

Around 7:30 a.m., February 22, 1980, a collision occurred approximately nine miles west of Rock Springs, Wyoming in the westbound lane of Interstate Highway 80 involving a pickup driven by appellant and appellee's cement truck. At the time of the accident, the road was icy and very slick; witnesses described it as covered with "black ice." Just prior to the accident appellant had difficulty controlling his vehicle and began to "fishtail" on the ice. He eventually lost control of his vehicle and started to slide. Appellee Graves, who had been approaching appellant from behind at a speed of 35-40 m.p.h., attempted to pass appellant's swerving vehicle first on the left side, then the right. He too, thereafter, lost control of his cement truck and the two vehicles collided. It was from that accident that appellant brought suit to recover damages for the numerous injuries he suffered.

By his own admission, appellee Graves at the time of the accident was an experienced, professional truck driver with over ten years of truck driving experience. He possessed a class "A" driver's license which entitled him to drive most types of vehicles including heavy trucks. He had attended the Wyoming Highway Patrol's defensive driver course and had kept up-to-date with various driving safety literature. He was the senior driver employed by appellee DeBernardi Brothers, Inc.

The suit was tried to a jury on the issues of appellee's negligence as well as the degree, if any, of appellant's own negligence. After a four-day trial, the jury was instructed and received the case for their consideration. They found no negligence on the part of appellees. Judgment was entered on the jury verdict and appellant moved for a new trial claiming the jury was improperly instructed. The district court took no action on the motion; it was deemed denied in sixty days. Rule 59, W.R.C.P. This appeal followed.

Appellant calls our attention to and alleges as error the district court's jury instructions . . . that:

> Negligence is the lack of ordinary care. It is the failure of a person to do something a reasonable, careful person would do, or the act of a person in doing something a reasonable, careful person would not do, under circumstances the same or similar to those shown by the evidence. The law does not say how a reasonable, careful person would act under those circumstances, as that is for the Jury to decide.
>
> A reasonable, careful person, whose conduct is set up as a standard, is not the extraordinarily cautious person, nor the exceptionally skillful one, but rather a person of reasonable and ordinary prudence. . . .

. . . Appellant argues that the second paragraph of that instruction is an incorrect statement of the law. We agree.

. . . That language is an apparent attempt to enlarge upon the reasonable man standard. In that attempt to explain the reasonable man concept, however, the instruction goes too far. It contradicts the correct statement of the law contained in the first paragraph of the instruction. Simply put, the first paragraph of the instruction correctly states that negligence is the failure to exercise ordinary care where ordinary care is that degree of care which a reasonable person is expected to exercise under the same or similar circumstances. The trial court's instruction first allows the jury to consider the parties' acts as compared to how the reasonable person would act in similar circumstances and then limits the circumstances the jury can consider by taking out of their purview the circumstances of exceptional skill or knowledge which are a part of the totality of circumstances.

Our view that negligence should be determined in view of the circumstances is in accord with the general view. The Restatement, Torts 2d §283 (1965) defines the standard of conduct in negligence actions in terms of the reasonable man under like circumstances. Professor Prosser, discussing the reasonable man, likewise said that "negligence is a failure to do what the reasonable man would do 'under the same or similar circumstances.'" He contended a jury must be instructed to take the circumstances into account. Prosser, Law of Torts §32, p.151 (4th ed. 1971). Prosser also went on to note that under the latitude of the phrase "under the same or similar circumstances," courts have made allowance not only for external facts but for many of the characteristics of the actor himself.

It has been said that "circumstances are the index to the reasonable man's conduct. His degree of diligence varies not only with standard of ordinary care, but also with his ability to avoid injuries to others, as well as the consequences of his conduct." (Footnote omitted.) 1 Dooley, Modern Tort Law §3.08, p.27 (1982 Rev.). It was aptly put many years ago when it was said:

> It seems plain also that the degree of vigilance which the law will exact as implied by the requirement of ordinary care, must vary with the probable consequences of negligence and also with the command of means to avoid injuring others possessed by the person on whom the obligation is imposed. . . . Under some circumstances a very high degree of vigilance is demanded by the requirement of ordinary care. Where the consequence of negligence will probably be serious injury to others, and where the means of avoiding the infliction of injury upon others are completely within the party's power, ordinary care requires almost the utmost degree of human vigilance and foresight. (Footnote omitted.) Id., quoting from Kelsey v. Barney, 12 N.Y. 425 (1855).

At a minimum, as Justice Holmes once said, the reasonable man is required to know what every person in the community knows. Holmes, Common Law p.57 (1881). In a similar vein, Professor Prosser notes there is, at least, a minimum standard of knowledge attributable to the reasonable man based upon what is common to the community. Prosser, supra at pp.159-160. Prosser went on to say, however, that although the reasonable man standard provides a minimum standard below which an individual's conduct will not be permitted to fall, the existence of knowledge, skill, or even intelligence superior to that of an ordinary man will demand conduct consistent therewith. Along that same line, Restatement, Torts 2d §289 (1965) provides:

> The actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising
>
> (a) such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have; and
>
> (b) such superior attention, perception, memory, knowledge, intelligence, and judgment as the actor himself has.

Section 289 comment m expands further on the effect of superior qualities of an individual when it states:

> m. Superior qualities of actor. The standard of the reasonable man requires only a minimum of attention, perception, memory, knowledge, intelligence, and judgment in order to recognize the existence of the risk. If the actor has in fact more than the

> minimum of these qualities, he is required to exercise the superior qualities that he has in a manner reasonable under the circumstances. The standard becomes, in other words, that of a reasonable man with such superior attributes.

The instruction given by the trial court could easily have been construed by the jury to preclude their consideration of exceptional skill or knowledge on the part of either party which the evidence may have shown. In determining negligence the jury must be allowed to consider all of the circumstances surrounding an occurrence, including the characteristics of the actors in reaching their decision. Where, as here, there was evidence from which the jury could have concluded appellee Graves was more skillful than others as a result of his experience as a driver, they should be allowed to consider that as one of the circumstances in reaching their decision. The second paragraph of [the instruction], as appellant points out, could easily have misled the jury into disregarding what they may have found from the evidence regarding appellee's skill and as such prejudiced appellant. The objectionable language of the instruction is surplus language which, rather than clarifying the fictional concept of the reasonable person, actually unduly limited it. Therefore, because [the instruction] was both an incorrect statement of the law and more importantly very probably misleading, we hold that the trial court committed reversible error in using it to instruct the jury.

NOTES TO CERVELLI v. GRAVES

1. ***Knowledge Requirement.*** The Restatement defines the background knowledge that it is fair to assume an actor would have as the "knowledge of . . . pertinent matters . . . a reasonable man would have." Is that standard consistent with the court's analysis in Parrot v. Wells, Fargo & Co. (The Nitro-Glycerine Case)?

2. ***Below and Above Average Knowledge.*** Vaughan v. Menlove required the conduct of the farmer to be evaluated against a standard of what a typical and reasonable farmer would do, regardless of whether the defendant possessed a reasonable person's knowledge or skill. In *Cervelli*, the court notes that in the evaluation of the conduct of a person who has superior knowledge or skill, that person's conduct should be evaluated against a standard that reflects the person's superior attributes. Why should tort law ignore an actor's below-average attributes but pay attention to an actor's above-average attributes?

Perspective: The Reasonable Person Test and Juror Discretion

Does the reasonable person test allow jurors to reach whatever decisions they think are fair, or does it control their discretion by applying an identifiable legal standard? In James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law,* 51 Ind. L.J. 467 (1976), the author evaluates that test in the context of what he calls "polycentric" or "open-ended" and "many-centered" problems:

> [I]n cases involving the individual conduct of "the man in the street" in his arm's length relations with others in the society, courts have relied heavily upon two institutions which have, as a consequence, come to occupy a centrally

important position in this area of the law: the reasonable man test and the lay jury. Given the nontechnical nature of the issues presented in these cases, the moralistic, flesh-and-blood qualities of the reasonable man have provided an adequate vehicle with which to bring a semblance of order to the task of addressing the polycentric question of what modes of conduct individual members of society have a right to expect from one another. And the collective jury verdict, reached in secret and rendered without explanation, is ideally suited to disguising and submerging the analytical difficulties encountered in applying so general a concept as "reasonableness" to the facts of particular cases. Admittedly, this combined technique of couching argument in terms of how a hypothetical reasonable person would or would not have acted, and then turning the ultimate question of liability over to a jury, depends for its success upon its ability to hide from view, rather than confront and solve, the polycentricity in these cases. Nevertheless, it must be conceded that in the negligence cases in which the content is given to the reciprocal duty of reasonable care owed generally by individuals in our society, the difficulties have not proven insurmountable.

D. Youth: Special Treatment for Minors

Tort cases sometimes require the evaluation of a *child's conduct.* A child may be a defendant who will be liable for having inflicted an injury if he or she did it negligently. More often, a child is a plaintiff seeking damages for an injury inflicted by the defendant. In those cases, the child's conduct must be characterized as negligent or non-negligent, because doctrines known as *contributory negligence* and *comparative negligence* prohibit or reduce recoveries when a plaintiff has been negligent in a way that contributed to his or her injury.

All jurisdictions use a *special standard of care* for children's conduct. Robinson v. Lindsay describes some of the history of that standard and also shows how modern courts apply it: Does a standard that makes sense for judging a child's conduct in traditional childhood activities work well for evaluating a child's use of a snowmobile? Peterson v. Taylor emphasizes the jury's ability to interpret the child's standard based on evidence it receives about the particular child whose conduct the jury must judge: Is there a reason to think that juries can estimate how carefully children of particular ages and particular levels of experience might reasonably act?

ROBINSON v. LINDSAY

598 P.2d 392 (Wash. 1979)

UTTER, C.J.

An action seeking damages for personal injuries was brought on behalf of Kelly Robinson who lost full use of a thumb in a snowmobile accident when she was 11 years of age. The petitioner, Billy Anderson, 13 years of age at the time of the accident, was the driver of the snowmobile. After a jury verdict in favor of Anderson, the trial court ordered a new trial.

The single issue on appeal is whether a minor operating a snowmobile is to be held to an adult standard of care. The trial court failed to instruct the jury as to that standard and ordered a new trial because it believed the jury should have been so instructed. We agree and affirm the order granting a new trial.

The trial court instructed the jury under WPI 10.05 that:

> In considering the claimed negligence of a child, you are instructed that it is the duty of a child to exercise the same care that a reasonably careful child of the same age, intelligence, maturity, training and experience would exercise under the same or similar circumstances.

Respondent properly excepted to the giving of this instruction and to the court's failure to give an adult standard of care.

The question of what standard of care should apply to acts of children has a long historical background. Traditionally, a flexible standard of care has been used to determine if children's actions were negligent. Under some circumstances, however, courts have developed a rationale for applying an adult standard.

In the courts' search for a uniform standard of behavior to use in determining whether or not a person's conduct has fallen below minimal acceptable standards, the law has developed a fictitious person, the "reasonable man of ordinary prudence." That term was first used in Vaughan v. Menlove, 132 Eng. Rep. 490 (1837).

Exceptions to the reasonable person standard developed when the individual whose conduct was alleged to have been negligent suffered from some physical impairment, such as blindness, deafness, or lameness. Courts also found it necessary, as a practical matter, to depart considerably from the objective standard when dealing with children's behavior. Children are traditionally encouraged to pursue childhood activities without the same burdens and responsibilities with which adults must contend. See Bahr, *Tort Law and the Games Kids Play,* 23 S.D. L. Rev. 275 (1978). As a result, courts evolved a special standard of care to measure a child's negligence in a particular situation.

In Roth v. Union Depot Co., 13 Wash. 525, 43 P. 641 (1896), Washington joined "the overwhelming weight of authority" in distinguishing between the capacity of a child and that of an adult. As the court then stated, at page 544, 43 P. at page 647:

> [I]t would be a monstrous doctrine to hold that a child of inexperience—and experience can come only with years—should be held to the same degree of care in avoiding danger as a person of mature years and accumulated experience.

The court went on to hold, at page 545, 43 P. at page 647:

> The care or caution required is according to the capacity of the child, and this is to be determined, ordinarily, by the age of the child. . . .
>
> . . . a child is held . . . only to the exercise of such degree of care and discretion as is reasonably to be expected from children of his age.

The current law in this state is fairly reflected in WPI 10.05, given in this case. In the past we have always compared a child's conduct to that expected of a reasonably careful child of the same age, intelligence, maturity, training and experience. This case is the first to consider the question of a child's liability for injuries sustained as a result of his or her operation of a motorized vehicle or participation in an inherently dangerous activity.

Courts in other jurisdictions have created an exception to the special child standard because of the apparent injustice that would occur if a child who caused injury while engaged in certain dangerous activities were permitted to defend himself by saying that other children similarly situated would not have exercised a degree of care higher than his, and he is, therefore, not liable for his tort. Some courts have couched the exception in terms of children engaging in an activity which is normally one for adults only. See, e.g., Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859 (1961) (operation of a motorboat). We believe a better rationale is that when the activity a child engages in is inherently dangerous, as is the operation of powerful mechanized vehicles, the child should be held to an adult standard of care.

Such a rule protects the need of children to be children but at the same time discourages immature individuals from engaging in inherently dangerous activities. Children will still be free to enjoy traditional childhood activities without being held to an adult standard of care. Although accidents sometimes occur as the result of such activities, they are not activities generally considered capable of resulting in "grave danger to others and to the minor himself if the care used in the course of the activity drops below that care which the reasonable and prudent adult would use . . ." Daniels v. Evans, 107 N.H. 407, 408, 224 A.2d 63, 64 (1966).

Other courts adopting the adult standard of care for children engaged in adult activities have emphasized the hazards to the public if the rule is otherwise. We agree with the Minnesota Supreme Court's language in its decision in Dellwo v. Pearson, supra, 259 Minn. at 457-58, 107 N.W.2d at 863:

> Certainly in the circumstances of modern life, where vehicles moved by powerful motors are readily available and frequently operated by immature individuals, we should be skeptical of a rule that would allow motor vehicles to be operated to the hazard of the public with less than the normal minimum degree of care and competence.

