PART I

PERSONAL INJURY: THE PRIMA FACIE CASE

Chapter 1
Establishing A Breach of Duty

Introduction

The word "tort" derives from a French word meaning "wrong" or "injustice." It is on the basis of some kind of deviation from the expectations of the rest of society that a person can be made liable in tort. As noted in the introduction, there is no fixed standard for what society expects of an individual—the expectation varies depending on the nature of the defendant's activity and the relationship between the plaintiff and the defendant. Also, as noted in the Introduction, there are other doctrines in tort law that determine whether or not a defendant will be held liable for a plaintiff's injury, including questions of causation, the plaintiff's own fault, the nature of the damages suffered, etc. But it is logical to begin with the question of whether or not the defendant commited some "wrong" or "injustice."

Another way to understand the question is to ask what duty the defendant owed to the plaintiff, and whether or not that duty was breached. Indeed, a negligence case is typically described as consisting of four "elements": duty, breach, causation, and damages.[1] It is only where the defendant failed to live up to the expectation society expects in such circumstances (a breach of the defendant's duty) that liability is imposed. And the nature of the duty that the defendant owes to the plaintiff depends upon changing social expectations; because society is not static, neither is tort law, and the nature of the duty imposed on may change substantially, even resulting in the creation of a new tort, or the abolition of an old one.[2]

As we will see, although the words "wrong" and "injustice" suggest moral failing, it is important to bear in mind that there may be moral failing without tort liability, and there may be tort liability without moral failing. Rather than focusing entirely on the defendant's conduct, it is more useful to see the question in light of the *relationship* between the defendant and the plaintiff.[3] Law generally, not just tort law, can only create rights by simultaneously imposing a duty on the rest of society to respect those rights. If I am to enjoy the right to free speech, society must impose upon others the duty to refrain from interfering with my exercise of that right. And because no right (even the right to free speech) is absolute, the duties society imposes will frequently reflect our desire to balance conflicting societal goods. We can't say that somebody has a "right" to medical care unless we impose a duty on the rest of society to provide such care.

One way to undersatnd legal rules is to see them as a way of specifying the respective entitlements — the correlative rights and duties — of the parties.[4] In

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[1] Harbeson v. Parke-Davis, 98 Wash.2d 460, 656 P.2d 483 (1983).

[2] For a description of this process, *see* Blomquist, *"New Torts": A Critical History, Taxonomy, and Appraisal*, 95 DICK. L. REV. 23 (1990); Nehal A. Patel, *The State's Perpetual Protection of Adultery: Examining Koestler V. Pollard and Wisconsin's Faded Adultery Torts*, 2003 WIS. L. REV. 1013.

[3] As noted in the Introduction, certain kinds of relationships between plaintiff and defendant (*e.g.*, manufacturer-consumer or doctor-patient) create specific rules redefining what obligation is owed to prevent injury.

[4] An excellent treatment of the entitlement concept is contained in Calabresi & Melamed, *Property Rules,* (continued...)

this sense tort law is like property law. Property law draws a line between two owners, either along geographic lines (as in a boundary dispute) or in a temporal way (as in the lease of property for a period of time).

Tort law involves the same kinds of questions about "who is entitled to what," but in tort law we have to determine the entitlement to be free of interference or the entitlement to be protected from the risk of injury. Thus, if *A* is injured by a car driven by *B*, we want to know whether *A* is entitled to be compensated by *B* (because *B* had a duty to avoid injuring him) — or was *B* exercising his entitlement to drive on the highway without worrying about the potential that *A* might get injured? Our allocation of duties corresponds to the rights we are trying to protect. Requiring drivers to use reasonable care is the balance we strike between a desire to protect other users of the highway and the driver's entitlement to use the highway.

As mentioned in the Introduction, tort law is frequently divided into four issues: duty, breach, causation and damages. To repeat, the question of duty is often more difficult that it appears. For the beginning torts student, I recommend looking at the questions of duty and breach as a single question.[5] It is easier for the student to determine whether a particular defendant has been negligent (breached the duty of reasonable care) or was engaged in an ultrahazardous activity than it is to answer the abstract question "What duty did the defendant owe the plaintiff?"

This chapter considers the two most common breaches of duty: (1) Negligence; and (2) Strict Liability.

BIERMAN v. CITY OF NEW YORK

302 N.Y.S.2d 696 (1969)

Jean Bierman pro se.

J. Lee Rankin, corporation counsel, (Thomas J. Brabazon of counsel), for New York City.

J. Bruce Byrne, New York City, for Consolidated Edison.

Irving YOUNGER, Judge

Jean Bierman, a lady no longer young, owns a small house at 149 Rivington Street, New York City, where, assisted by Social Security payments, she makes her home.

On February 11, 1968, at about 6:30 a.m., water poured into Mrs. Bierman's basement. It damaged the boiler, floor, and walls. The source of the flood was a ruptured water main in front of her house.

She filed a claim for property damage against the City, which responded with a letter stating, in substance, that Consolidated Edison had been working on the main, and hence that Mrs. Bierman's grievance, if any, was against Consolidated Edison. Mrs. Bierman then commenced an action in the Small Claims Part of this Court, against both the City and Consolidated Edison, seeking damages in the amount of $300.00. Because of a crowded calendar in the Small Claims Part, the case was referred to Part 20, where, on May 20, 1969, it was tried.

Neither the City nor Consolidated Edison offered any evidence. Rather, at the close of Mrs. Bierman's case, each moved to dismiss the complaint on the ground that there was no proof of negligence. There was none. Although it has been held that without such proof a plaintiff may not recover for harm caused by a broken water main, *George Foltis, Inc. v. City of New York*, 287 N.Y. 108, 38 N.E.2d 455 (1941), I find that simple citation of authority will not suffice as a basis for decision here.

This is a Small Claims case, and in Small Claims cases we are adjured "to do substantial justice between the parties according to the rules of substantive law." N.Y.S. City Civ. Ct. Act, Sec. 1804. The rule of substantive law says that Mrs. Bierman may not recover because she cannot prove negligence on the part of the City or of Consolidated Edison. Is this substantial justice? Only a very backward lawyer could think so. Why should a lady little able to bear the loss nevertheless bear it? Because the metropolis and

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4 (...continued)
Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089, 1090 (1972). A thoughtful critique by a leading exponent of the critical legal studies movement is Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

5 One author has questioned whether "duty" retains its status as part of the plaintiff's prima facie case: Jordan K. Kolar, *Is this Really the End of Duty?: the Evolution of the Third Restatement of Torts,* 87 MINN. L. REV. 233 (2002)

the great utility were not at fault, we are told. Yet the concept of fault is beside the point. When called upon to decide the rights of a farmer into whose cabbages the flock wandered while the shepherd dallied, a court can preach a sermon on culpability and still appear to reason its way to a just result. But when the task is the allocation of burdens between a plaintiff who is little more than a bystander in his own society and government itself, talk of negligence leaves the highroad to justice in darkness. Accidents happen. Injuries occur. People suffer. Frequently nobody is at fault. The problem is one of mechanics, not morals. The law should therefore turn from fault as a rule of decision. Rather, judges must find a rule to decide whose the cost and whose the compensation so as to satisfy the legislature's command in a case like this "to do substantial justice."

Modern legal scholarship provides at least three signposts pointing to such a rule.

(1) Cost-spreading. *See* Calabresi, "*Some Thoughts on Risk Distribution and the Law of Torts*," 70 YALE L.J. 499 (1961). The rule should operate to alleviate the expense of accidents. Can Mrs. Bierman recover only by proving negligence here where no one was negligent? Then she will bear the whole expense and defendants none. Can Mrs. Bierman recover without proving negligence? Then defendants will in the first instance bear the whole expense and Mrs. Bierman none. That whole expense defendants will thereupon spread among all who benefit from the water main: the City in taxes, Consolidated Edison in rates. Mrs. Bierman obviously can do no such thing. So the defendants should pay. If they must, they argue, they have become insurers. Precisely. Let them charge each person something so that no person pays everything.

