Negligence Per Se and Res Ipsa Loquitur: Kissing Cousins

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Negligence per se and Res Ipsa Loquitur would appear to have little in common other than that both are generally found adjacent to each other in the chapter on negligence in most torts casebooks.[1] However, aside from geography they share a common theme. In both, plaintiffs seek to prove negligence based on a generalization. Defendant can successfully defend only by showing that the generalization should not apply to the particular facts of her case. Restatement, Third, in these two areas would be more effective and more principled if it focused on the issue of when it is proper to rely on a generalization and when we must abandon the generalization in favor of a more fact-sensitive inquiry into the actor's conduct. General principles can be articulated that explain important aspects of these two doctrines. They, however, seem to get lost in the detailed application of the various sections. As a former Restatement reporter I am

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[1] See, e.g., Marc A. Franklin and Robert L. Rabin, TORT LAW AND ALTERNATIVES:CASES AND MATERIALS, 75-109 (8th Ed. 2006); Robert E. Keeton, Lewis D. Sargentich, Gregory C. Keating, TORT AND ACCIDENT LAW, 398-439 (4th Ed. 2004); Thomas C. Galligon, Phoebe A. Haddon, Frank L. Mariast, Frank McCellan, Michael L. Rustad, Nicholas P. Terry, Stephanie M. Wildman, TORT LAW: CASES, PERSPECTIVES, AND PROBLEMS, 207-230 (4th Ed. 2007); Victor E. Schwartz, Kathryn Kelly, David F. Partlett, PROSSER, WADE AND SCHWARTZ'S TORTS; CASES AND MATERIALS, 204-258 (11th Ed. 2004); Aaron D. Twerski and James A. Henderson, TORTS: CASES AND MATERIALS, 161-192 (2d ed. (2007).

sensitive to academicians taking pot shots at carefully crafted rules and comments.[2] I admire the work Professors Green and Powell have produced.[3] So much so that I feel free to critique their work and suggest some modifications that I believe would enhance their final work product.

I. Negligence Per Se and Excused Violation

The sections setting forth the doctrine of negligence per se and their corresponding comments lay out rules that are relatively uncontroversial.[4] An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident that actor's conduct causes and the victim is within the class of persons the statute is designed to protect.[5] A court will instruct the jury that the statutory standard of care governs the case.[6] The jury might have to decide (it the issue were contested) whether the actor did, in fact, violate the standard of care and whether her breach was the cause of the injury.[7] I have two qualms with the negligence per se sections. First, they read as an inexorable command to the trial judge that,

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[2] The author was a co-reporter with Professor James A. Henderson, Jr. for Restatement (Third) of Torts: Products Liability (1998).

[3] In another forum, the author has expressed some difference of opinion with the drafting of Restatement, Third, of Torts: Liability for Physical Harm Proposed Final Draft No. 1 (April 6, 2005) Sec. 7 (hereafter Restatement, Third). See Aaron D. Twerski, *The Cleaver, the Violin and the Scalpel; Duty and the Restatement (Third) of Torts*, 60 Hastings L.J. 1 (2008).

[4] Restatement, Third, Secs. 14 and 15.

[5] *Id.*

[6] Restatement, Third, Sec. 14, Comment *c*.

[7] Restatement, Third, Sec. 14 Comment *h*.

absent excuse, she must direct a verdict on standard of care. Second, the notion that there is an exhaustive list of excused violations which exempt the actor from the application of the statute[8] seems to be wrong. Furthermore, the excused violation section is in need of a better stated rationale to supports its black letter rule.

Let me start with a common sense proposition. Judges direct verdicts on the standard of care when they conclude that an actor's conduct, without question, falls below that what is expected of a reasonable person or clearly meets the standard of reasonable care.[9] For the most part the Learned Hand B< PL risk-utility test[10] guides the judge in deciding whether the standard should be set by the trial judge or whether the issue is for the jury.[11] When a statute is presented to the court as setting the standard of care, it is the role of the trial judge to decide whether to import the statutory standard as the mandatory standard of care. For the reasons set forth in § 14, Comment *b,* the statutory standard is an important source of law that informs the trial judge as to the appropriate standard of care.[12] But, the trial judge is not an automaton who mechanically adopts the statutory standard of care as appropriate to the case. Consider *Stachniewicz v. Mar-*

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[8] Restatement, Third, Sec. 15.