Dellwo applied the adult standard to a 12-year-old defendant operating a motor boat. Other jurisdictions have applied the adult standard to minors engaged in analogous activities. Goodfellow v. Coggburn, 98 Idaho 202, 203-04, 560 P.2d 873 (1977) (minor operating tractor); Williams v. Esaw, 214 Kan. 658, 668, 522 P.2d 950 (1974) (minor operating motorcycle); Perricone v. DiBartolo, 14 Ill. App. 3d 514, 520, 302 N.E.2d 637 (1973) (minor operating gasoline-powered minibike); Krahn v. LaMeres, 483 P.2d 522, 525-26 (Wyo. 1971) (minor operating automobile). The holding of minors to an adult standard of care when they operate motorized vehicles is gaining approval from an increasing number of courts and commentators.

The operation of a snowmobile likewise requires adult care and competence. Currently 2.2 million snowmobiles are in operation in the United States. 9 Envir. Rptr. (BNA) 876 [1978 Current Developments]. Studies show that collisions and other snowmobile accidents claim hundreds of casualties each year and that the incidence of accidents is particularly high among inexperienced operators. See Note, *Snowmobiles a Legislative Program,* 1972 Wis. L. Rev. 477, 489 n.58.

At the time of the accident, the 13-year-old petitioner had operated snowmobiles for about 2 years. When the injury occurred, petitioner was operating a 30-horsepower snowmobile at speeds of 10-20 miles per hour. The record indicates that the machine itself was capable of 65 miles per hour. Because petitioner was operating a powerful motorized vehicle, he should be held to the standard of care and conduct expected of an adult.

The order granting a new trial is affirmed.

NOTES TO ROBINSON v. LINDSAY

1. ***Basic Child Standard of Care.*** The court confirms the usual applicability of a special standard for children, approving the trial court's instruction that a child is required to exercise as "the same care that a reasonably careful child of the same age, intelligence, maturity, training and experience would exercise under the same or similar circumstances." The court quotes an earlier opinion saying it would be monstrous to require children to act as carefully as more experienced people act. The court also refers to "the need of children to be children." Consider how well this special standard for children relates to children's needs and society's needs for children to develop their abilities.

2. ***Exception to the Basic Rule.*** The *Robinson* court rejects applying the basic rule to the conduct of a child who was operating a snowmobile. It notes the inherent danger in that activity and cites that as a reason to apply the adult standard rather than the child's standard. Other courts have withdrawn the child standard when an activity is one that is normally engaged in only by adults. Still another position would withdraw the child standard only for activities that are both dangerous and usually "adults only" activities. How would each of these approaches apply to the following activities?

A. Downhill skiing. See Goss v. Allen, 70 N.J. 442, 360 A.2d 388 (1976).

B. Hunting with a rifle in a state where minors are not required to have a license to hunt. See Purtle v. Shelton, 251 Ark. 519, 474 S.W.2d 123 (1971).

C. Playing golf. See Neumann v. Shlansky, 294 N.Y.S.2d 628 (1968).

D. Using a fire outdoors for cooking. See Farm Bureau Ins. Group v. Phillips, 323 N.W.2d 477 (Mich. App. 1982).

Perspective: Fairness to Victims?

The noted scholar Richard A. Epstein has written that the rule applying a child's standard of care to the conduct of a child who rides a bicycle "undercuts the protection offered innocent strangers rammed by children." Richard A. Epstein, Torts 119 (1999). Does that question suggest a frame of reference different from the orientation of those who favor the special standard for children? How would those proponents respond to Professor Epstein's observation?

PETERSON v. TAYLOR

316 N.W.2d 869 (Iowa 1982)

ALLBEE, J.

An unfortunate combination of gasoline, matches and a seven-year-old boy resulted in the lawsuit which underlies this appeal. Badly burned as a result of his experimentation with fire, the minor plaintiff David Peterson, by his mother as next friend, brought a negligence suit against his neighbors, the Taylors, from whose storage shed he obtained the gasoline. The jury returned a verdict for the defendants, and plaintiff appeals.

Evidence at trial showed that the Taylors and the Petersons lived on neighboring small acreages just outside the Des Moines city limits and that David Peterson frequently played with the Taylors' son Greg. On Sunday, August 7, 1977, David and his three-year-old sister Molly stopped at the Taylor place on their way home from another neighbor's house. Finding no one home, David decided to gather some twigs and build a fire on a concrete slab in the Taylors' back yard, using some matches he had taken from his uncle's car earlier that day. When the wind blew that fire out, David "got mad." He then went to the Taylors' storage shed, removed a can of gasoline, opened it, smelled it to confirm that it was gasoline, threw a lighted match into it and stood back to watch the fire come out of the can. When that fire appeared to have died out, he went to the shed, removed a second can of gasoline, and accidentally spilled some of it on his pants. Then he dropped the second can and either lit another match or knocked over the first can which was still flaming inside; in any event, David's gasoline-soaked pants somehow became ignited, and he rolled on the ground to put out the fire. As a result of the incident, David received serious burns. . . .

Plaintiff presented expert testimony to the effect that David was of average intelligence, that he was mildly hyperactive, and that hyperactive children tend to be somewhat more attracted to playing with fire than other children. The expert also testified that a child having David's characteristics probably would not realize the full extent of the danger involved in playing with matches and gasoline; for instance, he probably would not realize that a gasoline fire cannot be put out with water. The same expert did testify, however, that such a child "would certainly know that he'd get burned" if he played with gasoline and matches.

On appeal, plaintiff . . . questions . . . the sufficiency of the evidence of his contributory negligence. . . .

. . . The trend is to view the question of a child's capacity for negligence as an issue of fact. Comment, *Capacity of Minors to Be Chargeable with Negligence and Their Standard of Care,* 57 Neb. L. Rev. 763, 767 (1978). See, e.g., Mann [*v. Fairbourn,* 12 Utah 2d 342, 346, 366 P.2d 606, 606] ("The capacity or incapacity of a child [for contributory negligence] is a factual inquiry and the test to be applied is that applicable to any other question of fact.") Under this approach, a particular child's incapacity for negligence may be determined by the court as a matter of law only if the child is so young or the evidence of incapacity so overwhelming that reasonable minds could not differ on that issue. Id.; 57 Neb. L. Rev., supra, at 767; see W. Prosser [Handbook of the Law of Torts 156 (4th ed. 1971]; Restatement (Second) of Torts §283A comment b (1965). If reasonable minds *could* differ, the question of the child's contributory negligence is submitted to the jury with instructions to apply a standard of care similar to that set forth in §283A of the Restatement, supra:

> If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.

In applying this standard, the jury must initially make a subjective determination of the particular child's capacity to perceive and avoid the specific risk involved, based on evidence of his age, intelligence and experience. . . .

We have articulated a standard of care for children similar to that in the Restatement, see, e.g., Ruby v. Easton, 207 N.W.2d 10, 20 (Iowa 1973) ("standard of reasonable behavior of children of similar age, intelligence and experience"). . . .

. . . Plaintiff argues that defendants had the burden of establishing the appropriate standard of care by which David's actions should be judged, and that they failed to meet that burden as a matter of law. Specifically, he asserts that evidence at trial showed David was generally a normal seven-year-old child, and that defendants presented no evidence that a normal seven-year-old child would have acted differently than David did. Therefore, it is argued, there was no evidence from which the jury could find that David did not exercise that degree of care which may be expected of a seven-year-old child. We believe this argument reflects a basic misunderstanding concerning the evidentiary showing which must be made in regard to the standard of care for children.

In applying the standard of care, as noted above, the jury's first inquiry is a subjective one: What was the capacity of this particular child—given what the evidence shows about his age, intelligence and experience—to perceive and avoid the particular risk involved in this case? Once this has been determined, the focus becomes objective: How would a reasonable child of like capacity have acted under similar circumstances? The particular child in question can be found negligent only if his actions fall short of what may reasonably be expected of children of similar capacity. . . .

Regarding the subjective inquiry, there must be evidence adduced at trial concerning the child's age, intelligence and experience so that the jury may determine the child's capacity, if any, to perceive and avoid the risk. *Watts v. Erickson,* 244 Minn. 264, 268-69, 69 N.W.2d 626, 629-30 (1955). We find there was ample evidence of that nature in this case, and the evidence was not such that David could be found incapable of contributory negligence as a matter of law. Plaintiff appears to complain, however, that no witness testified that a reasonable child of like capacity would not have acted as plaintiff did in this case. We hold that such testimony need not, and indeed may not, be presented. Determining how a reasonable person would have acted under the circumstances is clearly the function of the jury. The "reasonable child" inquiry differs from the "reasonable man" inquiry only in that the "circumstances" in the former case are broadened to include consideration of the child's age, intelligence and experience. In neither case should a witness, expert or otherwise, be permitted to express an opinion on what a reasonable person would have done in a similar situation, because such testimony would be tantamount to an opinion on whether the person in question was negligent. . . .

We conclude that there was sufficient evidence for trial court to submit the question of David's contributory negligence to the jury. . . .

Affirmed.

NOTES TO PETERSON v. TAYLOR

1. ***Expert Testimony on Child's Abilities.*** The court rejected the idea that expert testimony should be required to enable a jury to determine what a typical child of a specific age, intelligence, and experience would do in a given situation. What experiences do typical jury members have that might enable them to decide that question in the absence of information from experts?

2. ***Negligence of Very Young Children.*** Some states hold that a child under seven is not capable of negligence as a matter of law. This is known as the "Illinois rule." See Toney v. Mazariegos, 166 Ill. App. 3d 399, 116 Ill. Dec. 820, 519 N.E.2d 1035 (1988).

Most states follow the Restatement (Second) of Torts §283(A) (1964) and the comments to that section, taking the position that the variety of development and intelligence in children and the range of situations in which they may act make it preferable to allow the jury to interpret the standard in every case. See Honeycutt v. Phillips, 247 Kan. 250, 796 P.2d 549 (1990), for a discussion of this issue.

3. ***Historical Pressures for Pro-Child Rules.*** At the time when courts developed the child's standard of care, it was a nearly universal rule that a plaintiff who was negligent in any way in connection with his or her injury was completely barred from recovery. Adopting a pro-child standard at that time had the effect of allowing recovery for many children who otherwise would have recovered nothing if the defendant had been able to prove that their conduct was less careful than an adult's would have been. Since children are plaintiffs much more often than they are defendants, adopting the child's standard of care was probably seen as a step that could facilitate recoveries for relatively innocent children without causing a disadvantage to many other potential plaintiffs.

At present, almost every jurisdiction has rejected the "contributory negligence" doctrine that precluded recovery when a plaintiff was negligent. They have replaced it with "comparative negligence" doctrines that allow plaintiffs to recover in many situations even though a jury concludes they were negligent. This changes the importance of a special standard for children. When the standard was first developed, it protected children from total defeat. Now, when a jury uses the child's standard of care, the standard affects how severely a jury evaluates the child's conduct for the purpose of applying comparative negligence principles that often reduce and only sometimes preclude recovery by the child.

4. ***Why Sue a Child?*** As *Robinson* shows, children can be responsible under tort law for damages they inflict on others. Parents, though, are not obligated to pay for harms their children might cause. This leads to an obvious conclusion: It's not worth the effort to sue a child unless the child has his or her own wealth or the child is covered by an insurance policy that will pay a judgment entered against the child. A small number of children do have their own money, usually given to them by relatives or by their parents. Many children are covered by their parents' homeowner's insurance policies. These policies protect against damage to the insured's home, and they usually also provide coverage for personal injury liability incurred by anybody in the immediate family of the insured.

Some states have statutes that alter the common law position and make parents financially responsible for damage their children cause. These statutes generally cover only intentional misconduct and impose a ceiling on the amount of liability, such as $5,000 or $10,000.

Statute: LIABILITY OF PARENT OR GUARDIAN FOR WILLFUL DESTRUCTION OF PROPERTY BY INFANT UNDER 18

N.J. Stat. Ann. §2A:53A-15 (2000)

A parent, guardian or other person having legal custody of an infant under 18 years of age who fails or neglects to exercise reasonable supervision and control of the conduct of such infant, shall be liable in a civil action for any willful, malicious or

unlawful injury or destruction by such infant of the real or personal property of another.

Statute: PARENTAL LIABILITY FOR WILLFUL, MALICIOUS OR CRIMINAL ACTS OF CHILDREN

W. Va. Code §55-7A-2 (2002)

The custodial parent or parents of any minor child shall be personally liable in an amount not to exceed five thousand dollars for damages which are the proximate result of any one or a combination of the following acts of the minor child:

(a) The malicious and willful injury to the person of another; or

(b) The malicious and willful injury or damage to the property of another, whether the property be real, personal or mixed; or

(c) The malicious and willful setting fire to a forest or wooded area belonging to another; or

(d) The willful taking, stealing and carrying away of the property of another, with the intent to permanently deprive the owner of possession.

For purposes of this section, "custodial parent or parents" shall mean the parent or parents with whom the minor child is living, or a divorced or separated parent who does not have legal custody but who is exercising supervisory control over the minor child at the time of the minor child's act. . . .

Recovery hereunder shall be limited to the actual damages based upon direct out-of-pocket loss, taxable court costs, and interest from date of judgment. The right of action and remedy granted herein shall be in addition to and not exclusive of any rights of action and remedies therefor against a parent or parents for the tortious acts of his or their children heretofore existing under the provisions of any law, statutory or otherwise, or now so existing independently of the provisions of this article.

Statute: NATURAL GUARDIAN; LIABILITY FOR TORTS OF CHILD

Haw. Rev. Stat. Ann. §577-3 (2001)

. . . The father and mother of unmarried minor children shall jointly and severally be liable in damages for tortious acts committed by their children, and shall be jointly and severally entitled to prosecute and defend all actions in which the children or their individual property may be concerned.