(2) Injury-prevention. *See* Seavey, "*Speculations as to Respondeat Superior*," in HARVARD LEGAL ESSAYS 433 (1934); Calabresi, "*The Decision for Accidents: An Approach to Nonfault Allocation of Costs*," 78 HARV. L. REV. 713 (1965). The rule should assign liability to the party who will thereby be moved to take all possible precautions against recurrence of the accident. That party is not Mrs. Bierman. It is the defendants.

(3) Fairness. *See Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968). The rule should impress an onlooker as fair. Here, defendants maintained a water main in the street. It was their business to do it. They created a hazard. The hazard gave issue to the accident. I believe that fairness calls for a defendant to pay for accidents which occur because of his business activities. Thus the City and Consolidated Edison should pay Mrs. Bierman for her damages here.

I recognize that Mrs. Bierman was a beneficiary of defendants' water main. So were many others. There is nothing in Mrs. Bierman's use of her share of the water to require that she sustain the entire loss brought about by the accident. At most, she should sustain her share; and that is the result forecast under "cost-spreading," above.

I conclude that "substantial justice" in this case demands a rule of strict liability rather than a rule of fault. Accordingly, plaintiff shall have judgment against defendants, jointly and severally, in the sum of $300, together with interest from February 11, 1968.

Notes and Questions

1. Would Judge Younger be able to apply "substantial justice" if the case had involved $3,000,000 instead of $300? Why or why not? Should he have been?

2. Judge Younger relies upon "three signposts." What authority does he have for their use? What bearing should they have had upon his opinion?

3. How much do you think Mr. Rankin and Mr. Byrne billed their clients? How do you think the clients reacted to the outcome of this case?

4. In *Bierman v. Consolidated Edison Co. of New York*, 66 Misc.2d 237, 320 N.Y.S.2d 331 (N.Y.Sup.App.Term 1970), the court reversed Judge Younger in the following opinion:

> It being the mandate of the statute Civil Court Act, § 1804) that the rules of substantive law are applicable to the Small Claims Court, the court below erred in departing from the traditional rules of negligence and in adopting a rule of strict liability without fault. Stability and

certainty in the law requires adherence to precedents by courts of original jurisdiction, and the decisions of the Court of Appeals must be followed by all lower courts (*Brooks v. Horning*, 27 A.D.2d 874, 875, 876, 278 N.Y.S.2d 629, 632-634). If a rule of strict liability is to be adopted, the pronouncement should come from the Legislature or the Court of Appeals, and not from a court of original jurisdiction.

There being no proof of negligence on the part of the defendant Consolidated Edison Company, the judgment should be reversed as to it and the complaint against it dismissed.

With respect to the claim against the defendant City of New York, we find, contrary to the decision below, that there was sufficient proof of its negligence to sustain a recovery against it. The proof of a burst water main permitted an inference that the damage was due to the negligence of the City (*George Foltis, Inc. v. City of New York*, 287 N.Y. 108, 118, 38 N.E.2d 455, 461). While it is true that the court was not compelled to draw that inference, there appears no reason for declining to do so. Therefore, in the absence of any evidence on the part of the City, judgment should have been rendered against it. While the court below found otherwise on this issue, it is within our province to review the facts (CPLR 5501(d)), and, in a non-jury case, to render the judgment which the court below should have granted (CPLR 5522; *Bruno v. Koshac*, 13 A.D.2d 650, 213 N.Y.S.2d 784; *Society of New York Hospitals v. Burstein*, 22 A.D.2d 768, 253 N.Y.S.2d 753). We conclude that the judgment against the City should be affirmed, although in affirming, we are not approving the reasons reached below (*Ward v. Hasbrouck*, 169 N.Y. 407, 420, 62 N.E. 434, 438).

Judgment modified to the extent of reversing so much thereof as is against the defendant Consolidated Edison Company, without costs, and dismissing the complaint against it; otherwise affirmed, with $25 costs.

Was Judge Younger correct? Or was the reviewing court correct? Now how much had the City and Con Ed paid their lawyers? Did they get their money's worth?

5. One commentator characterizes the tort law of New York state as having "evolved" from a focus on fairness to an emphasis on efficiency. *See* William E. Nelson, *From Fairness to Efficiency: The Transformation of Tort Law in New York, 1920-1980*, 47 BUFF. L. REV. 117 (1999).

6. Compensation and tort liability are distinguished in John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027 (2003) (regarding the Compensation fund for victims of Sept. 11, 2001); Mark Geistfeld, *Negligence, Compensation, and the Coherence of Tort law* 91 GEO. L.J. 585 (2003). .

HAMMONTREE v. JENNER

20 Cal. App. 3d 528, 97 Cal. Rptr. 739 (1971)

LILLIE, Associate Justice

Plaintiff Maxine Hammontree and her husband sued defendant for personal injuries and property damage arising out of an automobile accident. The cause was tried to a jury. Plaintiffs appeal from judgment entered on a jury verdict returned against them and in favor of the defendant.

The evidence shows that on the afternoon of April 25, 1967, defendant was driving his 1959 Chevrolet home from work; at the same time plaintiff Maxine Hammontree was working in a bicycle shop owned and operated by her and her husband; without warning defendant's car crashed through the wall of the shop, struck Maxine and caused personal injuries and damages to the shop.

Defendant claimed he became unconscious during an epileptic seizure losing control of his car. He did not recall the accident but his last recollection before it, was leaving a stop light after his last stop, and his first recollection after the accident was being taken out of his car in plaintiffs' shop. Defendant testified he has a medical history of epilepsy and knows of no other reason for his loss of consciousness except an

epileptic seizure; prior to 1952 he had been examined by several neurologists whose conclusion was that the condition could be controlled and who placed him on medication; in 1952 he suffered a seizure while fishing; several days later he went to Dr. Benson Hyatt who diagnosed his condition as petit mal seizure and kept him on the same medication; thereafter he saw Dr. Hyatt every six months and then on a yearly basis several years prior to 1967; in 1953 he had another seizure, was told he was an epileptic and continued his medication; in 1954 Dr. Kershner prescribed dilantin and in 1955 Dr. Hyatt prescribed phelantin; from 1955 until the accident occurred (1967) defendant had used phelantin on a regular basis which controlled his condition; defendant has continued to take medication as prescribed by his physician and has done everything his doctors told him to do to avoid a seizure; he had no inkling or warning that he was about to have a seizure prior to the occurrence of the accident.

In 1955 or 1956 the department of motor vehicles was advised that defendant was an epileptic and placed him on probation under which every six months he had to report to the doctor who was required to advise it in writing of defendant's condition. In 1960 his probation was changed to a once-a-year report.

Dr. Hyatt testified that during the times he saw defendant, and according to his history, defendant "was doing normally" and that he continued to take phelantin; that "[t]he purpose of the (phelantin) would be to react on the nervous system in such a way that where, without the medication, I would say to raise the threshold so that he would not be as subject to these episodes without the medication, so as not to have the seizures. He would not be having the seizures with the medication as he would without the medication compared to taking medication"; in a seizure it would be impossible for a person to drive and control an automobile; he believed it was safe for defendant to drive.

Appellants' contentions that the trial court erred in refusing to grant their motion for summary judgment on the issue of liability and their motion for directed verdict on the pleadings and counsel's opening argument are answered by the disposition of their third claim that the trial court committed prejudicial error in refusing to give their jury instruction on absolute liability.[1]

Under the present state of the law found in appellate authorities beginning with *Waters v. Pacific Coast Dairy, Inc.*, 55 Cal. App. 2d 789, 791-793, 131 P.2d 588 (driver rendered unconscious from sharp pain in left arm and shoulder) through *Ford v. Carew & English*, 89 Cal. App. 2d 199, 203-204, 200 P.2d 828 (fainting spells from strained heart muscles), *Zabunoff v. Walker*, 192 Cal. App. 2d 8, 11, 13 Cal. Rptr. 463 (sudden sneeze), and *Tannyhill v. Pacific Motor Trans. Co.*, 227 Cal. App. 2d 512, 520, 38 Cal. Rptr. 774 (heart attack), the trial judge properly refused the instruction. The foregoing cases generally hold that liability of a driver, suddenly stricken by an illness rendering him unconscious, for injury resulting from an accident occurring during that time rests on principles of negligence. However, herein during the trial plaintiffs withdrew their claim of negligence and, after both parties rested and before jury argument, objected to the giving of any instructions on negligence electing to stand solely on the theory of absolute liability. The objection was overruled and the court refused plaintiffs' requested instruction after which plaintiffs waived both opening and closing jury arguments. Defendant argued the cause to the jury after which the judge read a series of negligence instructions and, on his own motion, BAJI 4.02 (res ipsa loquitur).