[9] Restatement, Third, Sec. 8, Comments *b* and *c*.

[10] United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir., 1947).

[11] Restatement, Third, Sec. 3, Comment *f*, Illustrations 1 and 2.

[12] The rational set forth in this comment are particularly well-stated and should guide trial judges in deciding whether to remove the issue of the standard of care from jury determination.

Cam Corp.[13], a casebook favorite. In that case a fight erupted in a bar between persons of American Indian ancestry and other patrons. The fight was preceded by racially charged remarks and shouting between the two groups. At some point an altercation took place and the plaintiff was knocked down and injured. The attacker had been part of a group that had been drinking in the defendant's establishment for two and one-half hours before the fight broke out.

Plaintiff argued that defendant bar-owner had violated a statute and a regulation and was thus negligent per se. The statute provided that:

> No person shall give or otherwise make available any alcoholic liquor to a person visibly intoxicated.[14]

The regulation promulgated by the Liquor Control board was of a different nature:

> No licensee shall permit or suffer any loud , noisy or disorderly or boisterous conduct, or any profane or abusive language, in or upon his licensed premises, or permit any visibly intoxicated person to enter or remain upon his licensed premises.[15]

The trial court held that neither the violation of statute nor the regulation constituted negligence per se.[16] On appeal the Oregon Supreme Court held that the violation of the statute was not appropriate for use as a standard of conduct in the case at bar.[17] The court reasoned that the

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[13] 488 P.2d 436 (1971).

[14] Or. Rev. Stat. 471.410(3).

[15] Oregon Liquor Control Regulation No. 10-065(2).

[16] 488 P.2d at 584.

[17] *Id.* at 586-87.

statute made it illegal to serve liquor to someone already visibly intoxicated**.** The statute "was particularly inappropriate for the awarding of civil damages because of the extreme difficulty, if not impossibility, of determining whether a third party's injuries would have been caused, in any event by the already inebriated person."[18] The regulation, on the other hand, was designed to keep bars free from abusive behavior by patrons and was right on target with the failure of the owner of the bar to keep order so as to avoid barroom brawls.[19]

What is interesting about the *Stachniewicz* decision is that the court did not view the Oregon statute as automatically applicable to a tort case. Instead, it looked at the facts of the case and decided that adopting the statutory standard would implicate causation problems that were not readily justiciable. The regulation, however, was far more compatible for use under the facts of the case. The parties had been boisterous and unruly for a considerable period of time and should have been shown the door well before the altercation took place. The problem with §14 is that it reads as a command to the trial judge that unless the case implicates an "excused violation," she is mandated to utilize the statute as the mandated standard of care. The trial judge should be empowered to use her own good sense as to whether a statute is appropriate for use in a civil tort action. There is nothing in the comments that reflects the view that a trial judge retains discretion

[18] *Id.*

[19] *Id.* at 815.

to decide whether to utilize the statute as the mandated standard of care. The *Stachniewicz* court's refusal to apply the Oregon statute was not predicated on excused violation. It refused to apply the statute because it did not fit well into the structure of a tort case.

My most serious problem, however, concerns the Restatement section dealing with excused violation of statute. Section 15 sets forth five classes of behavior that can serve as an "excuse" thus freeing the court from adopting the statutory standard.[20] The term "excused violation" almost certainly can be attributed to Justice Cardozo's opinion in *Martin v. Herzog*[21] where he declares "We think the unexcused omission of the statutory signals [failure to turn on headlights after sunset] is more than evidence of negligence. It *is* negligence itself."[22] I have always had difficulty with the term "excused violation." Who is doing the excusing? Section 15,

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[20] **§ 15. Excused Violations**

An actor's violation of a statute is excused and not negligence if:

(a) The violation is reasonable in light of the actor's childhood, physical disability, or physical incapacitation;

(b) The actor exercises reasonable care in attempting to comply with the statute;

(c) The actor neither knows nor should know of the factual circumstances that render the statute applicable;

(d) The actor's violation of the statute is due to the confusing way in which the requirements of the statute are presented to the public; or

(e) The actor's compliance with the statute would involve a greater risk of physical harm to the actor or to others than noncompliance.

[21] 126 N.E. 814 (N.Y. 1920).