NOTES TO STATUTES

1. *Comparing Parental Liability Statutes.* These statutes show three legislative approaches to the problem of financial responsibility for children's tortious conduct. The New Jersey and West Virginia statutes represent the majority view among states that have adopted statutes on this topic. Note the differences in detail between these two statutes. The Hawaii statute represents a minority position. If a young child rode a bicycle less carefully than a typical child of that age would usually ride and injured a pedestrian, under which of these three statutes could the child's parent be financially responsible for the injury?

2. *Alternative Statutory Approaches.* Under which of these statutes would a parent be responsible for the damage caused by his or her child's setting fire maliciously to a wooded area belonging to someone else? What does the West Virginia statute accomplish by including an explicit reference to that conduct?

3. *Hypotheticals: Children's Activities in Modern Settings*

A. A twelve-year-old child walked across a street in a city and was hit by a car while in the street's crosswalk. The child was playing with a hand-held electronic game and was listening to music with earphones — for these reasons, the youngster was not aware of the car's approach. When the jury evaluates the child's conduct, should it use a child's standard of care or the general reasonable person standard?

B. Two eight-year-olds, *A* and *B*, were playing together with a computer at *A*'s house. The computer stopped working, and *A* asked *B* to check to make sure its CD drive had a disk in it. As *B* did that, *A* clicked on a feature of the program that made the CD drive door close. The door cut one of *B*'s fingers badly. In a suit by *B* against *A*, should *A*'s conduct be judged by the child's standard of care or the reasonable person standard?

E. Physical and Mental Disabilities

When conduct by a person with a mental disability needs to be evaluated in a tort case, typical tort law evaluates that conduct by comparing it with how a reasonable person *without that mental disability* would act. For physical disabilities, the typical position is different. The physically disabled actor must act as well as a reasonable person *with that physical disability* would act. These two positions must reflect a belief that mental and physical disabilities are different in some important ways — a belief that may have had greater support in an earlier generation and that may be subject to criticism now.

Poyner v. Loftus applies a special standard to a legally blind plaintiff: When a person with limited vision goes to a public place, how careful does tort law require that person to be? In Ceasy v. Rusk, involving an institutionalized person suffering from Alzheimer's disease, a court affirms the general rule that would compare that person's conduct with a reasonable person's conduct but withdraws the rule's application under the specific circumstances of the case.

POYNER v. LOFTUS

694 A.2d 69 (D.C. Ct. App. 1997)

SCHWELB, Associate Judge.

This action for personal injuries was brought by William J. Poyner, who is legally blind, after he fell from an elevated walkway. The trial judge granted summary judgment in favor of the defendants, concluding that Mr. Poyner was contributorily negligent as a matter of law. On appeal, Mr. Poyner contends that, in light of his handicap, a genuine issue of material fact existed as to whether he exercised reasonable care, and that the entry of summary judgment was therefore erroneous. We affirm.

The essential evidentiary facts are undisputed. Mr. Poyner suffers from glaucoma and retrobulbar neuritis. He testified that he is able to see approximately six to eight feet in front of him. Notwithstanding his handicap, Mr. Poyner does not use a cane or a seeing eye dog in pursuing his daily activities.

On August 24, 1993, Mr. Poyner was proceeding from his home to Parklane Cleaners, a dry cleaning establishment. . . . The entrance to Parklane Cleaners is adjacent to an inclined platform which is located approximately four feet above street level. Mr. Poyner testified that he had walked by the area on three or four previous occasions, and that he was aware of the general layout. He stated that there were bushes along the edge of the platform, and that these bushes provided a natural barrier which would prevent him from falling if he attempted to walk too far. On the day of the accident, however, and unbeknownst to Mr. Poyner, one of the bushes was missing, and there was thus nothing to restrain him from falling off the platform.

Mr. Poyner testified that as he was walking along the elevated area, he heard someone call "Billy!" from Connecticut Avenue. He turned his head to the right, but continued to walk forward to the location at the end of the platform where he thought that a bush would be. There was no bush, however, and Mr. Poyner fell, suffering personal injuries.

Mr. Poyner brought suit against several defendants, including the owners of the building, the property manager in charge of its maintenance, and the proprietor of Parklane Cleaners. After the parties had conducted discovery, the defendants moved for summary judgment, contending, inter alia, that Mr. Poyner had been contributorily negligent as a matter of law. The trial judge granted the motion, and she stated her reasons, in pertinent part, as follows: . . .

> Mr. Poyner's actions, in the court's judgment, clearly violate an objective reasonableness standard. . . . [N]o reasonable jurors could conclude that the plaintiff was not negligent when he continued to walk on an elevated surface with limited vision while his head was turned away from the direction of his travel in an area in which he was not very familiar.

In order to be entitled to summary judgment, the defendants were required to demonstrate that there was no genuine issue of material fact and that they were entitled to judgment as a matter of law. . . .

Ordinarily, questions of negligence and contributory negligence must be decided by the trier of fact. . . . The issue of contributory negligence should not be submitted to the jury, however, where the evidence, taken in the light most favorable to the plaintiff, establishes contributory negligence so clearly that no other inference can reasonably be drawn. . . .

The trial judge concluded that this was one of those rare cases in which contributory negligence—a defense with respect to which the defendants had the burden of proof—had been established as a matter of law. We agree. . . .

It is undisputed that, at the time of the accident, a shrub at the end of the elevated platform was missing. . . . In this case, Mr. Poyner acknowledged that his attention was distracted when someone called his name, and that he turned his head to the right, but continued to walk forward. At the critical moment, according to his own testimony, Mr. Poyner, who could see six to eight feet in front of him and was aware of his handicap, did not look where he was going. We agree with the trial judge that this constituted contributory negligence and that no impartial jury could reasonably find otherwise.

Mr. Poyner argues, however, that he is not a sighted person, and that "it is reasonable for a legally blind person . . . as a response to his name being called, [to] turn towards the direction of his caller, reach for the handle and continue his step towards the door." He claims that those actions "do not constitute contributory negligence." He contends, in other words, that on account of his visual impairment, his conduct should be tested against a different standard of care.

The parties have cited no authority on this issue, and we have found no applicable case law in the District of Columbia. The precedents in other jurisdictions, however, support affirmance of the trial court's order. "It seems to be the general rule that a blind or otherwise handicapped person, in using the public ways, must exercise for his own safety due care, or care commensurate with the known or reasonably foreseeable dangers. Due care is such care as an ordinarily prudent person with the same disability would exercise under the same or similar circumstances." Cook v. City of Winston-Salem, 85 S.E.2d 696, 700-01 (N.C. 1955). . . .

In Smith v. Sneller, 26 A.2d 452 (Pa. 1942), the Supreme Court of Pennsylvania considered a situation similar to the one before us, and its disposition is instructive. Sneller, a plumbing contractor, had removed a portion of the sidewalk and had dug a trench in order to make a sewer connection. On the north side of the trench, Sneller constructed a barricade. On the south side, however, Sneller simply left a pile of earth two feet high. The plaintiff, Smith, was walking north along the sidewalk towards the trench. As a result of defective eyesight, he failed to see the pile of earth. Mr. Smith fell into the trench, and sustained personal injuries. A jury returned a verdict in his favor.

The intermediate appellate court expressed sympathy for Mr. Smith "in his effort to make a living in spite of his physical handicap," but nevertheless felt constrained to reverse the decision and enter judgment n.o.v. in Sneller's favor. Smith appealed to the Pennsylvania Supreme Court, which affirmed the judgment. Noting that Mr. Smith's vision was so defective that he could not see a dangerous condition immediately in front of him, and that the accident could have been avoided if he had used "one of the common well-known compensatory devices for the blind, such as a cane, a 'seeing eye' dog, or a companion," the court concluded:

> Plaintiff's conduct was not equal to the degree of care required of him. The Superior Court very properly said: "A blind man may not rely wholly upon his other senses to warn him of danger but must use the devices usually employed, to compensate for his blindness. Only by so doing can he go about with comparative safety to himself." We are in accord with that learned court . . . and we must, therefore, affirm the judgment.

26 A.2d at 454.

The reasoning of the court in *Smith* applies equally to the present case. Here, as in *Smith*, the plaintiff was walking alone, and he did not use a guide dog or a cane. As a result, he fell from the walkway. Indeed, the evidence of contributory negligence is stronger here than in *Smith*, for Mr. Poyner, who could see six to eight feet in front of him, acknowledged that, at the moment that he fell, he was not looking where he was going.

In Coker v. McDonald's Corp., 537 A.2d 549 (Del. Super. 1987), the legally blind plaintiff was walking to the entrance of a McDonald's restaurant from the parking lot. Unlike the plaintiffs in *Smith* and in the present case, however, she was carrying a cane

in her right hand, and she was holding on to a companion with her left hand. Ms. Coker lost her balance while attempting to navigate around an obstruction, and she sustained injuries. The defendant claimed that the obstruction was "open and obvious," and that the plaintiff was contributorily negligent as a matter of law. The court disagreed:

> A blind person is not bound to discover everything which a person of normal vision would. He is bound to use due care under the circumstances. Due care for a blind person includes a reasonable effort to compensate for his unfortunate affliction by use of artificial aids for discovery of obstacles in his path. When an effort in this direction is made, it will ordinarily be a jury question whether or not such effort was a reasonable one. . . .

Id. at 550-51 (citations and internal quotation marks omitted). Characterizing the issue presented as being whether Ms. Coker acted reasonably under the circumstances, the court concluded that . . . [b]ecause Ms. Coker was using two different aids, however — the cane and the companion — the question of contributory negligence was for the jury, and the defendant was not entitled to summary judgment. Id.

We agree with the analysis of the courts both in Smith v. Sneller and in *Coker*. Like the plaintiff in *Smith*, but unlike the plaintiff in *Coker*, Mr. Poyner was alone, and he used neither a cane nor a seeing eye dog. He also looked away at the critical moment. Under these circumstances, he was contributorily negligent as a matter of law, and summary judgment was properly granted.

Affirmed.

NOTES TO POYNER v. LOFTUS

1. ***Basic Standard of Care for Persons with Physical Disabilities.*** The reasonable person standard applies in a special way when an actor has a physical disability. The Poyner court approved the statement that for a person with a physical disability, due care "is such care as an ordinarily prudent person with the same disability would exercise under the same or similar circumstances." Using that test, on what basis did the court determine that the visually impaired plaintiff's conduct had been negligent?

2. ***Problem: Physical Disabilities.*** The plaintiff was partially paralyzed, but could walk using crutches and a leg brace. On his way to the defendant's insurance office, he attempted to walk up several steps that led to the office door. One of his feet caught on a small edge that projected from the front of a step, and he fell down and was injured. He sought damages from the owner of the office, claiming that the step was poorly designed and poorly maintained. The defendant claimed that the plaintiff was partly responsible for the fall because of the way he attempted to walk up the stairs. What jury instruction should be given with regard to evaluating the plaintiff's conduct? See Hodges v. Jewel Cos., 390 N.E.2d 930 (Ill. App. 1979).

3. ***Intoxication.*** The actions of a person who was intoxicated at the time he or she was injured or caused an injury are evaluated with reference to the reasonable prudent person standard, completely ignoring the fact of intoxication. See, e.g., Hines v. Pollock, 229 Neb. 614, 428 N.W.2d 207 (1988), Wilson v. City of Kotzebue, 627 P.2d 623 (Alaska 1981). If the person's intoxication was involuntary, would it be consistent with *Poyner* to have the jury ignore the intoxication?

If an injury victim was intoxicated at the time of injury, the fact of intoxication will not be a defense to liability unless the defendant can establish that the conduct of the victim, considered without regard to the intoxication, was not reasonable. In 1855, the California Supreme Court made this point in language that has been quoted often: "If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street as a sober one, and much more in need of it." Robinson v. Pioche, Bayerque & Co., 5 Cal. 460 (1855).

CREASY v. RUSK

730 N.E.2d 659 (Ind. 2000)

SULLIVAN, J.

Carol Creasy, a certified nursing assistant, sued Lloyd Rusk, an Alzheimer's patient, for injuries she suffered when he kicked her while she was trying to put him to bed. We hold that adults with mental disabilities have the same general duty of care toward others as those without. But we conclude that the relationship between the parties and public policy considerations here are such that Rusk had no such duty to Creasy.

In July, 1992, Lloyd Rusk's wife admitted Rusk to the Brethren Healthcare Center ("BHC") because he suffered from memory loss and confusion and Rusk's wife was unable to care for him. Rusk's primary diagnosis was Alzheimer's disease. Over the course of three years at BHC, Rusk experienced periods of anxiousness, confusion, depression, disorientation, and agitation. Rusk often resisted when staff members attempted to remove him from prohibited areas of the facility. On several occasions, Rusk was belligerent with both staff and other residents. In particular, Rusk was often combative, agitated, and aggressive and would hit staff members when they tried to care for him.

BHC had employed Creasy as a certified nursing assistant for nearly 20 months when the incident at issue occurred. Creasy's responsibilities included caring for Rusk and other patients with Alzheimer's disease. . . .

On May 16, 1995, Creasy and another certified nursing assistant, Linda Davis, were working through their routine of putting Rusk and other residents to bed. Creasy knew that Rusk had been "very agitated and combative that evening." By Creasy's account:

> [Davis] was helping me put Mr. Rusk to bed. She was holding his wrists to keep him from hitting us and I was trying to get his legs to put him to bed. He was hitting and kicking wildly. During this time, he kicked me several times in my left knee and hip area. My lower back popped and I yelled out with pain from my lower back and left knee.

Creasy filed a civil negligence suit against Rusk, seeking monetary damages for the injuries she suffered as a result of Rusk's conduct. Rusk moved for summary judgment and the trial court granted his motion. Creasy appealed. The Court of Appeals reversed, holding "that a person's mental capacity, whether that person is a child or an adult, must be factored [into] the determination of whether a legal duty exists," and that a genuine issue of material fact existed as to the level of Rusk's mental capacity.