Appellants seek to have this court override the established law of this state which is dispositive of the issue before us as outmoded in today's social and economic structure, particularly in the light of the now recognized principles imposing liability upon the manufacturer, retailer and all distributive and vending elements and activities which bring a product to the consumer to his injury, on the basis of strict liability in tort expressed first in Justice Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461-468, 150 P.2d 436, and then in *Greenman v. Yuba Power*

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[1] "When the evidence shows that a driver of a motor vehicle on a public street or highway loses his ability to safely operate and control such vehicle because of some seizure or health failure, that driver is nevertheless legally liable for all injuries and property damage which an innocent person may suffer as a proximate result of the defendant's inability to so control or operate his motor vehicle.
"This is true even if you find the defendant driver had no warning of any such impending seizure or health failure."

Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897; *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168, and *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P.2d 84. These authorities hold that "A manufacturer (or retailer) is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." (*Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 700, 377 P.2d 897, 900; *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 260-261, 37 Cal. Rptr. 896, 391 P.2d 168.) Drawing a parallel with these products liability cases, appellants argue, with some degree of logic, that only the driver affected by a physical condition which could suddenly render him unconscious and who is aware of that condition can anticipate the hazards and foresee the dangers involved in his operation of a motor vehicle, and that the liability of those who by reason of seizure or heart failure or some other physical condition lose the ability to safely operate and control a motor vehicle resulting in injury to an innocent person should be predicated on strict liability.

We decline to superimpose the absolute liability of products liability cases drivers under the circumstances here. The theory on which those cases are predicated is that manufacturers, retailers and distributors of products are engaged in the business of distributing goods to the public and are an integral part of the over-all producing and marketing enterprise that should bear the cost of injuries from defective parts. (*Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262, 37 Cal. Rptr. 896, 391 P.2d 168; *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 63, 27 Cal. Rptr. 697, 377 P.2d 897.) This policy hardly applies here and it is not enough to simply say, as do appellants, that the insurance carriers should be the ones to bear the cost of injuries to innocent victims on a strict liability basis. In *Maloney v. Rath*, 69 Cal. 2d 442, 71 Cal. Rptr. 897, 445 P.2d 513, followed by *Clark v. Dziabas*, 69 Cal. 2d 449, 71 Cal. Rptr. 901, 445 P.2d 517, appellant urged that defendant's violation of a safety provision (defective brakes) of the Vehicle Code makes the violator strictly liable for damages caused by the violation. While reversing the judgment for defendant upon another ground, the California Supreme Court refused to apply the doctrine of strict liability to automobile drivers. The situation involved two users of the highway but the problems of fixing responsibility under a system of strict liability are as complicated in the instant case as those in *Maloney v. Rath* at 447, 71 Cal. Rptr. 897, 445 P.2d 513, and could only create uncertainty in the area of its concern. As stated in *Maloney*, at page 446, 71 Cal. Rptr. at page 899, 445 P.2d at page 515: "To invoke a rule of strict liability on users of the streets and highways, however, without also establishing in substantial detail how the new rule should operate would only contribute confusion to the automobile accident problem. Settlement and claims adjustment procedures would become chaotic until the new rules were worked out on a case-by-case basis, and the hardships of delayed compensation would be seriously intensified. Only the Legislature, if it deems it wise to do so, can avoid such difficulties by enacting a comprehensive plan for the compensation of automobile accident victims in place of or in addition to the law of negligence."

The instruction tendered by appellants was properly refused for still another reason. Even assuming the merit of appellants' position under the facts of this case in which defendant knew he had a history of epilepsy, previously had suffered seizures and at the time of the accident was attempting to control the condition by medication, the instruction does not except from its ambit the driver who suddenly is stricken by an illness or physical condition which he had no reason whatever to anticipate and of which he had no prior knowledge.

The judgment is affirmed.

WOOD, P.J., and THOMPSON, J., concur.

§ A. Negligence

Introductory Note. By far the most common kind of tort case is one based upon *negligence*. In most (but not all) areas of social interaction, we are expected to exercise "reasonable care." If *A* fails to use reasonable care, and that failure results in *B*'s injury, *A* is usually responsible for the damages suffered by *B*. Because negligence is the bedrock, so to speak, of tort liability, a thorough mastery of it is crucial to understanding tort law.

1. The Standard of Reasonable Care —In General

LUSSAN v. GRAIN DEALERS MUTUAL INSURANCE COMPANY

280 F.2d 491 (5th Cir. 1960)

John R. BROWN, Circuit Judge

This case presents the question whether an action which a human being would normally take may be considered by a jury to be that which the law's ordinary prudent person would have taken under such circumstances.

What brings this all about was a wasp —or a bee —it really doesn't matter for bees and wasps are both of the order hymenoptera, and while a wasp, unlike the bee, is predacious in habit, both sting human beings, or humans fear they will. The wasp did not intrude upon a pastoral scene or disturb the tranquillity of nature's order. What this wasp did —perhaps innocently while wafted by convection or the force of unnatural currents generated by the ceaseless motion of man's nearby machines — was to find itself an unwelcome passenger in an automobile then moving toward, of all places, Elysian Fields —not on the banks of Oceanus, but a major thoroughfare in the City of New Orleans on the Mississippi.

With the wasp was the defendant —owner and driver of the vehicle. Two others were with him in the front seat as his mobile guests. The wasp flew in —or his presence was suddenly discovered. Like thousands of others confronted with the imminent fear of a sting by such air-borne agents, the defendant driver swatted at the wasp. Whether he hit the wasp, no one knows. But momentarily the defendant driver apparently thought this menace had flown his coupe. The wasp, however, was not yet through. One of the passengers suddenly looked down and hollered out "watch out, it's still alive." Instinctively the defendant driver looked down at the floorboard and simultaneously made a sweeping swat at the wasp or where the wasp was thought to be. The wasp with all his capacity for harm scarcely could have thought itself so powerful. For without ever matter even being there at all, this anonymous bug brought substantial damage to one of the guests. Unconscious probably that it had set in motion the law's but-for chain reaction of causation, the wasp was the blame in fact. For when the driver by involuntary reflex took the swat, he lurched just enough to pull the steering wheel over to crash the moving car into a vehicle parked at the curb.

The traditional twelve good men performing their function in the jury system by which men drawn from all walks of life pass upon behavior of their fellow men, heard these uncontradicted facts. Instructed by the judge in a clear fashion on the law of due care in a charge to which no exception was taken, the jury in nine minutes returned a verdict for the driver. The plaintiff, appellant here, injured substantially by this combination of natural, human and mechanical forces has a single aim, and hope and necessity: convincing us that the trial court erred in not granting the plaintiff's motions for instructed verdict and j.n.o.v.

His surprise or even disappointment in this adverse verdict actually returned in favor of a direct-action insurer-defendant is not sufficient to give to this incident the quality essential to a directed verdict. Variously stated, restated, repeated and reiterated, the legal standard to be met is that no reasonable man could infer that the prudent man would have acted this way. *Marsh v. Illinois Central R.*, 5 Cir., 1949, 175 F.2d 498; *Whiteman v. Pitrie*, 5 Cir., 1955, 220 F.2d 941. In the determination of this, little instruction comes from prior cases involving a Connecticut bee in *Rindge v. Holbrook*, 111 Conn. 72, 149 A. 231, of a diversity Eighth Circuit Iowa wasp, *Heerman v. Burke*, 8 Cir., 1959, 266 F.2d 935.

Asserting this negative imperative — no reasonable man could hold as the jury did — inescapably puts the reviewing judge, trial or appellate, in the position of a silent witness in behalf of mankind. In assaying the scope of the

specific record, we inevitably measure it in terms of the general experience of mankind including our own. Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957). We draw on what we and what all others constituting that composite reasonable man have come to know. The sources of this knowledge are as variable as are the subjects of inquiry.