[22] *Id.* at 815

Comment *a*, declares that recognizing excuses "prevents the negligence per se doctrine from being applied in many . . . cases in which public officials might well find it inappropriate to prosecute the person who technically is a law violator." In my view whether public officials would prosecute the violator is beside the point. The real problem facing the trial judge is that statutes are written in universalist "Thou shalt never" language. Negligence is fact specific. It asks was the behavior of the actor reasonable under the circumstances.

In statutory violation cases there is good reason to utilize the general statutory standard of behavior. But, when the judge concludes that the statutory standard does not fairly apply to the particular facts before the court, then she should not direct a verdict on the standard of care but rather should send case to the jury case on the reasonable person standard. The problem with §§ 14 and 15 as written is that they mandate the use of the statute subject to excuse whereas they should be geared to whether the statutory standard can fairly be applied to the specific facts of the case. Consider the example set forth in §15, Comment *c* which allows for excused violation from a statute that requires all motor-vehicle owners to have well functioning brakes when the brakes fail without any negligence on the part of the owner. These "equipment" statute cases are almost always badly reasoned.[23] The courts squirm in trying to find a way out of applying the statute.

[23] See, e.g., Freund v. DeBuse, 506 P.2d 491 (Or. 1973); Brotherton v. Day & Night Fuel co., 73 P.2d 788 (Wash. 1937); Gowins v. Merrell, 541 P.2d 857 (Okla. 1975). Some courts rely on statutes requiring one to maintain equipment in good working condition to impose strict liability. Since the statutes do not impose civil liability when

They labor for naught. These statutes have no place in a negligence case not, as the Restatement suggests, because the defendant expended "reasonable efforts to comply." They do not apply because they don't set a standard of care. If the statute mandated that the owner of a vehicle is to have his brakes inspected six times a year, then it would provide a standard of care that a court could sensibly apply in a negligence case. But, a statute that says that brakes should be in good operating order does not speak to a standard of care. I cannot order my brakes to stop. The comments to the Restatement look for an excuse for not applying a statute that was never relevant in the first place. It gets into trouble because it views violation of a statute as an inexorable mandate subject to exceptions rather than a sensible source of law that can be helpful in deciding whether to direct a verdict.

Another example–this one my own. A's wife unexpectedly goes into early labor. She calls the obstertrician who tells her "I don't like what I am hearing. Get to the hospital immediately. Every minute counts." A drives his wife to the hospital and exceeds the speed limit by 15 mph. At an intersection he is unable to bring his car to a stop and collides with a car that has the right of way injuring the driver, B. A is clearly in violation of the statute. A should not be held negligent per se. Whether A acted as a reasonable person under the circumstances is a legitimate jury issue but the statutory standard has no place in the case. Perhaps one could argue

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these statutes are violated, the imposition of strict liability is imposed by the courts and has nothing to do with

that Sec. 15(e) provides an excuse "when the actor's compliance with the statute would involve a greater risk of physical harm to the actor or to others than noncompliance." But that exception seems to apply to situations where the actor is faced with an emergency such as a child darting out into the driver's lane of traffic and the driver swerves into the opposite lane of traffic to avoid hitting the child. It takes some straining to apply that exception where the driver has reasons to violate the statute that do not stem from road-related emergencies.

If the suggestion does not come too late for inclusion, I would rewrite Comment *a* in part to include the following language:

> In the vast majority of cases where an actor is in violation of statute, the court will adopt the statutory standard as the governing standard of care and will instruct the jury that the actor is held to that standard. However, statutes are written in broad general terms and cannot account for a host of situations when it is clear that defendant, for good and just reasons, should not have met the standard. Negligence is fact-sensitive and there are occasions when the fact-sensitive nature of the conduct dictate that the jury be allowed to judge the actor's conduct based on whether the actor met the standard of a reasonable person under the circumstances. One cannot articulate a general rule as to when the actor's conduct is sufficiently fact-sensitive that the general statutory prescription should not apply. The exceptions set forth in (a)-(e) are illustrative of the kinds of situations in which courts have refused to apply the statutory standard in civil tort litigation. They are not meant to exhaust the possibilities. A trial judge must determine in each instance whether the facts are such that utilizing the statutory standard would constitute a significant departure from the standard of reasonable care that lies at the heart of the rule of negligence.