This case requires us to decide two distinct questions of Indiana common law:

(1) Whether the general duty of care imposed upon adults with mental disabilities is the same as that for adults without mental disabilities?

(2) Whether the circumstances of Rusk's case are such that the general duty of care imposed upon adults with mental disabilities should be imposed upon him? . . .

. . . We believe that the Court of Appeals accurately stated Indiana law but that the law is in need of revision.

. . . [T]he generally accepted rule in jurisdictions other than Indiana is that mental disability does not excuse a person from liability for "conduct which does not conform to the standard of a reasonable man under like circumstances." Restatement (Second) of Torts §283B; accord Restatement (Third) of Torts §9(c) (Discussion Draft Apr. 5, 1999) ("Unless the actor is a child, the actor's mental or emotional disability is not considered in determining whether conduct is negligent."). People with mental disabilities are commonly held liable for their intentional and negligent torts. No allowance is made for lack of intelligence, ignorance, excitability, or proneness to accident. . . .

The public policy reasons most often cited for holding individuals with mental disabilities to a standard of reasonable care in negligence claims include the following.

(1) Allocates losses between two innocent parties to the one who caused or occasioned the loss. Under this rationale, the one who experienced the loss or injury as a result of the conduct of a person with a mental disability is presumed not to have assumed risks or to have been contributorily negligent with respect to the cause of the injury. This policy is also intended to protect even negligent third parties from bearing excessive liabilities.

(2) Provides incentive to those responsible for people with disabilities and interested in their estates to prevent harm and "restrain" those who are potentially dangerous.

(3) Removes inducements for alleged tort-feasors to fake a mental disability in order to escape liability. The Restatement mentions the ease with which mental disability can be feigned as one possible basis for this policy concern.

(4) Avoids administrative problems involved in courts and juries attempting to identify and assess the significance of an actor's disability. As a practical matter, it is arguably too difficult to account for or draw any "satisfactory line between mental deficiency and those variations of temperament, intellect, and emotional balance."

(5) Forces persons with disabilities to pay for the damage they do if they "are to live in the world." The Restatement adds that it is better that the assets, if any, of the one with the mental deficiency be used "to compensate innocent victims than that [the assets] remain in their hands." A discussion draft for the Restatement (Third) of Torts rephrases this policy rationale and concludes: "If a person is suffering from a mental disorder so serious as to make it likely that the person will engage in substandard conduct that threatens the safety of others, there can be doubts as to whether this person should be allowed to engage in the normal range of society's activities; given these doubts, there is nothing especially harsh in at least holding the person responsible for the harms the person may cause by substandard conduct."

To assist in deciding whether Indiana should adopt the generally accepted rule, we turn to an examination of contemporary public policy in Indiana as embodied in enactments of our state legislature.

Since the 1970's, Indiana law has strongly reflected policies to deinstitutionalize people with disabilities and integrate them into the least restrictive environment. National policy changes have led the way for some of Indiana's enactments in that several federal acts either guarantee the civil rights of people with disabilities or condition state aid upon state compliance with desegregation and integrationist practices.

These legislative developments reflect policies consistent with those supporting the Restatement rule generally accepted outside Indiana in that they reflect a determination that people with disabilities should be treated in the same way as non-disabled persons.

We pause for a moment to consider in greater detail the issue . . . that the Restatement rule may very well have been grounded in a policy determination that persons with mental disabilities should be institutionalized or otherwise confined rather than "live in the world." It is clear from our recitation of state and federal legislative and regulatory developments that contemporary public policy has rejected institutionalization and confinement for a "strong professional consensus in favor of . . . community treatment . . . and integration into the least restrictive . . . environment." Indeed, scholarly commentary has noted that "new statutes and case law . . . have transformed the areas of commitment, guardianship, confidentiality, consent to treatment, and institutional conditions." [Citing James W. Ellis, *Tort Responsibility of Mentally Disabled Persons*, 1981 Am. B. Found. Res. J. 1079, 1079-1080 (1981).] We observe that it is a matter of some irony that public policies favoring the opposite ends — institutionalization and confinement on the one hand and community treatment and integration into the least restrictive environment on the other — should nevertheless yield the same common law rule: that the general duty of care imposed on adults with mental disabilities is the same as that for adults without mental disabilities.

In balancing the considerations presented in the foregoing analysis, we reject the Court of Appeals's approach and adopt the Restatement rule. We hold that a person with mental disabilities is generally held to the same standard of care as that of a reasonable person under the same circumstances without regard to the alleged tortfeasor's capacity to control or understand the consequences of his or her actions.

We turn now to the question of whether the circumstances of Rusk's case are such that the general duty of care imposed upon adults with mental disabilities should be found to run from him to Creasy.

In asking this question, we recognize that exceptions to the general rule will arise where the factual circumstances negate the factors supporting imposition of a duty particularly with respect to the nature of the parties' relationship and public policy considerations. For example, courts in jurisdictions that apply the reasonable person standard to individuals with mental disabilities have uniformly held that Alzheimer's patients who have no capacity to control their conduct do not owe a duty to their caregivers to refrain from violent conduct because the factual circumstances negate the policy rationales behind the presumption of liability.

We find that the relationship between Rusk and Creasy and public policy concerns dictate that Rusk owed no duty of care to Creasy. See Webb v. Jarvis, 575 N.E.2d 992, 995 (Ind. 1991) (balancing three factors to determine whether an individual owes a duty to another: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy concerns).

Unlike the typical victim supporting the Restatement rationale, Creasy was not a member of the public at large, unable to anticipate or safeguard against the harm she

encountered. Creasy knew of Rusk's violent history. She could have changed her course of action or requested additional assistance when she recognized Rusk's state of mind on the evening when she received the alleged injury. Rusk's inability to comprehend the circumstances of his relationship with Creasy and others was the very reason Creasy was employed to support Rusk. The nursing home and Creasy, through the nursing home, were "employed to encounter, and knowingly did encounter, just the dangers which injured" Creasy. In fact, caregivers and their employers under these circumstances are better positioned to prevent caregiver injury and to protect against risks faced as a result of job responsibilities. In Indiana, the workers' compensation system, not the tort system, exists to cover such employment-related losses. To the extent that the workers' compensation system is inadequate as Creasy asserts, the inadequacy reflects defects in the workers' compensation system and is not a ground for alternative recovery under tort law. . . .

Public Policy Concerns. The first rationale behind the Restatement rule justifies imposing a duty on a defendant with a mental disability where it seems unfair to force a plaintiff who did not contribute to the cause of his or her injury to bear the cost of that injury. This policy concern overlaps with the relationship analysis set forth supra. The nature of Creasy and Rusk's relationship was such that Creasy cannot be "presumed not to have assumed risks . . . with respect to the cause of the injury." Therefore, imposing a duty on Rusk in this circumstance is not justified by the first Restatement policy rationale.

The second Restatement policy rationale creates an inducement for those responsible for a person with a mental disability to prevent harm to others. By placing Rusk in a nursing home, we presume Rusk's wife made a difficult decision based on her desire to prevent Rusk from being violent and harming himself, herself, or others. . . . Mrs. Rusk entrusted her husband's care, including prevention of the harm he might bring to others, to the nursing home staff and the nursing home. And as a business enterprise, the nursing home received compensation for its services.

With respect to the third policy rationale, "it is virtually impossible to imagine circumstances under which a person would feign the symptoms of mental disability and subject themselves to commitment to an institution in order to avoid some future civil liability." To the extent that such circumstances exist, there is no evidence whatsoever that they are present under the facts in this case.

Finally, there are no administrative difficulties in this case with respect to determining the degree and existence of Rusk's mental disability. Under the relationship analysis set forth above and the present policy analysis, it is unnecessary to determine the degree of Rusk's mental disability. We need only conclude that Rusk had a mental disability which served as the reason for his presence in the nursing home and the foundation of his relationship with Creasy.

. . . By May 1995, when Creasy was injured by Rusk, Rusk had been a resident of the nursing home for three years and his condition had deteriorated. He regularly displayed behaviors characteristic of a person with advanced Alzheimer's disease such as aggression, belligerence, and violence. . . .

In addition to the public policy concerns behind the Restatement rule, we find that it would be contrary to public policy to hold Rusk to a duty to Creasy when it would place "too great a burden on him because his disorientation and potential for violence is the very reason he was institutionalized and needed the aid of employed caretakers."

Rusk was entitled to summary judgment because public policy and the nature of the relationship between Rusk, Creasy, and the nursing home preclude holding that Rusk owed a duty of care to Creasy under these factual circumstances.

Having previously granted transfer, thereby vacating the opinion of the Court of Appeals pursuant to Ind. Appellate Rule 11(B)(3), we now affirm the trial court, finding that Rusk did not owe a duty to Creasy, and grant Rusk's motion for summary judgment.

[Concurring and dissenting opinion omitted.]

NOTES TO CREASY v. RUSK

1. ***Basic Standard of Care for Persons with Mental Disabilities.*** Supporting its decision by analyzing what it described as five social policy factors, the *Creasy* court adopted the majority rule defining the standard of care for people with mental disabilities. It held that tort law should ignore an actor's mental disability in evaluating the actor's conduct and should treat the actor as one with typical mental abilities. How would the reasons the court relied on for ignoring a mental condition such as Alzheimer's disease or developmental disabilities apply to physical conditions such as blindness?

2. ***Avoiding Application of the Basic Rule.*** The court adopted the majority rule that mental disabilities are ignored in judging an actor's conduct. The court avoided applying the rule, however, by holding that even if Rusk had been negligent, Rusk would not be liable because Rusk had no duty to Creasy.

The requirement that a defendant must owe a duty to a plaintiff in order to be liable is one way the law limits the liability of defendants. Chapters 6 and 11 explore duty in detail. The court found that Rusk owed no duty to Creasy under the circumstances of the case. How would the court's analysis be affected if the defendant had injured a stranger on a street near the nursing home (for example, by throwing something from a window)?

3. ***Unanticipated Mental Illness.*** Some cases have involved an actor who caused an injury while experiencing the sudden and unanticipated onset of mental impairment. In cases of this type, courts have sometimes been willing to take account of the impairment and protect the actor from liability. See Breunig v. American Family Insurance Co., 173 N.W.2d 619 (Wis. 1970).

Perspective: Scientific Knowledge and Judges' Knowledge

As medical and related fields develop, they identify more and more syndromes and diseases. Mental illness, for example, may become better understood. If greater scientific knowledge made it less likely that individuals could feign mental illness, how would the development of that knowledge have an effect on tort doctrines? What are the roles of trial judges, jurors, and appellate judges in accounting for changes in scientific knowledge?

IV. Recklessness

Tort law generally recognizes three theories of recovery: intentional torts, unintentional torts, and strict liability. Intentional torts, such as battery, which were covered in Chapter 2, require that the actor intend to invade a legally protected interest of the other person. Unintentional torts require that the actor create an unjustifiable risk of invading another's legally protected interest. Strict liability torts, covered in Chapters 13 through 16, impose liability without regard to whether the actor's conduct is blameworthy.

While negligence cases, introduced in this chapter, are the most common unintentional injury cases, tort law has also developed an additional concept of unintentional conduct known as "recklessness." In terms of fault or blameworthiness, recklessness falls in between intentional tort and negligence. Many courts and the Restatement (Second) of Torts use the term *recklessness* to embrace all unintentional torts other than negligence, including behavior described as "wanton misconduct" and "gross negligence."

At present, characterizing an actor's conduct as reckless is important in several contexts. Sometimes punitive damages will be available when a defendant's conduct was reckless but would be prohibited if the conduct was only negligent. Individuals sometimes sign waivers or releases of liability giving up the right to sue for negligence in connection with certain activities, but these agreements often preserve the right to recover for injuries inflicted due to recklessness. Also, for some activities common law doctrines or statutes expose an actor to tort responsibility for reckless conduct but protect an actor from liability for mere negligence.

Sandler v. Commonwealth introduces significant aspects of the recklessness doctrine in the context of a personal injury claim brought against the owner of land. An applicable statute protected the landowner from liability for negligence but exposed the landowner to responsibility for recklessly inflicted harms.

SANDLER v. COMMONWEALTH

644 N.E.2d 641 (Mass. 1995)

WILKINS, J.

In Molinaro v. Northbridge, 643 N.E.2d 1043 (1995), we reiterated our view that a governmental unit could be liable under G.L. c. 21, §§17C (1992 ed.), for its wanton or reckless conduct that caused harm to a member of the public who used government land that was available for recreational purposes without charge. In this case we deal with the question whether the evidence, viewed most favorably to the plaintiff, justified the submission of the plaintiff's case to the jury. The Commonwealth appeals from a judgment for the plaintiff, arguing that the evidence was insufficient to warrant submission of the case to the jury and that, therefore, its motion for a directed verdict and its motion for judgment notwithstanding the verdict should have been allowed. . . .

The plaintiff was injured, not long after 5 p.m. on October 29, 1987, when he fell off his bicycle while attempting to pass through a tunnel under the Eliot Bridge in Cambridge. The tunnel is part of the Dr. Paul Dudley White Bikeway, along the Charles River, which is controlled by the Commonwealth through the Metropolitan District

Commission [MDC]. The jury were warranted in concluding that the plaintiff's fall was caused by an uncovered, eight-inch wide, twelve-inch long drain in the unlit tunnel. The drain, which was about eight inches deep, had had a cover, and the tunnel was designed to be lit, but vandals had removed the drain cover and had made the lights inoperative. Before we discuss the evidence in detail, it is important that we define wanton or reckless conduct.

The judge used the words "wilful, wanton, or reckless" in instructing the jury but defined them by the standard this court has used for wanton or reckless conduct. This was appropriate because wilfulness in the sense of an intention to cause harm was not presented by the facts. "Indifferent or reckless wrongdoing is not deliberate or intentional wrongdoing." Andover Newton Theological Sch., Inc. v. Continental Casualty Co., 566 N.E.2d 1117 (1991). Wanton conduct may suggest arrogance, insolence, or heartlessness that reckless conduct lacks, but the difference is likely not to be significant in most cases. Our recent practice has been simply to refer to reckless conduct as constituting the conduct that produces liability for what the court has traditionally called wilful, wanton, or reckless conduct.