In this simple case in the search for the negative limits of the inferences open to the so-called reasonable man, we deal with a situation known and experienced by all —the involuntary reflex responses by which nature protects life from harm or apprehended harm. In a philosophical way it may be that nature has here elevated the instinct of self-preservation to a plane above the duty to refrain from harming others. It is here where man through law and ordered society steps in. But in stepping in, man, through law, has erected as the standard of performance, not what had to be done to avoid damage, but that which prudent human beings would have done or not done.

At times the judgment of the common man —voiced through the jury or other trier of fact —on what the prudent man should have done will be to deny to the individual concerned a legal justification for his perfectly human instinctive response. At other times what is actually usual may be equated with that which is legally prudent.

That is what occurred here. A wasp became the object of apprehended harm. Protective responses were instinctive and natural and swift. True, this diverted driver and his attention from other harm and other duties. But the jury in these circumstances under unchallenged instruction on legal standards concluded that this was normal and prudent human conduct. What better way is there to judge of this?

Affirmed.

a. The "Reasonable Person"

VAUGHN v. MENLOVE

3 Bing. (N.C.) 468, 132 Eng. Rep. 490 (C.P. 1837)

At the trial it appeared that the rick [haystack] in question had been made by the Defendant near the boundary of his own premises; that the hay was in such a state when put together, as to give rise to discussions on the probability of a fire: that though there were conflicting opinions on the subject, yet during a period of five weeks, the Defendant was repeatedly warned of his peril; that his stock was insured; and upon one occasion, being advised to take the rick down to avoid all danger, he said "he would chance it." He made an aperture or chimney through the rick; but in spite, or perhaps in consequence of this precaution, the rick at length burst into flames from the spontaneous heating of its materials; the flames communicated to the Defendant's barn and stables, and thence to the Plaintiff's cottages, which were entirely destroyed.

PATTESON, J. before whom the cause was tried, told the jury that the question for them to consider, was, whether the fire had been occasioned by gross negligence on the part of the Defendant; adding, that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances.

A verdict having been found for the plaintiff, a rule *nisi* for a new trial was obtained, on the ground that the jury should have been directed to consider, not, whether the Defendant had been guilty of gross negligence with reference to the standard of ordinary prudence, a standard too uncertain to afford any criterion; but whether he had acted *bona fide* to the best of his judgment; if he had, he ought not to be responsible for the misfortune of not possessing the highest order of intelligence. The action, under such circumstances, was of the first impression.

R.V. RICHARDS, in support of the rule.…

… The measure of prudence varies so with the faculties of men, that it is impossible to say what is gross negligence with reference to the standard of what is called ordinary prudence.…

TINDAL, C.J.… [I]t is well known that hay will ferment and take fire if it be not carefully stacked.…

… It is contended, however, that the learned Judge was wrong in leaving this to the jury as a case of gross negligence, and that the question of negligence was so mixed up with reference to what would be the conduct of a man of ordinary prudence that the jury might have thought the latter the rule by which they were to decide; that such a

rule would be too uncertain to act upon; and that the question ought to have been whether the Defendant had acted honestly and *bona fide* to the best of his own judgment. That, however, would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various: and though it has been urged that the care which a prudent man would take, is not an intelligible proposition as a rule of law, yet such has always been the rule adopted in cases of bailment,…

Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. That was in substance the criterion presented to the jury in this case, and therefore the present rule must be discharged.

Questions and Notes

1. Should a mentally disabled person be held to the standard of a "reasonable person" or to the standard of the average person with that disability? *See* Note, *Tort Liability of the Mentally Ill. in Negligence Actions*, 93 YALE L.J. 153 (1983).

2. Is the standard for determining negligence objective or subjective? Which should it be? For an argument that tort law should use a standard based less on luck, see Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990).

3. For an economic analysis, see Schwartz, *Objective and Subjective Standards of Negligence: Defining the Reasonable Person to Induce Optimal Care and Optimal Populations of Injurers and Victims*, 78 GEO. L.J. 241 (1989). For a good historical treatment of the development of negligence, see M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860 (1977), chapter 3.

4. *The Emergency Doctrine.* One important feature of the standard of reasonable care is that it is phrased in terms of what the reasonable person would do *in the same or similar circumstances.* Thus, if the defendant is confronted with an emergency, we do not hold the defendant to the standard of what might be expected of a person who has plenty of time to think about the best course of action. Thus, a typical jury instruction on emergency reads like this: "A person who is suddenly confronted by an emergency through no negligence of his or her own and who is compelled to decide instantly how to avoid injury and who makes such a choice as a reasonably careful person placed in such a position might make, is not negligent even though it is not the wisest choice." (Washington Pattern Instruction 12.02) Note, however, the qualification that the emergency must not be a result of the defendant's own prior negligence.

ADAMS v. BULLOCK

227 N.Y. 208, 125 N.E. 93 (1919)

CARDOZO, J.

The defendant runs a trolley line in the city of Dunkirk, employing the overhead wire system. At one point, the road is crossed by a bridge or culvert which carries the tracks of the Nickle Plate and Pennsylvania Railroads. Pedestrians often use the bridge as a short cut between streets, and children play on it. On April 21, 1916, the plaintiff, a boy of 12 years, came across the bridge, swinging a wire about 8 feet long. In swinging it, he brought it in contact with the defendant's trolley wire, which ran beneath the structure. The side of the bridge was protected by a parapet 18 inches wide. Four feet 7¾ inches below the top of the parapet, the trolley wire was strung. The plaintiff was shocked and burned when the wires came together. He had a verdict at Trial Term, which has been affirmed at the Appellate Division by a divided court.

We think the verdict cannot stand. The defendant in using an overhead trolley was in the lawful exercise of its franchise. Negligence, therefore, cannot be imputed to it because is used that system and not another. *Dumphy v. Montreal, etc., Co.*, 1907 A.C. 454. There was, of course, a duty to adopt all reasonable precautions to minimize the resulting perils. We think there is no evidence that this duty was ignored. The trolley

wire was so placed that no one standing on the bridge or even bending over the parapet could reach it. Only some extraordinary casualty, not fairly within the area of ordinary prevision, could make it a thing of danger. Reasonable care in the use of a destructive agency imports a high degree of vigilance. *Nelson v. Branford L.& W. Co.*, 75 Conn. 548, 551, 54 Atl. 303; *Braun v. Buffalo Gen. El. Co.*, 200 N.Y. 484, 94 N.E. 206, 35 L.R.A.(N.S.) 1089, 140 Am. St. Rep. 645, 21 Ann. Cas. 370. But no vigilance, however alert, unless fortified by the gift of prophecy, could have predicted the point upon the route where such an accident would occur. It might with equal reason have been expected anywhere else. At any point upon the route a mischievous or thoughtless boy might touch the wire with a metal pole, or fling another wire across it. *Green v. W.P. Co.*, 246 Pa. 340, 92 Atl. 341, L.R.A. 1915C, 151. If unable to reach it from the walk, he might stand upon a wagon or climb upon a tree. No special danger at this bridge warned the defendant that there was need of special measures of precaution. No like accident had occurred before. No custom had been disregarded. We think that ordinary caution did not involve forethought of this extraordinary peril. It has been so ruled in like circumstances by courts in other jurisdictions. *Green v. W.P. Co.*, *supra*; *Vannatta v. Lancaster Co.*, 164 Wis. 344, 159 N.W. 940; *Parker v. Charlotte R.R. Co.*, 169 N.C. 68, 85 S.E. 33; *Kempf v. S.R. Co.*, 82 Wash. 263, 144 Pac. 77, L.R.A. 1915C, 405; *Sheffield Co. v. Morton*, 161 Ala. 153, 49 South. 772. Nothing to the contrary was held in *Braun v. Buffalo Gen. El. Co.*, 200 N.Y. 484, 94 N.E. 206, 35 L.R.A.(N.S.) 1089, 140 Am. St. Rep. 645, 21 Ann. Cas. 370, or *Wittleder v. Citizens Electric Ill. Co.*, 47 App. Div. 410, 62 N.Y. Supp. 297. In those cases, the accidents were well within the range of prudent foresight. *Braun v. Buffalo Gen. El. Co.*, *supra*, 200 N.Y. at page 494, 94 N.E. 206, 35 L.R.A.(N.S.) 1089, 140 Am. St. Rep. 645, 21 Ann. Cas. 370. That was also the basis of the ruling in *Nelson v. Branford Lighting & Water Co.*, 75 Conn. 548, 551, 54 Atl. 303. There is, we may add, a distinction not to be ignored between electric light and trolley wires. The distinction is that the former may be insulated. Chance of harm, though remote, may betoken negligence, if needless. Facility of protection may impose a duty to protect. With trolley wires, the case is different. Insulation is impossible. Guards here and there are of little value. To avert the possibility of this accident and others like it at one point or another on the route, the defendant must have abandoned the overhead system, and put the wires underground. Neither its power nor its duty to make the change is shown. To hold it liable upon the facts exhibited in this record would be to charge it as an insurer.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

HISCOCK, C.J., and CHASE, COLLIN, HOGAN, CRANE, and ANDREWS, JJ., concur.