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negligence per se. See Dan B. Dobbs, THE LAW OF TORTS, § 141 (2000).

No one ever has and no one ever will provide courts with a foolproof test as to when to direct a verdict on standard of care. The law of negligence is far too fluid to permit such certainty. Statutes provide an important datum for judges to direct verdicts but the trial judge should never lose sight of the underlying issue in a negligence case. The core question is always whether the actor behaved according to the norms that society has set for reasonable behavior.

II. Res Ipsa Loquitur

The Restatement's treatment of res ipsa loquitur is a vast improvement over the Second Restatement formulation.[24] If it has forever banished the requirement of "exclusive control" as a requisite for applying res ipsa, it will be an occasion for rejoicing.[25] Section 17, Comment *a,* correctly points out that "res ipsa is circumstantial evidence of a quite distinctive form. The doctrine implies that the court does not know, and cannot find out , what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of the cause of the type or category of accidents involved." Put simply, res ipsa relies on a generalization that

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[24] Restatement Third provides:

> **§ 17. Res Ipsa Loquitur**
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> **The factfinder may infer that the defendant has been negligent when the accident causing the plaintiff's physical harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member.**

[25] Restatement, Third, Sec. 17, Comment *b*. This author has said that "whoever first gave voice to the exclusive control articulation should be shot at sunrise." Aaron D. Twerski and James A. Henderson, Jr., Torts: Cases and Materials, 186 (2d ed. 2007).

negligence is the best explanation for a given category of events. The inherent weakness of the generalization is that it cannot speak to what the defendant did on a given day or time. The defendant with some justification is put out because there is no evidence to link her to the generalization. Almost the only way for a defendant to defeat a res ipsa case is to provide some evidence that the generalization was not operative at the time the accident took place.[26] What transpires if the defendant does, in fact, present evidence that a non-negligent alternative cause was operative at the crucial time in question? Comment *d* is vague. At one point it suggests that such alternative cause evidence is for the court in determining whether res ipsa is available. But, then it quickly goes on to say that such alternative cause evidence can influence the jury in assessing plaintiff's res ipsa claim. As an example of how evidence of a particular accident can influence how a jury would deal with a plaintiff's res ipsa claim, the comment posits an airplane crash in bad weather. Unexpected wind shear can be one cause of the accident. "If on the day of the crash, a large storm was in progress, the possibility of wind shear as a cause of the crash is considerably enhanced." That according to the comment is an argument for the jury.

Given the lack of evidence on the part of the plaintiff and hard evidence of a large storm that can cause wind shear supporting the alternative cause should the case go to the jury or should

[26] See, e.g., Donnelly v. National R.R. Passenger Corp., 16 F.3d 941 (8th Cir. 1994) (applying Kansas law) (summary judgment granted to defendant since alternative cause other than defendant's conduct not negated); Vavarro v.

a judge, absent any other evidence, direct a verdict for defendant? The problem is that the generalization that most planes don't crash absent pilot negligence or negligently maintained equipment maintenance is without factual support as to the crash on the day of the accident. The defendant shows up with real evidence (a severe storm that can cause wind shear). I would think that a trial judge would have to think long and hard before letting the case go the jury. How is a jury to decide between the generalization and hard evidence? It can only indulge in rank speculation. It cannot reason to a rational conclusion. I tell my classes that a defendant does not have to prove the res ipsa inference to be invalid to obtain a directed verdict. It is sufficient for the defendant to muddy the waters with hard evidence that places in serious doubt that the generalization was at work at the time of the accident. With a generalization on one side of the scale and hard evidence on the other, the generalization should lose. I have no prescription that will get it right all the time. However, viewing the res ipsa issue in this light helps clarify the problem of when the judge should decide to direct a verdict for defendant and when to send the case to the jury.

In short, the law of negligence abhors generalizations. It is fact-sensitive. At times, for good and sufficient reason, we resort to generalizations. But we do not do so without concern. The tension between the generalization and fact specificity is real and tangible. That is the

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Michael G. Jabar, 197 F.3d 1 (1st Cir. 1999) (applying Maine law) (trial judge's refusal to give res ipsa instruction

dynamic that drives the case law in both negligence per se and res ipsa loquitur. The two concepts may not be twins but they are kissing cousins.

upheld because there were alternative causes other than defendant's conduct that could have caused her injury).