. . . Reckless conduct may consist of a failure to act, if there is a duty to act, as well as affirmative conduct. We are concerned here with an alleged breach of a duty to remedy or guard against a known or reasonably knowable dangerous condition.

Reckless failure to act involves an intentional or unreasonable disregard of a risk that presents a high degree of probability that substantial harm will result to another. The risk of death or grave bodily injury must be known or reasonably apparent, and the harm must be a probable consequence of the defendant's election to run that risk or of his failure reasonably to recognize it. . . .

There is no doubt that the MDC through its employees was aware that a risk of harm was created by a chronically unlit tunnel with missing drain covers. An MDC employee testified that he did not know when the lights last worked. Another witness testified that he had not seen them illuminated in at least thirteen years. There was evidence that the lights were frequently broken, that they once had had protective devices which were now broken, and that they were broken and not working on the day of the accident. The MDC used only unattached drain covers, held in place only by gravity. The covers loosened over the years, did not fit the drains, and were frequently stolen by vandals. The MDC knew that at least one drain in the tunnel was often without a cover from January 1 to October 30, 1987. The cover of the particular drain that caused the plaintiff's injury was frequently stolen and was not in place following the accident. The MDC knew that the lack of a drain cover posed a danger to individuals. The MDC also knew that the regularly used tunnel was often flooded with water because of inadequate drainage.

There was evidence that the MDC, knowing of the danger posed by absent drain covers in the dark tunnel, did not respond reasonably. It had no policy for bikeway inspection, had no record of the existence or replacement of drain covers from January 1 to October 30, 1987, and did not have drain cover replacements on hand, although they were frequently stolen and there was room to store replacement covers in the tunnel closet. There was expert testimony that the design of the lighting and drainage in the tunnel was deficient and that feasible alternatives were available at reasonable costs, including vandal-resistant lighting and drains capable of being fastened.

Nevertheless, the degree of the risk of injury in this case does not meet the standard that we have established for recklessness. While it is true that each case depends on its

facts and that some cases are close to the line, this case, which involves a persistent failure to remedy defects in a tunnel on a traveled bikeway, simply does not present a level of dangerousness that warrants liability under G.L. c. 21, §§17C, for the MDC's inaction. In the margin, we summarize several of our civil cases in which the degree of risk of injury was so great that a finding of recklessness justifying tort liability was warranted.[4] . . .

The level of fault in this case, measured by the degree of risk of serious injury, is more consistent with our cases in which we have held that the evidence did not warrant a finding of wanton or reckless conduct. See, e.g., Manning v. Nobile, 582 N.E.2d 942 (1991) (claim of recklessness based on hotel's failure to provide bartender for private party rejected); Hawco v. Massachusetts Bay Transp. Auth., 499 N.E.2d 295 (1986) (defendant not reckless in leaving bus passenger at station where it appeared to bus driver that burglary was in progress); Mounsey v. Ellard, 297 N.E.2d 43 (1973) (failure to repair drain resulting in accumulation of ice on defendant's premises, not wilful, wanton, or reckless conduct); Sawler v. Boston & Albany R.R., 157 N.E.2d 516 (1959) (long-standing failure to fulfil statutory duty to maintain fence along right of way, thus permitting child to cross railroad tracks, not wilful, wanton, or reckless misconduct); Siver v. Atlantic Union College, 154 N.E.2d 360 (1958) (where young child fell into pit and died because some third party removed pit's cover, landowner not liable for wilful, wanton, or reckless conduct); Carroll v. Hemenway, 51 N.E.2d 952 (1943) (where police officer investigating building fell into unguarded and unlit elevator well, lack of repair not wilful, wanton, or reckless conduct).

Judgment reversed.

[4] Many of our cases involving reckless conduct justifying tort liability have involved the use of motor vehicles and the like. See, e.g., Sheehan v. Goriansky, 56 N.E.2d 883 (1944) (finding warranted that driver's conduct was reckless where driver knew that trespasser was on running board, increased speed, ran into pole, killing him); Baines v. Collins, 38 N.E.2d 626 (1942) (question for jury whether truck driver was reckless where he knew boy on bicycle was holding onto heavy truck, continued to drive thirty-five miles an hour on asphalt highway, and suddenly and unnecessarily veered onto shoulder of road, throwing boy from bicycle and injuring him); Isaacson v. Boston, Worcester & N.Y. St. Ry., 180 N.E. 118 (1932) (finding that bus driver was reckless warranted where brakes were not functioning and driver was speeding in a forbidden lane, in violation of three separate laws); Leonard v. Conquest, 174 N.E. 677 (1931) (evidence warranted finding of recklessness where driver drove thirty miles an hour in lane designated for oncoming traffic on crowded narrow road, forcing oncoming car off road and into pole and thereby injuring other driver, and noting that "[t]he jury could find that the driver rode with death and that no reasonable person would expect to be saved from great bodily harm"); Yancey v. Boston Elevated Ry., 91 N.E. 202 (1910) (jury could have concluded that conductor acted recklessly when he deliberately and without warning started streetcar despite knowledge that disabled person stood on step and held onto car, so that plaintiff was dragged and fell onto street); Aiken v. Holyoke St. Ry., 68 N.E. 238 (1903) (proper question for jury whether motorman was reckless in quickly starting streetcar when he knew young boy, clinging to step of car and yelling for help, was in great peril, thereby throwing him under wheels of car). Other cases, not involving vehicles but warranting a finding of recklessness include Freeman v. United Fruit Co., 111 N.E. 789 (1916) (deliberately throwing large, heavy roll of canvas stiffened with ice off deck from great height, thereby breaking plaintiff's leg); Zink v. Foss, 108 N.E. 906 (1915) (setting dog on boy who had fallen into defendant's yard); Romana v. Boston Elevated Ry., 105 N.E. 598 (1914) (girl shocked and burned when she tripped into electrically charged pole on path commonly used by children with defendant's permission, where defendant had been warned of condition of pole, and had done nothing).

NOTES TO SANDLER v. COMMONWEALTH

1. ***Choosing a Recklessness Theory.*** The plaintiff chose the legal theory of recklessness because a recreational use statute denied plaintiff the right to recover on a negligence theory. The Massachusetts recreational use statute reads as follows:

> (a) Any person having an interest in land including the structures, buildings, and equipment attached to the land, including without limitation, wetlands, rivers, streams, ponds, lakes, and other bodies of water, who lawfully permits the public to use such land for recreational, conservation, scientific, educational, environmental, ecological, research, religious, or charitable purposes without imposing a charge or fee therefor, or who leases such land for said purposes to the commonwealth or any political subdivision thereof or to any nonprofit corporation, trust or association, shall not be liable for personal injuries or property damage sustained by such members of the public, including without limitation a minor, while on said land in the absence of wilful, wanton, or reckless conduct by such person.

Mass. Gen. Laws ch. 21, §17c (2000).

2. ***Elements of a Recklessness Theory.*** The Restatement (Third) of Torts §2 defines "reckless conduct" as follows:

> A person acts with recklessness in engaging in conduct if:
>
> (a) the person knows of the risk of harm created by the conduct or knows facts that make that risk obvious to anyone in the person's situation, and
>
> (b) the precaution that would eliminate or reduce that risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk.

3. ***Serious Risk for Recklessness.*** Sandler v. Commonwealth illustrates the degree of risk necessary to characterize conduct as reckless rather than negligent. The court says that reckless conduct "involves an intentional or unreasonable disregard of a risk that presents a high degree of probability that substantial harm will result." The plaintiff must prove the existence of this serious risk. The probability that harm will result from the conduct combined with the magnitude of the loss if the harm occurs make up the risk. Rather than describe the probability of harm or the magnitude of the loss in this case, the court cites to its previous decisions. In footnote 4, the court describes nine cases where the risk was serious enough to justify a finding of liability on a recklessness theory. Some of the cases involve a high probability of harm, while others involve serious losses. Most involve both. It is the combination of likelihood and seriousness that makes a risk a serious risk. In the last full paragraph of the *Sandler* case, the court refers to six cases in which the risk was not found to be serious enough to support a finding of recklessness. Consider how these fifteen cases could be ranked according to the degree of risk involved in the conduct they analyze.

4. ***Knowledge of the Risk for Recklessness.*** To establish a recklessness cause of action under the Restatement (Third) §2, the plaintiff must show that the actor either (a) knew of the risk or (b) knew of facts that made the risk obvious. The Restatement (Second) §500, applied by many courts, has a somewhat looser subjective knowledge requirement. It is enough if the plaintiff proves that the defendant "had reason to know of facts relating to the risk presented by the conduct." Both "knowing" and "having

reason to know" refer to the actor's own experience. The Restatement (Second) of Torts §12(1) describes "having reason to know" as follows:

> The words "reason to know" . . . denote the fact that the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists.

The Restatement (Second) of Torts distinguishes "reason to know" from "should know," which is the standard used in negligence cases. To succeed with a recklessness claim, the plaintiff must prove some subjective knowledge by the defendant—that the defendant *actually knew of the risk* or *actually knew of facts* from which a reasonable, prudent person would recognize a risk. By contrast, in a negligence case, the plaintiff is required to show only that a defendant *should have known of the risk* or *should have known certain facts.* The Restatement (Second) of Torts §290 comment a offers an example of a man who was brought up on a small island where there are no automobiles and is ignorant about how fast automobiles go. When arriving in a community where automobiles are present, the man will be treated *in a negligence case* as if he knows of the risk of crossing the street in front of an approaching automobile. He should know of that risk even though he does not know of it and has no reason to know of it.

5. ***Willful, Wanton, and Reckless.*** It is apparent that in 1995, the Supreme Judicial Court of Massachusetts in Sandler v. Commonwealth was still dealing with the distinctions among willfulness, wantonness, and recklessness. The court observed that willfulness sometimes carries with it a "sense of an intention to harm" and that wantonness suggests "arrogance, insolence, or heartlessness that reckless conduct lacks." Some courts use the term "willfulness" to refer to intentional conduct, like that required for battery or assault. Lawyers must be alert to this use of willfulness and judge whether the court means to refer to an intentional tort or to the tort of recklessness. As the Massachusetts Supreme Judicial Court reported, the general tendency of modern courts "has been simply to refer to reckless conduct as constituting the conduct that produces liability for what the court has traditionally called willful, wanton, or reckless conduct."

6. ***Problem: Recklessness.*** The following facts are taken from the case of Van Gordon v. Portland General Electric Co. [PGE], 662 P.2d 714 (Or. 1983), in which the plaintiff sued on a recklessness theory because the defendant was protected from negligence-based liability by a recreational use statute.

> Austin Hot Springs is a park located on the upper Clackamas River. The public is invited to use this facility without charge. There was evidence that as many as 6,000 people accept this invitation every year. PGE provides toilets, picnic tables, fire pits, garbage cans and parking. The hot springs themselves are the major attraction. Hot water percolates out of the riverbed and the banks. People move rocks to encircle the hot water coming up from the bed of the river in order to form small pools. This allows some control in the mixture of the hot water with the cold river water. The pools formed in this manner vary in temperature from comfortably warm to as hot as 190 degrees Fahrenheit. There was testimony that water at this temperature can cause severe burns in less than one second. At the time of the accident there were three signs saying "hot water" between the main parking lot and the principal bathing area of the river. There was evidence that PGE had knowledge of previous burns caused by the hot water.

On May 20, 1978, Brock Van Gordon, then two years old, went on a picnic with his grandparents and his four-year-old brother. The grandparents realized that the Austin Hot Springs were in this area, but had never been there before. They drove into the park by a secondary entrance to the west of the main entrance. This road had no sign indicating the name of the park. After they had their lunch in an area that had a picnic table and a fire pit, the grandmother took Brock and his brother for a walk. They came to the Clackamas River, evidently west of the main parking area. The children wanted to wade, so after testing the water, their grandmother allowed them to do so. Brock climbed on a rock that was part of the rim of a warm pool in which he was wading. He slipped and fell backward into a neighboring pool. This pool was extremely hot, and Brock's legs and feet were scalded before his grandmother was able to lift him out of the water. He was burned severely enough to require hospitalization. The grandmother testified that although she could see steam rising on the other side of the river, she did not know that the water on this side of the river was hot rather than warm. She testified that because of the route she followed from their picnic area to the river, the three warning signs were not visible. Brock filed suit, charging PGE with reckless failure to warn.

Was PGE's failure to warn reckless?

CHAPTER 4

PROVING BREACH

I. Introduction

To recover damages in a tort suit, a plaintiff must persuade the trier of fact that the opponent breached a duty. Cases in Chapter 3 illustrated some of the kinds of evidence and arguments parties can use to do this. To show that a party failed to behave as an ordinary, prudent person, the party's opponent typically offers evidence showing that the conduct created significant risks and that a reasonable person would have avoided those risks. For example, a party may introduce evidence about the risks involved in building a hayrick or providing hotel rooms with sliding glass doors behind curtains. Any information that sheds light on reasonableness can be presented to the jury.

Cases in this chapter show that for some recurring types of proof, tort law applies particular rules. First, if a statute applies to the factual circumstances in which the defendant acted, the statute may be considered as proof of how a reasonable person behaves. Second, a party may rely on custom to show what behavior is reasonable. Third, circumstantial evidence may be so strong in some cases that it can substitute for direct or eyewitness proof about how the defendant acted. When it is clear that the defendant must have been negligent in some way that caused the plaintiff's harm, the law excuses the plaintiff from identifying the specific negligent conduct of the defendant. The legal doctrine of *res ipsa loquitur*, which means "the thing speaks for itself," permits an inference of negligence from circumstantial evidence.

An important aspect of these methods of proof is their procedural effect. How much benefit will a jurisdiction give to a plaintiff who shows that a defendant violated a statute, failed to comply with a custom, or acted in a way that fits the *res ipsa loquitur* doctrine? These types of proof may: (a) require a finding that the defendant was negligent regardless of contradictory evidence; (b) require a finding that the defendant was negligent unless the defendant offers contradictory evidence; or (c) have no mandatory effect on the trial outcome.