Judgments reversed, etc.

Questions and Notes

1. What does the court mean by suggesting that compensating the plaintiff in this case would amount to making the trolley company into an "insurer"?

2. What would be the advantages of making the trolley company an insurer? The disadvantages? Which would you prefer?

b. "Customizing" the Standard of the Reasonable Person

ROBINSON v. LINDSAY

92 Wash. 2d 410, 598 P.2d 392 (1979)

UTTER, Chief Justice

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. *See generally* Comment, *Capacity of Minors to be Chargeable with Negligence and Their Standard of Care*, 57 NEB. L. REV. 763, 770-71 (1978); Comment, *Recommended: An Objective Stand-ard of Care for Minors in Nebraska*, 46 NEB. L. REV. 699, 703-05 (1967).

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.

ROSELLINI, STAFFORD, WRIGHT, BRACHTENBACH, HOROWITZ, DOLLIVER and HICKS, JJ., and RYAN, J. Pro Tem., concur.

Questions and Notes

1. Many jurisdictions hold that a child younger than 7 years of age is legally incapable of negligence. *See generally*, Donald J. Gee & Charlotte Peoples Hodges, *The Liability of Children: At What Age is a Child Deemed to Have the Capacity Required for Negligence, Contributory Negligence, or Comparative Negligence?*, 35 TRIAL 52 (May 1999).

2. Students with a taste for British humor may enjoy *Fardell v. Potts*, or "The Reasonable Man," found in A.P. HERBERT, UNCOMMON LAW 1-6.

c. Efficiency

UNITED STATES v. CARROLL TOWING

159 F.2d 169 (2d Cir. 1947)

L. HAND, Circuit Judge

These appeals concern the sinking of the barge, "Anna C," on January 4, 1944, off Pier 51, North River.

[*The barge **Anna C**, owned by the Conners Marine Co., sank after colliding with a tanker in New York's North River, losing a cargo of flour owned by the United States. The tug **Carroll**, owned by Carroll Towing Co. and chartered to Grace Line, Inc., was in the process of moving a*

*nearby barge when the **Anna C** came unmoored. To get to the barge it wished to move, the **Carroll** had to throw off a line connecting one string of barges — of which the **Anna C** was innermost or closest to the pier — with barges across the inlet at another pier. When the other barges were tied to the **Anna C** her fasts to the pier apparently had not been strengthened.*

*The **Carroll** and another tug went to help the flotilla of barges after it broke loose and could have possibly helped pump water from the **Anna C** had anyone known it was taking on water after colliding with the tanker. However, the bargee (the person responsible for watching the barge while it is in the harbor) for the **Anna C** had left her the evening before. At trial, the district court did not assign any responsibility for the loss to the Conners Marine Co. The other defendants appealed, claiming that the owners of the **Anna C** were either negligent themselves or liable for their bargee's negligence. - ed.*]

* * *

For this reason the question arises whether a barge owner is slack in the care of his barge if the bargee is absent.

As to the consequences of a bargee' s absence from his barge there have been a number of decisions; and we cannot agree that it never ground for liability even to other vessels who may be injured. As early as 1843, Judge Sprague in *Clapp v. Young*, held a schooner liable which broke adrift from her moorings in a gale in Provincetown Harbor, and ran down another ship. The ground was that the owners of the offending ship had left no one on board, even though it was the custom in that harbor not to do so. Judge Tenney in *Fenno v. The Mary E. Cuff*, treated it as one of several faults against another vessel which was run down, to leave the offending vessel unattended in a storm in Port Jefferson Harbor. Judge Thomas in *The On-the-Level*, held liable for damage to a stake-boat, a barge moored to the stake-boat "south of Liberty Light, off the Jersey shore," because she had been left without a bargee; indeed he declared that the bargee's absence was "gross negligence." In the *Kathryn B. Guinan*, Ward, J., did indeed say that, when a barge was made fast to a pier in the harbor, as distinct from being in open waters, the bargee's absence would not be the basis for the owner's negligence. However, the facts in that case made no such holding necessary; the offending barge in fact had a bargee aboard though he was asleep. In *The Beeko*, Judge Campbell exonerated a power boat which had no watchman on board, which boys had maliciously cast loose from her moorings at the Marine Basin in Brooklyn and which collided with another vessel. Obviously that decision has no bearing on the facts at bar. In *United States Trucking Corporation v. City of New York*, the same judge refused to reduce the recovery of a coal hoister, injured at a foul berth, because the engineer was not on board; he had gone home for the night as was apparently his custom. We reversed the decree, but for another reason. In *The Sadie*, we affirmed Judge Coleman's holding that it was actionable negligence to leave without a bargee on board a barge made fast outside another barge, in the face of storm warnings. The damage was done to the inside barge. In *The P.R.R. No. 216*, we charged with liability a lighter which broke loose from, or was cast off, by a tanker to which she was moored, on the ground that her bargee should not have left her over Sunday. He could not know when the tanker might have to cast her off. We carried this so far in *The East Indian*, as to hold a lighter whose bargee went ashore for breakfast, during which the stevedores cast off some of the lighter's lines. True, the bargee came back after she was free and was then ineffectual in taking control of her before she damaged another vessel; but we held his absence itself a fault, knowing as he must have, that the stevedores were apt to cast off the lighter. *The Conway No. 23* went on the theory that the absence of the bargee had no connection with the damage done to the vessel itself; it assumed liability, if the contrary had been proved. In *The Trenton*, we refused to hold a moored vessel because another outside of her had overcharged her fasts. The bargee had gone away for the night when a storm arose; and our exoneration of the offending vessel did depend upon the theory that it was not negligent for the bargee to be away for the night; but no danger was apparently then to be apprehended. In *Bouker Contracting Co. v. Williamsburgh Power Plant Corporation*, we charged a scow with half damages because her bargee left her without adequate precautions. In *O'Donnell Transportation Co. v. M. & J. Tracy*, we refused to charge a barge whose bargee had been absent from 9 A.M. to 1:30 P.M., having "left the vessel to go ashore for a time on his own business."

It appears from the foregoing review that there is no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her moorings. However, in any cases where he would be so liable for injuries to others obviously he must reduce his damages proportionately, if the injury is to his own barge. It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called *P*; the injury, *L*; and the burden, *B*; liability depends upon whether *B* is less than *L* multiplied by *P*: *i.e.*, whether $B < PL$. Applied to the situation at bar, the likelihood that a barge will break from her fasts and the damage she will do, vary with the place and time; for example, if a storm threatens, the danger is greater; so it is, if she is in a crowded harbor where moored barges are constantly being shifted about. On the other hand, the barge must not be the bargee's prison, even though he lives aboard; he must go ashore at times. We need not say whether, even in such crowded waters as New York Harbor a bargee must be aboard at night at all; it may be that the custom is otherwise, as Ward, J., supposed in "*The Kathryn B. Guinan*," *supra*; and that, if so, the situation is one where custom should control. We leave that question open; but we hold that it is not in all cases a sufficient answer to a bargee's absence without excuse, during working hours, that he has properly made fast his barge to a pier, when he leaves her. In the case at bar the bargee left at five o'clock in the afternoon of January 3d, and the flotilla broke away at about two o'clock in the afternoon of the following day, twenty-one hours afterwards. The bargee had been away all the time, and we hold that his fabricated story was affirmative evidence that he had no excuse for his absence. At the locus in quo —especially during the short January days and in the full tide of war activity —barges were being constantly "drilled" in and out. Certainly it was not beyond reasonable expectation that, with the inevitable haste and bustle, the work might not be done with adequate care. In such circumstances we hold —and it is all that we do hold —that it was a fair requirement that the Conners Company should have a bargee aboard (unless he had some excuse for his absence), during the working hours of daylight.