II. Violation of a Statute

In many cases, a party may establish that the opponent's conduct violated a statute. If the statute's purpose was to protect the injured party from the type of harm that occurred, the proof of violation will have special evidentiary effect. Courts may treat proof of the statutory violation both as establishing a standard of care and as evidence that the opponent's conduct was negligent. Proof of violation of a statute may support a finding that either a plaintiff or a defendant was negligent.

Martin v. Herzog, a classic case, introduces the concept of using legislative standards to determine reasonable conduct. In Thomas v. McDonald, a modern court applies the basic rules concerning proof of violation of a statute. Wawanesa Mutual Insurance Co. v. Matlock illustrates the fundamental concept that the type of harm and type of plaintiff involved in the case must be related to the purposes of the statute in order for violation of the statute to be considered as evidence of negligence. Sikora v. Wenzel considers when justice might require recognizing a party's excuse for violating a statute.

MARTIN v. HERZOG

126 N.E. 814 (N.Y. 1920)

CARDOZO, J.

The action is one to recover damages for injuries resulting in death.

Plaintiff and her husband, while driving toward Tarrytown in a buggy on the night of August 21, 1915, were struck by the defendant's automobile coming in the opposite direction. They were thrown to the ground, and the man was killed. At the point of the collision the highway makes a curve. The car was rounding the curve when suddenly it came upon the buggy, emerging, the defendant tells us, from the gloom. Negligence is charged against the defendant, the driver of the car, in that he did not keep to the right of the center of the highway. . . . Negligence is charged against the plaintiff's intestate, the driver of the wagon, in that he was traveling without lights (Highway Law, sec. 329a, as amended by L. 1915, ch. 367). There is no evidence that the defendant was moving at an excessive speed. There is none of any defect in the equipment of his car. . . . The case against him must stand . . . upon the divergence of his course from the center of the highway. The jury found him delinquent and his victim blameless. The Appellate Division reversed, and ordered a new trial.

We agree with the Appellate Division that the charge to the jury was erroneous and misleading. The case was tried on the assumption that the hour had arrived when lights were due. . . . In the body of the charge the trial judge said that the jury could consider the absence of light "in determining whether the plaintiff's intestate was guilty of contributory negligence in failing to have a light upon the buggy as provided by law. I do not mean to say that the absence of light necessarily makes him negligent, but it is a fact for your consideration." . . . The plaintiff then requested a charge that "the fact that the plaintiff's intestate was driving without a light is not negligence in itself," and to this the court acceded. The defendant saved his rights by appropriate exceptions.

We think the unexcused omission of the statutory signals is more than some evidence of negligence. It *is* negligence in itself. Lights are intended for the guidance

and protection of other travelers on the highway (Highway Law, sec. 329a). By the very terms of the hypothesis, to omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform. That, we think, is now the established rule in this state. Whether the omission of an absolute duty, not willfully or heedlessly, but through unavoidable accident, is also to be characterized as negligence, is a question of nomenclature into which we need not enter, for it does not touch the case before us. There may be times, when if jural niceties are to be preserved, the two wrongs, negligence and breach of statutory duty, must be kept distinct in speech and thought. In the conditions here present they come together and coalesce. In the case at hand, we have an instance of the admitted violation of a statute intended for the protection of travelers on the highway, of whom the defendant at the time was one. Yet the jurors were instructed in effect that they were at liberty in their discretion to treat the omission of lights either as innocent or as culpable. They were allowed to "consider the default as lightly or gravely" as they would (Thomas, J., in the court below). They might as well have been told that they could use a like discretion in holding a master at fault for the omission of a safety appliance prescribed by positive law for the protection of a workman. Jurors have no dispensing power by which they may relax the duty that one traveler on the highway owes under the statute to another. It is error to tell them that they have. The omission of these lights was a wrong, and being wholly unexcused was also a negligent wrong. No license should have been conceded to the triers of the facts to find it anything else.

We must be on our guard, however, against confusing the question of negligence with that of the causal connection between the negligence and the injury. A defendant who travels without lights is not to pay damages for his fault unless the absence of lights is the cause of the disaster. A plaintiff who travels without them is not to forfeit the right to damages unless the absence of lights is at least a contributing cause of the disaster. To say that conduct is negligence is not to say that it is always contributory negligence. . . . We think, however, that evidence of a collision occurring more than an hour after sundown between a car and an unseen buggy, proceeding without lights, is evidence from which a causal connection may be inferred between the collision and the lack of signals. . . .

The order of the Appellate Division should be affirmed. . . .

NOTES TO MARTIN v. HERZOG

1. ***Negligence Per Se.*** While the Martin v. Herzog court stated that an *unexcused* statutory violation "*is* negligence in itself," other courts have used a famous phrase, "negligence per se" to characterize such a violation. An early use of that term came in Osborne v. McMasters, 41 N.W. 543 (Minn. 1889):

> 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. In either case the failure to perform the duty constitutes negligence, and renders the party liable for injuries resulting from it. 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.

2. ***Effect of the Doctrine.*** The doctrine adopted in Martin v. Herzog treats proof of an *unexcused* statutory violation as conclusive proof of the violator's breach of duty. Because the doctrine can have so much power, courts have given significant attention to defining "unexcused" and to considering how to treat excuses when they are offered.

3. ***Role of the Jury.*** The jury's role changes when a doctrine gives special effect to proof of a statutory violation. In a setting where this proof is treated as equivalent to proof of negligence, the jury's function is to determine whether a violation occurred. This is different from the usual jury function of analyzing whether an actor's conduct was reasonable.

4. ***Rationale for Importing Statutory Standards.*** Doctrines that give weight to proof of statutory violations represent the legal system's respect for the legislative process. In Chambers v. St. Mary's School, 697 N.E.2d 198, 202 (Ohio 1998), the Ohio Supreme Court analyzed reasons why the standards of care defined in statutes are appropriate for use in tort litigation. The court noted that "[t]he legislative process and accountability are the cornerstones of the democratic process which justify the General Assembly's role as lawmaker."

5. ***Specificity Required for Negligence Per Se Treatment.*** Some states refuse to recognize a statutory violation when it involves a statute that fails to provide a clear-cut statement of the conduct it requires. This aspect of negligence per se doctrine was explained in Supreme Beef Processors, Inc. v. Maddox, 67 S.W.2d 453 (Tex. Ct. App. 2002) as follows:

> [S]ome statutes do not define a mandatory standard of conduct, but merely create a standard of care, under which the duty of compliance may be conditional or less than absolute. Proving a violation of a statute imposing such a standard of care usually requires proof that the party charged with the violation has failed to exercise ordinary care. For example, when a statute requires a person to exercise his or her judgment, as when a driver should proceed only when it is safe to do so, the statute reflects a standard of care that is no different from the ordinarily prudent person standard. But if the statute requires all persons to stop in obedience to a red flashing light at an intersection, the statute clearly defines the prohibited conduct, leaving the driver no discretion or room for the exercise of judgment, and it is therefore a standard of conduct statute. Whether a statute describes a mandatory standard of conduct or incorporates the ordinarily prudent person standard of care must be determined on a case-by-case basis.
>
> Where a statute incorporates the ordinarily prudent person standard, negligence per se does not apply because the statute does not establish a specific standard of conduct different from the common-law standard of ordinary care. In those cases, "it is redundant to submit a question on the statutory standard or to instruct the jury regarding it, and the negligence per se standard is subsumed under the broad-form negligence question." . . .

6. ***Proof of Causation.*** The Martin v. Herzog court notes that even when violation of a statute may support a finding of unreasonable conduct, showing a causal connection between that conduct and a person's harm may be a separate question.

For example, in Schwabe v. Custer's Inn Associates, LLP, 15 P.3d 903 (Mont. 2000), Schwabe drowned while swimming in Custer's Inn's indoor swimming pool and was later discovered by an Inn employee. Schwabe's estate sued alleging that the Inn was negligent per se in violating a statute that required the Inn to have a CPR-trained employee on the premises. Because there was no evidence of how Schwabe got into distress in the pool, how he drowned, or how long he was at the bottom of the pool, there was no proof that a CPR-trained employee would have made any difference. Custer's Inn was awarded judgment as a matter of law. Violation of the statute did not support a finding that the violation was a cause of the injury. In Martin v. Herzog, in what way did proof of violation support a finding that the violation was a cause of the injury?

THOMAS v. McDONALD

667 So. 2d 594 (Miss. 1995)

McRae, J. . . .

Sam McCormick was injured on March 7, 1990, when his pick-up truck collided with an International "gang truck" owned by DAPSCO and operated by William McDonald. The DAPSCO truck had stalled on a hill, blocking the eastbound lane of Highway 528, near Heidelberg, Mississippi. Although it was about 6:30 p.m., the operator of the disabled vehicle had provided no warning to the other drivers on the road.

The DAPSCO truck had suffered mechanical problems throughout the week before the accident. It had failed to start on several occasions and a new battery had been installed. It remained idle at a job site until the evening of the accident. Sometime between 5:45 and 6:00 p.m., when it was "getting dark," the crew left the site to return to the DAPSCO yard in Heidelberg. McDonald drove the "gang truck" for the first time since it was last repaired. As he approached the intersection of Claiborne Road and Highway 528, the truck stalled. The engine stopped and the lights went off. After McDonald failed to arrive at the DAPSCO yard, the foreman went to look for him. Baker jump started the truck with booster cables. However, while going up a slight incline, the truck stalled again. McDonald attempted to "kick start" the truck, but it had already stopped. The disabled truck occupied the entire eastbound lane leading into town. Baker testified that he had turned around to warn oncoming cars of the stalled truck. Neither this truck, nor any of the other DAPSCO trucks, however, were equipped with warning devices in the event of vehicle breakdown.

McCormick filed a negligence action against McDonald and DAPSCO on May 14, 1990 in the First Judicial District of the Jasper County Circuit Court. . . . On August 12, 1991, the jury returned a verdict for McDonald and DAPSCO. Judgment was entered consistent with the verdict on August 19, 1991, and thereafter, Thomas [McCormick's administratrix — Sam McCormick having died of a heart attack due to a preexisting congestive heart condition after filing suit] perfected this appeal.

Thomas first asserts that the trial court erred in refusing to instruct the jury that the defendants' failure to place warning signals on the highway was negligence per se. The rejected Instruction P-10 stated as follows:

> This Court instructs the jury that at the time and place of the truck collision which occurred on March 7, 1990, William McDonald, Jr. was negligent as a matter of law in

> that he violated §63-7-71 of the Miss. Code by failing to place reflectors or other signals in an operating condition upon the highway. . . .

McDonald and DAPSCO . . . argued that drivers are only required to place signals with reasonable diligence. The refused instruction was based on Miss. Code Ann. §63-7-71 (1972) which, in relevant part, states:

> (1) Whenever any motor truck or bus is stopped upon the highway except for the purpose of picking up or discharging passengers . . . and such motor truck or bus cannot immediately be removed from the main traveled portion of a highway outside of a business or residence district, the driver or other person in charge of such *vehicle shall cause such flares, fuses [warning devices used by railroads and truckers], reflectors, or other signals to be lighted or otherwise placed in an operating condition and placed upon the highway,* one at a distance of approximately one hundred feet to the rear of the vehicle, one approximately one hundred feet in advance of the vehicle and the third upon the roadway side of the vehicle. . . . (Emphasis added.)

Generally, when two cars are traveling in the same direction, the primary duty of avoiding collision rests with the second driver, who, in the absence of an emergency or unusual condition, is negligent as a matter of law if he runs into the car ahead. Whether the circumstances rise to the level of an emergency or unusual condition is a matter for the jury to determine.

However, where there is a statute, the statute will be the controlling law for the parties' action or failure to act. Violations of statutes generally constitute negligence per se.

> The principle that violation of a statute constitutes negligence per se is so elementary that it does not require citation of authority. When a statute is violated, the injured party is entitled to an instruction that the party violating is guilty of negligence, and if that negligence proximately caused or contributed to the injury, then the injured party is entitled to recover.

Bryant v. Alpha Entertainment Corp., 508 So. 2d 1094, 1096 (Miss. 1987) (negligence per se to sell beer to person under the age of eighteen).

In order for the doctrine of negligence per se to apply, the plaintiff must show that he is a member of the class that the statute was designed to protect and that the harm he suffered was the type of harm which the statute was intended to prevent. McCormick, a traveler on a Mississippi highway, was within the class of individuals the statute was designed to protect. The accident that occurred on Highway 528 was the kind of harm that the statute was intended to prevent. "Sections 63-3-903 and 63-7-71 were enacted by our legislature to protect motorists on our highways." Golden Flake Snack Foods, Inc. v. Thornton, 548 So. 2d 382, 383 (Miss. 1989). . . .

Both Stong v. Freeman Truck Line, 456 So. 2d 698 (Miss. 1984) and Hankins v. Harvey, 160 So. 2d 63 (Miss. 1964) have imposed a reasonable time limit upon vehicle operators to set out reflectors or other warning devices. In *Hankins,* we stated that flares, reflectors, or other signals should be set out with "reasonable and proper diligence, or promptly under all the facts and circumstances of the case." 160 So. 2d at 63. In *Stong,* we applied the ten-minute time limit used in the federal regulations for interstate highways pursuant to 49 C.F.R. 392.22(b)(1), holding that "[w]here there is a conflict in the evidence and where more than one reasonable interpretation may be given the facts, *whether the driver acted with reasonable promptness under the*

circumstances or within a ten minute time limit must be determined by the jury under proper instructions." *Stong*, 456 So. 2d at 710 (emphasis added).

When this Court interprets a statute, and the statute is retained in subsequent codes without amendment by the Legislature, our interpretation becomes, in effect, part of the statute. McDonald and DAPSCO contend that they did not have time to move the truck or to provide any warning that it was blocking the road. Because we have provided a "reasonable time" interpretation to the statute, McDonald and DAPSCO might have had a viable defense had the vehicle been equipped with the required warning devices. However, regardless of how we construe the statute, DAPSCO could not have complied. It is uncontroverted that the truck had no lights and was not equipped with reflectors or other warning devices. Thus, the circuit court erred in failing to grant Thomas the negligence per se instruction she sought.

Thomas further contends that the circuit court erred in denying Instruction P-11, based on Miss. Code Ann. §63-7-69(1), which provides as follows:

> No person shall operate any truck or bus on any highway outside the limits of any municipality or residential adjacent thereto between the hours of one half hour after sunset and one half hour before sunrise unless there be carried in such vehicle, ready for use, certain warning and safety appliances such as flares, fuses, flags, reflectors, fire extinguishers, and the like.

As Thomas recognized, it was her duty as the plaintiff to prove her case. While statutes furnish our standard of care, the facts must support the applicability of the statute. *Stong*, 456 So. 2d at 707-08. Courts may take issues from the jury only where "the facts are so clear that reasonable minds could not differ." Id. at 708. Although the fact that neither McDonald's vehicle nor any of the other DAPSCO trucks had safety devices in the event of truck failure as required by statute was admitted, Thomas failed to establish the requisite time component of the statute; that is, whether a half hour had passed since the sun set. Butler, the DAPSCO foreman, testified that the crew left the work site around 5:45 p.m. or 6:00 p.m. The investigating officer testified that he received a call for the wreck about 6:30 p.m. and described the light as "dusk dark." Although McDonald originally stated in his answer to interrogatories and in his Motion in Limine that it was dark at the time of the accident, he subsequently changed his testimony at trial to state that it was "getting dark." Whether it was dark at the approximate time of the accident is a fact that could easily have been determined and would have been a proper subject for the taking of judicial notice. Thomas could have offered into evidence *The Clarion Ledger* for that date, the *Farmer's Almanac*, or any other recognized publication documenting the time of the sunset on the day of the accident. Because Thomas failed to establish the requisite time component of §63-7-69(1), the circuit court cannot be held in error for denying this particular instruction. Therefore, her second assignment of error is without merit. . . .

The circuit court erred in refusing to grant a negligence per se jury instruction based on Miss. Code Ann. §§63-7-71(1) and (2). . . . Accordingly, we reverse the decision of the lower court and remand the case for a new trial.

NOTES TO THOMAS v. McDONALD

1. ***Proof of Violation.*** To obtain the benefit of the negligence per se doctrine, a plaintiff must show that the defendant violated a statute. In *Thomas*, the plaintiff relied on two statutes. One requires the display of flares and other signal devices.

The other requires the carrying of such signal devices. The trial court refused to give a negligence per se jury instruction based on either of the statutes. The Mississippi Supreme Court reversed with regard to only one. Why did the court base its reversal on the "display" statute and not on the "carry" statute?

2. ***Statutory Interpretation.*** The *Thomas* court refers to earlier decisions that had interpreted the "display" statute to include a grace period during which a failure to display warning devices would be excused. Without a grace period, a truck driver whose truck was equipped with warning equipment might have been treated as negligent if the truck had stopped and the driver had not yet used any warning devices, even if the driver had not had a reasonable amount of time to deploy them. Treating the statute as incorporating a grace period avoids a result in which reasonable conduct would be characterized as negligence.

3. ***Variations in Treatment of Statutes.*** States vary somewhat in the elements a plaintiff must prove to rely on a statute as evidence of breach. The *Thomas* court stated that "a plaintiff must show that he is a member of the class that the statute was designed to protect and that the harm he suffered was the type of harm which the statute was intended to prevent." What results would the following approaches have required on the facts of Thomas v. McDonald?

A. In Idaho, violation of a city ordinance may constitute negligence per se if several criteria are met:

> First, the ordinance must clearly define the required standard of conduct; second, the ordinance must have been intended to prevent the type of harm which occurred; and third, the plaintiff must be a member of the class of persons the ordinance was designed to protect.

See Nettleton v. Thompson, 787 P.2d 294 (Idaho Ct. App. 1990).

B. In VanLuchene v. State, 797 P.2d 932, 935 (Mont. 1990), the court recited five criteria that a plaintiff must prove in a negligence per se case in order to prevail:

> Those criteria are as follows: 1) the defendant violated the particular statute; 2) the statute was enacted to protect a specific class of persons; 3) the plaintiff is a member of that class; 4) the plaintiff's injury is of the sort the statute was enacted to prevent; and 5) the statute was intended to regulate members of defendant's class.

4. ***Problem: Statutory Interpretation and Proof of Violation.*** Fourteen-year-old Rob and a friend were walking across an open field leased by the Pleshas. The Pleshas were hosting a barbeque in their backyard and had taken their dog, Sampson, off his chain so he could play. As Rob and his friend walked by, Sampson began barking and ran toward them. The Pleshas yelled after Sampson to stop and told the boys, "Whatever you do, don't move. He won't hurt you if you don't move." Rob's friend ran, but Rob remained still, as he had been instructed. Sampson then bit Rob several times as Rob tried to protect himself by pushing the dog away. In a suit by Rob against the Pleshas, the plaintiff sought to obtain the benefit of the negligence per se doctrine in connection with the following ordinance:

> [A]ll dogs and cats shall be kept under restraint. It is an animal owner's responsibility to insure that animals on and off their real property be restrained. When off

> the real property, animals shall be on a leash not to exceed six feet in length; or if without [a] leash, [the] animal must be under complete control of the owner and not more than three feet from the owner. Animals on real property must be within a fenced area sufficient in height to prevent the animal to escape; or if on a leash, the animal must be secured on a leash that is at least six feet in length and located where the animal cannot trespass beyond its owner's property line.

These facts are taken from Plesha v. Edmonds, 717 N.E.2d 981 (Ct. App. Ind. 1999). In its opinion, the court described the following generally accepted rules of statutory interpretation:

> We note that the rules relating to statutory construction are equally applicable to construing ordinances. Every word in a statute must be given effect and meaning, and no part is to be held meaningless if it can be reconciled with the rest of the statute. A statute should be examined as a whole and a strict, literal, or selective reading of individual words should not be overemphasized. Moreover, this court endeavors to give statutory words their plain and ordinary meaning absent a clearly manifested purpose to do otherwise.

The defendants argued that the ordinance required only that owners prevent their dogs and cats from escaping beyond their property line. Because Sampson never left their property, the Pleshas maintain they could not have violated the ordinance. May the plaintiff rely on the statute?

WAWANESA MUTUAL INSURANCE CO. v. MATLOCK

60 Cal. App. 4th 583 (1997)

SILLS, P.J. . . .

Timothy Matlock, age seventeen, bought two packs of cigarettes from a gas station one day in April 1993. Tim gave one of the packs to his friend, Eric Erdley, age fifteen. Smoking as they walked, the two trespassed onto a private storage facility in Huntington Beach, where a couple of hundred telephone poles were stacked up high upon the ground, held in place by two vertical poles sticking out of the ground. The two had climbed on the logs many times before.

Timothy and Eric were joined by 2 younger boys, about 10 or 11 years old, who walked with them on the logs. Eric was smoking a cigarette held in his left hand. Timothy began to tease the younger boys, telling them the logs were going to fall. The boys started to run, though perhaps more out of laughter than of fear. One of the younger boys ran right into Eric's left arm. Eric dropped his cigarette down between the logs, where it landed on a bed of sand. For about 20 seconds Eric tried to retrieve the cigarette, but he couldn't reach it. He stood up and tried to extinguish it by spitting on it, and again was unsuccessful.

Then Eric caught up with Timothy, who was about 10 feet ahead. They went into some bunkers about 50 feet away; when they came out again after about 20 minutes, they saw flames at the base of the logs. They were seen running from the location.

The Woodman Pole Company suffered considerable property damage because of the fire. Eric was insured under a $100,000 policy with plaintiff Wawanesa Mutual Insurance Company. Wawanesa paid $89,000 to Woodman, $10,000 to the Orange

County Fire Department, and $1,000 to the Huntington Beach Fire Department. Wawanesa, now subrogated to Eric's rights, filed this suit against Timothy and his father Paul E. Matlock for contribution.

After a bench trial, the court awarded the insurer $44,500 against Timothy and Paul, which included $25,000 against Paul based on a statute which fixes liability on a custodial parent for the willful misconduct of a minor. (See Civ. Code, §1714.1, subd. (a).) . . . The judge stated that the statute that makes it unlawful to give cigarettes to minors, Penal Code §308, had to have been enacted in 1891 with "more than health concerns" in mind, "since the health issues on tobacco are of considerably more recent concern."

Timothy and his father Paul now appeal, arguing that there is no basis on which to hold Timothy liable for the damage caused when Eric dropped the cigarette.

We agree. There is no valid basis on which to hold Timothy liable.

Just because a statute has been violated does not mean that the violator is necessarily liable for any damage that might be ultimately traced back to the violation. As the court stated in Olsen v. McGillicuddy (1971) 15 Cal. App. 3d 897, 902-903 [93 Cal. Rptr. 530]: "The doctrine of negligence per se does not apply even though a statute has been violated if the plaintiff was not in the class of persons designed to be protected or the type of harm which occurred was not one which the statute was designed to prevent." Mere "but for" causation, as is urged in Wawanesa's brief, is simply not enough. The statute must be designed to protect against the kind of harm which occurred.

The statute that makes it illegal to furnish tobacco to minors, Penal Code §308, has nothing to do with fire suppression. As it now stands, it is intended to prevent early addiction to tobacco. It may be true, as the trial court opined, that when the first version of the statute was enacted in 1891 (see Stats. 1891, ch. 70, §1, p.64) it was not directed primarily at protecting minors' health.[3] But it is most certainly a health statute as it exists today. As our Supreme Court recently noted in Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 Cal. 4th 1057, 1060 [31 Cal. Rptr. 2d 358, 875 P.2d 73] (quoting from an affirmed decision of the Court of Appeal), §308 "reflects a statutory policy of protecting minors from addiction to cigarettes." The connection of §308 with health is emphasized by the court's specifically analogizing §308 to former Health and Safety Code §25967, which states that preventing children from "beginning to use tobacco products" is "among the highest priorities in disease prevention for the State of California." (Mangini, supra, 7 Cal. 4th at pp.1061-1062 [quoting from appellate opinion quoting statute].)

[3] Which raises the question — why was it originally enacted? The trial judge may have been a little hasty in concluding that health was not the reason behind the 1891 statute. The noxiousness of tobacco was known long before 1891. . . .

Assuming, for sake of argument, that the Legislature did not have minors' health at heart when it prohibited giving tobacco to them in 1891, the placement of section 308 in chapter 7 of title 9 of the Penal Code, dealing with crimes against religion, conscience and "good morals," furnishes another answer. While we do not have the legislative history from 1891, it appears the statute was most probably enacted to protect minors from the general licentiousness associated with the consumption of cigarettes in the 1890's. (These days — though we recognize that there is altogether too much teenage tobacco smoking — cigarettes tend to be associated more with the World War II generation than with cheesy dens of iniquity.) However, we have found nothing, and certainly Wawanesa has cited us to nothing, which would show that section 308 was ever enacted out of some concern that minors would pose a fire hazard.

Nothing suggests that §308 is part of any scheme to prevent fires. Its placement in the general morals section of the Penal Code belies such an intent.

[Discussion of other recovery theories omitted.]

Because there is no basis on which to hold Timothy liable we need not address the liability of his father. The judgment is reversed with directions to enter a new judgment in favor of Timothy and Paul Matlock. The Matlocks are to recover their costs on appeal.

NOTES TO WAWANESA MUTUAL INSURANCE CO. v. MATLOCK

1. ***Sources of Statutory Interpretation.*** To obtain the benefit of the negligence per se doctrine, in addition to showing that the defendant violated a statute, the plaintiff must prove that the harm that occurred was the type of harm the statute was designed to prevent. Sometimes it is obvious that the harm a statute was meant to prevent and the harm a plaintiff suffered are identical. In other cases, courts pay close attention to this aspect of the doctrine. On what sources did the *Wawanesa* court rely to determine whether the cigarette statute was designed to prevent fires?

2. ***Subrogation.*** Wawanesa Mutual was Eric's insurance company. It paid money to settle Eric's liabilities to the pole company and the fire departments. Having paid on Eric's behalf, Wawanesa was entitled to collect, on Eric's behalf, the portion of damages owed by Timothy, who bought the cigarettes. The court said that Wawanesa was "subrogated to Eric's rights," meaning that the rights Eric had to sue Timothy for reimbursement now belonged to the insurance company.

3. ***Licensing Statutes.*** In a number of cases, individuals who have failed to obtain a statutorily required license for an activity cause harm while engaging in that activity. Driving without a license is a primary example. Many courts decline to treat violation of a licensing statute by a driver as relevant to determining fault, sometimes on a theory that the lack of a license has no causal relationship with bad driving. See Duncan v. Hixon, 288 S.E.2d 494 (Va. 1982) (the majority of cases do not treat unlicensed driving as equivalent to negligent driving). In a decision that refused to apply negligence per se treatment to a defendant company's failure to obtain a Food and Drug Administration license for a medical device, a court wrote:

> . . . As Professors Prosser and Keeton have reasoned, "when a car is driven without a license, the act of driving the car certainly causes a collision; the absence of the license, or the existence of the statute, of course does not." W. Page Keeton et al., Prosser & Keeton on Torts §36, at 223-24 (5th ed. 1984).
>
> In summary, where a particular statutory requirement does not itself articulate a standard of care but rather requires only regulatory approval, or a license, or a report for the administration of a more general underlying standard, violation of that administrative requirement itself is not a breach of a standard of care. This violation rather indicates only a failure to comply with an administrative requirement, not the breach of a tort duty.

Talley v. Danek Medical, Inc., 179 F.3d 154 (4th Cir. 1999).