* * *

Decrees reversed and cause remanded for further proceedings in accordance with the foregoing.

Questions and Notes

1. "Though mathematical in form, the Hand formula does not yield mathematically precise results in practice; that would require that *B*, *P*, and *L* all be quantified, which so far as we know has never been done in an actual lawsuit. Nevertheless, the formula is a valuable aid to clear thinking about the factors that are relevant to a judgment of negligence and about the relationship among those factors." *U.S. Fidelity & Guar. Co. v. Jadranska Slobodna*, 683 F.2d 1022, 1026 (7th Cir. 1982) (POSNER, J.).

2. Is the negligence standard superior to a standard that makes the defendant liable as an insurer? Why or why not?

3. Law review articles discussing the development of the negligence standard include: Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1 (1970); Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981); Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

LEVI v. SLEMCO
542 So.2d 1081 (La. 1989)

DENNIS, Justice

The issue here is whether a power company's conduct in operating an uninsulated 14,400 volt electric distribution line 40.5 feet from an oil well and suspended 25.7 feet over the well's only access road or driveway together with the power company's knowledge that oil field workers regularly serviced the well with a mast or boom erectable to a height of 34 feet affixed to a 19 foot long truck, constituted negligence because there was an unreasonable risk that a worker might be electrocuted due to accidental contact or near contact between the mobile mast and the uninsulated high power line. After a jury trial, the jury found that the power company had exercised reasonable care, and the trial court rendered judgment for the defendants. The court of appeal affirmed. 524 So.2d 899 (La. App. 3rd Cir.1988). This court granted a writ. 532 So.2d 106. After entertaining the parties' oral and written arguments, we reverse and remand the case to the court of appeal for the completion of its review of the merits of the controversy in accordance with this opinion.

Facts

The plaintiff, Giovanni Levi, an oil field roustabout-pumper for Amoco Oil Company, sustained near fatal permanently disabling injuries when the erected mast of a paraffin removal truck rig upon which he was working came in contact or close proximity with an uninsulated 14,400 volt electric distribution line being operated by Southwest Louisiana Electric Membership Cooperative (Slemco). The accident occurred on February 16, 1982 at the E.C. Stuart # 2 Well in the Section 28 Dome Field, in St. Martin Parish, an oil field owned by Amoco Oil Company. In the 1960's Slemco had constructed an uninsulated electrical distribution line to serve most of the 22 wells producing in the field. The power company routed the line so as to avoid crossing a well driveway or coming in close proximity to the well by placing the line either across the main road from the well or behind the well, with the exception of the E.C. Stuart # 2 Well where the line crossed the access road leading to the well 40.5 feet from the well head and 25.7 feet overhead. Slemco failed to avoid a driveway traversal or a close encounter between its line and the E.C. Stuart # 2 Well because that well was omitted from the power company's original construction plan due to oversight or to the fact that no electricity was supplied to this well or both.

To remove paraffin from its wells the oil company used a rig mounted on a truck. A mast was attached to the rear of the truck with hinges. In the collapsed position, the other end was carried in a "headache rack" over the front of the truck. We infer that, to service a well, the truck was backed to within about 13.5 feet of the well, where the mast was raised and extended so as to describe a 60° angle with the ground placing the mast tip about 30.3 feet high over the well crown. In the raised position the rig was stabilized by guy wires and used to lower a device known as a "lubricator" onto the crown of the well in order to service the well.

On the day of the accident Levi and another Amoco employee, while servicing wells in the field, found it necessary to dismantle the lubricator to make a repair. After borrowing some tools they looked for a dry place to work on the device. They did not intend to service the E.C. Stuart # 2 Well that day but in order to get off the main road and find a dry place to repair the rig they drove the truck into that well site and parked. The truck was headed toward the well with its front end approximately 3-4 feet from the well and its rear end approximately 15-16 feet from the point at which the high power line crossed the access road. It was necessary for the workers to raise the mast off the truck and lower the lubricator to the ground to make the repairs. Using control levers on the side of the truck, Levi raised the mast tip up, over the truck and back toward the power line. Levi had noticed the distribution line at this location on previous occasions but failed to pay attention to it on the day of the accident. Levi recalled only that he last saw the mast when it was at a 45° angle in front of the truck. Shortly thereafter, the mast either touched the power line or came close enough for electrical arcing to occur. 14,400 volts of electricity escaped from the power line and coursed through the mast, the truck and Levi's body.

As a result of the accident, Levi suffered the amputation of both legs just below the knees and severe burns over 25% of his body. At the time of the trial, he had been hospitalized 10 times for 11 different surgical procedures.

Levi filed suit against Slemco and its insurer. The case was tried before a jury. In response to

written interrogatories, the jury found that Slemco's conduct did not fall below the reasonable standard of care. The trial court denied plaintiff's motions for a judgment notwithstanding the verdict and for a new trial. Levi appealed, and the court of appeal affirmed. This court granted writs to determine whether the principles of law had been applied correctly below concerning the power company's duty of "utmost care" and the test for "unreasonable risk of harm".

Statement and Application of Legal Precepts

The crucial questions are (a) whether the power company was required to recognize that its conduct involved a risk of causing physical injury or loss to another in the manner of that sustained by the plaintiff, and, if so, (b) whether the possibility of such injury or loss constituted an unreasonable risk of harm. These issues are decisive under either a duty-risk or a traditional negligence approach. The legal duty under one approach and the standard of conduct under the other impose the same obligation, viz., when the power company realizes or should realize that the transmission of electricity through its line presents an unreasonable risk of causing physical harm to another, it is under a duty to exercise reasonable care to prevent the risk from taking effect. It is undisputed that the escape of electricity from the power company's line was a cause in fact of the plaintiff's injuries. If the risk which took effect as plaintiff's injuries was an unreasonable one, and the power company failed to comply with a duty or standard of care requiring it to take precautions against that danger, the risk was within the scope of the defendant's duty and defendant's substandard conduct was a legal cause of the injuries.

(a) Whether the power company was required to recognize the hazard

A power company is required to recognize that its conduct involves a risk of causing harm to another if a reasonable person would do so while exercising such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence and judgment as a reasonable person would have. *See* RESTATEMENT (SECOND) OF TORTS § 289(a) & (b) comment m and illus. 9-14 (1965). If the company has in fact more than a minimum of these qualities, it is required to exercise the superior qualities that it has in a manner reasonable under the circumstances. *See* RESTATEMENT (SECOND) OF TORTS, *supra*, § 289(b). The standard becomes, in other words, that of a reasonable person with such superior attributes. *Id* Comment m.

It is well recognized that those who engage in certain activities or come into certain relationships with people or things are under a peculiar obligation to acquire knowledge and experience about that activity, person or thing. *See generally*, Harper, James and Gray, *supra,* § 16.5. A carrier owes to its passengers the duty of discovering all detectable defects. *Johnson v. Continental Southern Lines, Inc.*, 113 So.2d 114 (La. App. 2d Cir.1959); *Smith v. New Orleans Public Serv., Inc.*, 391 So.2d 962 (La. App. 4th Cir.1980). Manufacturers must learn of dangers that lurk in their products. *Schneider v. Eli Lilly and Co.*, 556 F.Supp. 809 (1983); RESTATEMENT (SECOND) OF TORTS, *supra*, § 395, comments. Traditionally, professionals as well as manufacturers must keep reasonably abreast of current advances in their fields.

By the same token, a company which maintains and employs high power lines is required to exercise the utmost care to reduce hazards to life as far as practicable. Pursuant to this duty, a power company has an obligation to make reasonable inspections of wires and other instrumentalities in order to discover and remedy hazards and defects. Consequently, a company will be considered to have constructive knowledge of an electrical hazard which has existed for a period of time which would reasonably permit discovery had the company adequately performed its duties.

In the present case there is no dispute as to the fact that the power company had actual knowledge of the oil company's regular use of trucks with erectable high masts around its wells. Because this activity had continued on a regular basis over a long period of time the power company should have been aware of the physical characteristics of this equipment and any electrical hazard it might create. An Amoco employee testified that although the E.C. Stuart # 2 Well was not a "problem paraffin well", the paraffin was removed from it every two to three weeks. Levi testified that other wells in the field were serviced as frequently as every week. The truck involved in the accident was designed to cut paraffin accumulating in the wells. The truck itself measured 19 feet in length.

The mast attached to the rear of the truck with hinges, 7.4 feet above ground level, was 26.5 feet long. Thus, when raised to its full height the mast extended approximately 34 feet above ground level. Since the power company knew that its uninsulated 14,400 volt electric line passed near the oil wells at a level of only 25 to 26 feet above ground, the company should have known that electrical hazards would be created if masts were raised near the line.

The evidence clearly indicates that the power company was aware of these potential dangers and took significant precautions against them in choosing the route of its line. The 22 oil wells in the oil field had been completed when the power company constructed its transmission line. The company purposefully routed the line, in most instances, so as to give wide berth to each well and to avoid crossing over well access roads. Except for the E.C. Stuart # 2 Well, according to the exhibits, the power line was kept at distances of 76.5 to 212 feet from the wells. At one site other than the Stuart Well the line partially encroached upon the well access road, but the line there was placed approximately 150 feet away from the well. Thus, the design of the power line route, except at the Stuart Well, afforded workers with high-masted equipment ample working area free of electrical hazards, and, at all wells except Stuart and one other, completely safe access, as margins of error against their negligence or inattentiveness.

At the E.C. Stuart # 2 well site, however, the power company placed its line completely across the access road only 40.5 feet from the well and only 25.7 feet above ground. The evidence indicates that the power company designed the route of its distribution line to avoid such risks at every other well site but failed to do so at the E.C. Stuart # 2 Well because of an error in its original construction plans. Many of the power company employees observed roustabouts working with high masted equipment around wells in the oil field on a regular basis for many years. A routine visual inspection would have given the power company notice that careless or inattentive operation of the high masted equipment could cause an electrical accident. Thus, the company definitely had actual or constructive knowledge that oil field activity involving equipment capable of extending vertically some 34 feet and horizontally some 45 feet was occurring regularly at the E.C. Stuart # 2 Well. Further, the company knew that the route of its line allowed only 40.5 feet between the well and the point at which its 25.7 foot high uninsulated wire crossed over the access road within which to conduct these operations.

We do not think reasonable minds can disagree with the conclusion that the power company, particularly with its superior knowledge, skill and experience in electrical safety, should have recognized that its conduct under these circumstances involved a risk of harm to oil field workers. Aside from the obvious serious possibility that an inattentive worker might raise the mast while parked on the access road too near the power line, there were similar chances that a falling mast could pass dangerously close to the line or that a careless roustabout might attempt to drive under the line on his way to another well without fully lowering his mast. The power company complains that it should not be charged with recognition of any risk that takes effect through a victim's negligence. But the ordinary reasonable person, and even more so the power company, is required to realize that there will be a certain amount of negligence in the world. When the risk becomes serious, either because the threatened harm is great, or because there is an especial likelihood that it will occur, reasonable care may demand precautions against "that occasional negligence which is one of the ordinary incidents of human life and therefore to be anticipated." *Murphy v. Great Northern R. Co.*, 2 IR.REP. 301 (1897); *See* PROSSER AND KEETON ON TORTS, *supra*, § 33 at p. 198; RESTATEMENT (SECOND) TORTS, *supra*, § 302A. It is not due care to depend on the exercise of care by another when such reliance is accompanied by obvious danger.

Moreover, the power company had actual knowledge of previous instances of oil field workers' negligence or inattentiveness in moving erect masts under or near the uninsulated power lines. Its own employee testified that he had warned other roustabout crews of danger on two previous occasions when they drove under the uninsulated electric line on a board road with their masts partially or fully erect.

(b) Whether the hazard was an unreasonable risk of harm

The test for determining whether a risk apparent to one in the position of the actor is

unreasonable is supplied by the following formula: The amount of precautions "demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk." L. Hand, J., in *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir.1940); *Allien v. Louisiana Power & Light Co.*, 202 So.2d 704 (La. App. 3rd Cir.1967); *Goff v. Carlino,* 181 So.2d 426 (La. App. 3rd Cir.1965); Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Calabresi and Hirschoff, *Toward a Test For Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Harper, James and Gray, *supra*, § 16.9; RESTATEMENT (SECOND) OF TORTS, *supra,* § 291.

The amount of caution tends to increase with the first factor--the likelihood that the actor's conduct will injure others. Other things being equal, the amount of care required will vary directly with the degree of likelihood of injury.

The amount of caution required also tends to increase with the second factor--the seriousness of the injury if it happens. If the harm that may be foreseen is great, conduct that threatens it may be negligent even though the statistical possibility of its happening is very slight.

The third variable factor--the interest the defendant must sacrifice or the burden he must assume in order to avoid the risk--works in the opposite direction and may sometimes be entitled to enough weight to prevent conduct from being negligent even where it involves virtual certainty of very great harm. The interest that must be sacrificed or the burden that must be assumed to avoid the risk is balanced against the danger. At this point there is the greatest need for careful analysis so as to focus attention on the precise interest that would be sacrificed, or the precise burden that would be assumed, and this in turn will depend on precisely what act or omission is challenged as negligent. The interest whose sacrifice is in question on the issue of negligence is the value of the particular act or omission that is challenged as negligent. Looked at another way, it is the burden of refraining from the particular act or of taking an effective precaution to cover that particular omission. It is not the value of the activity or enterprise as a whole, or the detriment that would flow from its abandonment. Harper, James & Gray, *supra*, § 16.9; PROSSER & KEETON ON TORTS, *supra*, § 31; RESTATEMENT (SECOND) OF TORTS, *supra*, § 291, comment e; *Id*. § 292, comment a. Thus, the cost of precautions to avoid a recognizable risk is relevant, but the law imposes liability for failure to take precautions, even against remote risks, if the costs of the precautions would be relatively low.

The facts of the present controversy and other similar power line cases invite a sharp focus upon the essential balancing process that lies at the heart of negligence. *See* Malone, *Work of Appellate Courts*, 29 LA.L.REV. 212 (1969). In such a case, a paraphrase of the Hand formula helps to bring the elements of the process into relief: Since there are occasions when high voltage electricity will escape from an uninsulated transmission line, and since, if it does, it becomes a menace to those about the point of its escape, the power company's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) the possibility that the electricity will escape; (2) the gravity of the resulting injury, if it does; (3) the burden of taking adequate precautions that would avert the mishap. When the product of the possibility of escape multiplied times the gravity of the harm, if it happens, exceeds the burden of precautions, the failure to take those precautions is negligence.[1]

The cost of prevention is what Hand meant by the burden of taking precautions against the accident. It may be the cost of installing safety equipment or otherwise making the activity safer, or the benefit foregone by curtailing or eliminating the activity. *See* Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972). No one, including Judge Hand thought reasonable care can be measured with mathematical precision, however. His formula in Carroll Towing merely suggests the kind of evidence that is relevant on the issue of reasonable care and how it should be

[1] "Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other situations, to provide against resulting injuries is a function of three variables: (1) The **probability** that she will break away; (2) the **gravity** of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the **probability** be called P; the injury L; and the burden B; liability depends upon whether B is less than L multiplied by P: *i.e.*, whether B < PL." *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir.1947).

weighed. See D. ROBERTSON, W. POWERS, JR. & D. ANDERSON, CASES AND MATERIALS ON TORTS, *supra*, p. 85.