Where compliance with a licensing statute would prevent the occurrence of dangerous conduct, courts are likely to treat the violation as relevant. For example, in Bier v. Leanna Lakeside Property Association, 711 N.E.2d 773 (Ill. App. Ct. 1999), the

defendant operated a beach without a required license, and the plaintiff was injured using a rope swing there. The licensing authority would have refused to grant a license unless the swing had been removed. The court held that this violation could serve as evidence of negligence.

4. *Problems: Applicability of Statute*

A. In Gorris v. Scott, L.R. 9 Ex. 125 (1874), sheep being carried as cargo on the deck of a ship were washed overboard during a severe storm. The plaintiff, seeking to recover damages for the lost sheep, attempted to rely on the provision of The Contagious Diseases (Animals) Act of 1869, which provided that animals onboard ship must be confined in pens no larger than 9 feet by 15 feet and that the pens must have strips of wood on the bottom that the animals can use as footholds. The pens in which the lost sheep were confined did not meet these specifications. May the plaintiff rely on this statute to prove breach?

B. In Kernan v. American Dredging Co., 355 U.S. 426 (1958), a kerosene lamp used as a navigation light on a scow, placed no more than three feet above the water, ignited petroleum fumes on the Schuylkill River in Philadelphia, Pennsylvania. The estate of a seaman who lost his life in the fire sought to rely on a Coast Guard navigation rule requiring that scows operating at night display a white navigation light not less than 8 feet from the water "so placed as to show an unbroken light all around the horizon, and . . . of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least 5 miles." The court found that the river would not have caught fire if the light had been 8 feet or more above the river. May the seaman's estate rely on this statute to prove breach?

SIKORA v. WENZEL

727 N.E.2d 1277 (Ohio 2000)

[A deck attached to a condominium owned by Tom Wenzel collapsed during a party held by one of Wenzel's tenants. Aaron Sikora, a guest at the party, was injured as a result of the collapse. After the incident, an engineering firm hired by the city of Fairborn concluded that the deck's collapse resulted from improper construction and design in violation of the Ohio Basic Building Code ("OBBC").

A decade earlier, before the deck was built, Zink Road Manor Investment ("Zink") owned and was developing the property where the condominium was located. After Zink submitted plans for the condominiums to Fairborn, Zink decided to modify the units to include decks. Documents containing the deck design were given to the city for review at a meeting between the construction company and the city. The city, however, rejected these plans because they violated the OBBC and contained insufficient information. The city made no inspection of the decks during construction and received from Zink no modified plans or other documents sufficient for it to proceed with approval, but it nevertheless issued Zink a certificate of occupancy.

After the city issued the certificate, Wenzel purchased the property at issue from Zink. Wenzel had no knowledge of any defect in the deck that was attached to the condominium.

Following the deck's collapse, Sikora sued Wenzel, the contractor, and the design company, alleging that each was negligent and therefore jointly and severally liable.

Sikora based his claim against Wenzel in part upon a violation of R.C. 5321.04(A)(1), which requires landlords to comply with all applicable provisions of the OBBC. The trial court granted summary judgment in Wenzel's favor on the basis that he lacked notice of the defect in the deck.

Sikora appealed the trial court's decision to the Second District Court of Appeals, which reversed and remanded the decision below.]

Cook, J.

With this decision we confirm that the doctrine of negligence *per se* countenances lack of notice of a defective condition as a legal excuse. We reverse the appellate court's determination that notice is irrelevant and strict liability applies, and instead hold that a violation of R.C. 5321.04(A)(1) (failing to comply with the Ohio Basic Building Code) constitutes negligence *per se*, but that such liability may be excused by a landlord's lack of actual or constructive notice of the defective condition.

In *Shroades v. Rental Homes, Inc.* [427 N.E.2d 774 (Ohio 1981)], this court set forth the broad principle that landlords are subject to tort liability for violations of R.C. 5321.04. Having decided that issue, the court concluded that a landlord's failure to make repairs as required by R.C. 5321.04(A)(2) constitutes negligence *per se*, but that a landlord's notice of the condition causing the violation is a prerequisite to liability. The court of appeals here declined to apply this conclusion from *Shroades* to the instant violation of R.C. 5321.04(A)(1). The appellate court reasoned that no justification exists for the imposition of a notice requirement in a negligence *per se* context, and therefore held Wenzel strictly liable without regard to his lack of notice of the defect.

Negligence *per se* and strict liability, however, are not synonymous. Courts view the evidentiary value of the violation of statutes imposed for public safety in three ways: as creating strict liability, as giving rise to negligence *per se*, or as simply evidence of negligence. These are three separate principles with unique effects upon a plaintiff's burden of proof and to which the concept of notice may or may not be relevant.

Strict liability is also termed "liability without fault." Black's Law Dictionary (7 Ed. 1999) 926. Thus, where a statute is interpreted as imposing strict liability, the defendant will be deemed liable *per se*—that is, no defenses or excuses, including lack of notice, are applicable. Areas where the law typically imposes strict liability include liability for injuries inflicted from a dangerous instrumentality, liability for violations of certain statutes, and liability for injuries caused by a manufacturer, distributor, or vendor of certain products.

Courts generally agree that violation of a statute will not preclude defenses and excuses—*i.e.*, [will not impose] strict liability—unless the statute clearly contemplates such a result. Notably, most courts refuse to impose strict liability in the context of landlord liability for defective conditions, recognizing the need for some kind of notice element prior to the imposition of liability.

More frequently, then, this sort of statutory violation either will be considered as evidence of negligence or will support a finding of negligence *per se*. As this court has consistently held, the distinction between the two depends upon the degree of specificity with which the particular duty is stated in the statute.

Where a statute contains a general, abstract description of a duty, a plaintiff proving that a defendant violated the statute must nevertheless prove each of the elements of negligence in order to prevail. Thus, proof will be necessary that the defendant failed to act as a reasonably prudent person under like circumstances, to

which the defendant's lack of notice of a defective condition may be a relevant consideration.

But where a statute sets forth "'a positive and definite standard of care . . . whereby a jury may determine whether there has been a violation thereof by finding a single issue of fact,'" a violation of that statute constitutes negligence *per se*. In situations where a statutory violation constitutes negligence *per se*, the plaintiff will be considered to have "conclusively established that the defendant breached the duty that he or she owed to the plaintiff." In such instances, the statute "serves as a legislative declaration of the standard of care of a reasonably prudent person applicable in negligence actions." Thus the "reasonable person standard is supplanted by a standard of care established by the legislature." . . .

Furthermore, negligence *per se* and strict liability differ in that a negligence *per se* statutory violation may be "excused." As set forth in the Restatement of Torts 2d, *supra*, at 37, Section 288B(1): "The *unexcused* violation of a legislative enactment . . . which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself." (Emphasis added.) But "an *excused* violation of a legislative enactment . . . is not negligence." (Emphasis added.) Restatement of Torts 2d, *supra*, at 32, Section 288A(1).

Lack of notice is among the legal excuses recognized by other jurisdictions and set forth in the Restatement of Torts 2d. This excuse applies where "the actor neither knows nor should know of any occasion or necessity for action in compliance with the legislation or regulation." Restatement of Torts 2d, *supra*, at 35, Section 288A(2)(b), Comment *f*.

It follows, then, that a determination of liability and the relevance of notice under a statute imposed for safety depends first upon which of the above categories the statute occupies. Wenzel urges us to construe the violation of R.C. 5321.04(A)(1) only as evidence of his negligence and therefore to consider his lack of notice as crucial to a determination of the breach of his duty of care. Sikora, in contrast, would have us uphold the appellate court's determination that strict liability applies and that Wenzel's lack of notice is irrelevant.

We reject Sikora's argument that the statute imposes strict liability. R.C. 5321.04(A)(1) requires landlords to "comply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety." Considering the general reluctance among courts to impose strict liability in this context, the wording of the statute fails to convince us that the General Assembly intended to create strict liability upon a violation of this statutory requirement. Absent language denoting that liability exists without possibility of excuses, we are unpersuaded that the intent behind this statute was to eliminate excuses and impose strict liability.

Nor do we agree with Wenzel that the language of that statute is so general or abstract as to constitute merely evidence of negligence. Rather, we believe the statutory requirement is stated with sufficient specificity to impose negligence *per se*. It is "fixed and absolute, the same under all circumstances and is imposed upon" all landlords. Accordingly, we conclude that the statute requires landlords to conform to a particular standard of care, the violation of which constitutes negligence *per se*.

Having determined that the statute's violation constitutes negligence *per se*, we turn now to the question of whether Wenzel's lack of notice of the defect in the deck excuses the violation. Both parties agree that Wenzel neither knew nor had any way of

knowing of the defective condition. The City issued the necessary approval documents despite having failed to reinspect the situation. Because Wenzel was not involved at that point, however, he had no reason to question the validity of the City's certification. Thus, no factual circumstances existed that would have prompted or required Wenzel to investigate the process that occurred between the City and the developer prior to his involvement. Given that Wenzel neither knew nor should have known of the condition giving rise to the violation of R.C. 5321.04(A)(1), his violation is excused and he is not liable to Sikora for failing to comply with the OBBC.

We hold, therefore, that a landlord's violation of the duties imposed by R.C. 5321.04(A)(1) or 5321.04(A)(2) constitutes negligence *per se*, but a landlord will be excused from liability under either section if he neither knew nor should have known of the factual circumstances that caused the violation. . . .

For the foregoing reasons, the judgment of the court of appeals is reversed.

NOTES TO SIKORA v. WENZEL

1. *Terminology.* The *Sikora* court explains that proof of a statutory violation might establish strict liability, might establish negligence per se, or might simply be evidence of negligence. The court uses the term *strict liability* to mean that in some cases conduct that violates a statute will be treated as negligent conduct without regard to any excuse or justification an actor might assert.

A common alternative way to characterize the effect of a statute that allows no excuses is to describe its violation as creating a conclusive and irrebuttable presumption of negligence. If violation of a statute would constitute negligence per se and the statute allows excuses, violation either creates a *rebuttable* presumption of negligence or provides some evidence of negligence.

2. *Reasons for Recognizing Excuses.* Statutes may represent the product of careful study by a legislature, often aided by detailed expert presentations in many phases of the legislative process. In contrast to this strength, statutes suffer from the shortcoming of being insensitive to the detailed factual variations that real cases present. Most jurisdictions allow the violator of a statute to offer excuses for the violation. A 1928 opinion described why inflexible treatment of statutes could be unfair:

> We have held that a failure to obey an ordinance passed for the protection of the public is negligence per se. But this is not an inflexible rule, applicable to every conceivable situation. In some circumstances, it might be negligence, even gross negligence, for a passenger, upon alighting from a street car, to "proceed immediately to the sidewalk to the right," as the ordinance (sec. 1980) provides; for example, if automobiles between the street car and the sidewalk to the right are moving forward, and others are rapidly approaching; or if a runaway horse is approaching the space. Or, for other reasons, a compliance with the ordinance might be impracticable, or even impossible; for example, if there is a deep excavation in the space; or if street repairers are laying hot asphalt; or if the space is occupied by automobiles or other vehicles. Traffic ordinances are to be given a reasonable construction. They should not be so construed as to require a person to do the impossible, or to take a dangerous course when an apparently safe course is open. . . .

Crosby v. Canino, 84 Colo. 225, 268 P. 1021 (1928).

3. *Allowable Types of Excuses.* In *Sikora*, the reasonableness of the defendant's conduct protected the defendant from liability based on the statutory violation. Some courts have required excuses to fit narrowly defined categories different from general proof of reasonable conduct. For example, a 1963 Idaho decision adopted a summary of circumstances in which excuses for statutory violations related to operation of motor vehicles could be considered:

> Such circumstances may generally be classified in four categories: (1) Anything that would make compliance with the statute impossible; (2) Anything over which the driver has no control which places his car in a position violative of the statute; (3) An emergency not of the driver's own making by reason of which he fails to obey the statute; (4) An excuse specifically provided by statute.

Bale v. Perryman, 380 P.2d 510 (Idaho 1963). The *Sikora* opinion may exemplify a trend in general toward more acceptance of excuses for statutory violations. The Restatement (Second) of Torts offers a listing of types of excuses that a court should consider, but the list is explicitly nonexclusive. See §288A.

4. *Procedural Effect of Proof of Violation and Excuse.* When a jurisdiction seeks to give some effect to a statute violator's excuse, it cannot treat proof of violation as *requiring* a finding of breach of duty. Courts have responded to this dilemma in a variety of ways.

A. "Some Evidence": Excuse Offered or No Excuse Offered. Some courts treat a violation of a statute as merely "some evidence" that is admissible and that can be considered by the jury. The jury may find for or against the alleged violator on the basis of all the evidence in the case, including any excuse offered by the alleged violator.

B. "Prima Facie" Evidence: No Excuse Offered. Some courts treat violation of a statute as prima facie evidence of duty and breach. In some of these jurisdictions, a party who shows an opponent's violation is entitled to reach the jury on the issues of duty and breach. The jury may find for or against the alleged violator. In other prima facie jurisdictions, courts refer to proof of violation as creating a presumption of negligence. This usually means that if the alleged violator of a statute offers no evidence contradicting the existence of duty and breach, those issues must be decided against the alleged violator.

C. "Negligence Per Se": No Excuse Offered. In negligence per se jurisdictions, where violation of a statute is treated as negligence per se, proof of a statutory violation is conclusive on the issues of an actor's duty and breach. This is a difference between negligence per se and those prima facie jurisdictions where evidence of a statutory violation allows, but does not require, a finding in favor of the proponent of the evidence.

D. "Prima Facie" Evidence and "Negligence Per Se": Excuse Offered. Negligence per se and prima facie evidence jurisdictions would likely apply the same treatment when a violator offers evidence of an excuse. The case must go to the jury, and the jury is entitled to find for or against the violator.

5. *Ordinances and Regulations.* The procedural and evidentiary effect given to statutes also applies to ordinances and regulations. Thus the discussion of the uniform building code in *Nettleton* applies to statutes as well. There are considerable differences among states in how statutes are treated and occasionally differences within a state on