Applied to the situation in the present case, the likelihood that a roustabout's inattentiveness or that a malfunction of a rig would allow a mast to come close enough to the uninsulated power line to cause the electricity to escape varied between locations in the oil field. This danger was greatest on the E.C. Stuart # 2 well site at which the accident happened. This was the only location at which the power company suspended its uninsulated line completely across a road used by masted truck operators for access to a well. It was the one site where the uninsulated line was located only about two truck lengths from the well, leaving very little room for a high masted truck to maneuver safely. The fact that the power company systematically avoided these hazards elsewhere within the oil field possibly tended to make workers less wary of them at the accident site and thereby increased the likelihood of an accident. Under these circumstances, there was a significant chance that the power company's conduct would cause harm or death to one or more of the class of workers handling masted equipment at the well site. *See* RESTATEMENT (SECOND) OF TORTS, *supra*, § 293(b).

The social value which the law attaches to each person's interest in life and freedom from physical harm is of the highest order. Fatal or disastrous harm is likely to be caused to these interests by a high voltage electrical accident. Moreover, electrical hazards located in oil fields or other industrial settings typically threaten harm to many workers when the risk takes effect. *See* RESTATEMENT (SECOND) TORTS, *supra*, § 293. Consequently, the gravity of the harm, if the risk takes effect, is extreme.

Plaintiff's experts testified that several different kinds of precautions could and should have been taken to eliminate or reduce the hazard caused by the operation of the bare high voltage line at the E.C. Stuart # 2 Well: (1) The power company could have routed the line differently so as to avoid creating a hazardous driveway crossing and a dangerously small workspace abutting the hot high voltage wires; (2) The company simply could have raised the line to a safer level at the site of the accident; (3) The utility could have replaced the line at the well with factory installed insulation or could have insulated the line temporarily with rubber hose type insulation; (4) The company could have attached one of various forms of warnings, i.e., signs on poles, stakes or on the line itself; or orange balls on the wires; (5) The power utility could have installed the line underground instead of overhead at the accident site. With the possible exception of underground installation, these experts indicated that the burden of these precautions were inexpensive and did not outweigh the magnitude of the risk.

The defendants do not argue that the cost of taking these precautions would have exceeded the hazard of an electrical accident. Instead they contend that none of the preventative measures would have been effective or practical.

The defendants' expert attempted to show that rerouting the power line would not result in any net gain in safety for oil field workers. He testified that placing the line on the other side of the main road from the Stuart Well, so as to avoid its access road and work area, would require either a "dog-legged" route or a traversal of the driveway at a different well site. He argued that the angles and guy-wires required in a "dog-legged" pattern created the danger of a weak and sagging line. From our review of the expert testimony and the plats of the well sites, however, we conclude that the power company could have eliminated the dangerous situation at the Stuart Well without creating any danger elsewhere. The utility avoided well access roads and other hazards consistently throughout the oil field by using right angles and zig-zags in selecting the course of the power line. There is no concrete evidence that this policy caused any danger from weak or sagging lines. Furthermore, a driveway traversal on the other side of the main road from the Stuart Well clearly would have been much less dangerous, because the well site on the other side of the road was considerably further back from the main road.

The defendants' expert only quibbled at the precaution of insulation. His objection to insulation was that it would deteriorate and might give workers a false sense of security. His criticism must be discounted as being directed evidently at rubber hose type temporary insulation, rather than factory installed permanent insulation. The record discloses no reason why permanent insulation could not have been used at the accident site. Even if only temporary insulation were available, we are

convinced from the evidence that this lesser precaution would reduce the risk substantially and be worth the burden it cost. As for the company's evidence that insulation of the line would have to be replaced from time to time, it is clear that this small additional cost would not cause the burden of precautions to outweigh the gravity of the harm threatened when multiplied by the likelihood that it would happen.

As for the precaution of a warning, the defendants' expert objected to a warning attached to the power line poles because, he contended, it would present danger to workers climbing the poles. He apparently had no criticism of other types of warnings as presenting any danger to electrical workers.

The power company argues generally, however, that no warning would have been effective as to Levi because he knew of the existence of the uninsulated line and nevertheless encountered the danger. The purpose of a duty or standard of care requiring a warning, however, is to attract and arrest the attention of a potential victim. It assumes both the possibility and probability of his inattention. Although such a legal obligation is not imposed to protect the utterly indifferent or foolhardy, at the same time, however, its protection is not restricted to those whose senses are precisely attuned to the prospect of the particular warning called for. The evidence does not indicate that Levi would have been oblivious to a warning sign or an orange ball warning on the power line at the E.C. Stuart well site. On the contrary, there is every reason to believe that if such a warning had been posted, because of the absence of warnings at other well sites (due to lack of necessity for them there), Levi's attention would have been drawn to the warning, causing him to be more attentive to the danger.

The expert witness for the defendants apparently could find no fault with the suggested precautions of elevation of the line to a height safely above the reach of masted equipment or the precaution of underground installations. He was not asked about either safeguard and he did not volunteer any information on them.

When the components of the evidence are brought into relief and weighed in the light of their interrelationships, reasonable minds must agree that the minimal burden of adequate precautions was clearly outweighed by the product of the chance and the gravity of the harm. Accordingly, the power company was guilty of negligence that was a legal cause of plaintiff's injuries, or, in other words, the company breached its duty to take precautions against the risk that took effect as those injuries, and the lower courts committed manifest error in not reaching this conclusion.

For the reasons assigned, the judgment of the court of appeal is reversed, the judgment of the trial court is set aside, and the case is remanded to the court of appeal for it to review the balance of the merits of the controversy and to render a judgment consistently with this court's opinion.

REVERSED AND REMANDED TO THE COURT OF APPEAL.

MARCUS, J., concurs and assigns reasons.

LEMMON, J., dissents and assigns reasons.

COLE, J., dissents for reasons assigned by LEMMON, J.

MARCUS, Justice (concurring)

I agree that the power company breached its high duty of care to plaintiff under the circumstances, and the risk of plaintiff's accident was within the scope of the duty owed. Accordingly, I concur in the finding that the power company was guilty of negligence. In my view, when the case is remanded to the court of appeal, it should consider plaintiff's negligence, if any, under the principles of comparative negligence.

LEMMON, Justice, dissenting.

It is highly unusual for this court to decide only one portion of a liability issue. Nevertheless, causation is usually the threshold issue in a liability decision, and I would decide the case on the basis of causation.

During a parafin cutting operation at Stewart # 2 well, an A-frame truck backs up adjacent to the well site and lifts the boom over the truck and over the well in order to perform the operations in the hole. In this operation the boom comes no closer than ten feet to the power lines.

At the time of this accident plaintiff was not performing a parafin cutting operation. He had had difficulty with his crane and was returning to the shop to obtain wrenches needed to perform the repairs. En route to the shop he came upon a contract crew near the Stewart # 2 well site and

borrowed the wrenches. Because the area was muddy from recent rains and because the well site in question was the closest high and dry spot in the area, plaintiff drove his truck off the main road onto the shelled area of the well site and stopped several feet from the well site. In doing so, he drove under the power lines, which were in open view. Because it was necessary to do so in performing the repairs, he lifted the boom of his A-frame truck. During the lifting the boom struck the power lines and injured plaintiff.

Plaintiff's theory of the case, either in negligence or strict liability, was that defendant's placement of the power lines in close proximity to the well site (which was in existence when the power lines were constructed) created an unreasonable risk of harm for which defendant should be held liable (perhaps subject to a reduction in accordance with plaintiff's contributory negligence). That theory is based upon the foreseeable danger of oilfield activities in close proximity to the well site in which a boom or other equipment working on the well may come into contact with the power lines.

The problem with plaintiff's theory is that oilfield activity in servicing this well site had nothing to do with this accident, and therefore any fault in defendant's placement of its lines in proximity to foreseeable oilfield activity near the well site was not a cause in fact of this accident. The well site could have been located 200 feet from the power line, and the accident would have occurred exactly as it did when plaintiff pulled off the main road into the spot he chose to perform his repair. Any duty on defendant to place its power lines a reasonable distance from the well site did not extend to a plaintiff who pulled off the main road to perform a job chore that had nothing to do with the well site and could have been performed at any dry location on the entire field.[2] There is simply no ease of relationship between defendant's duty to construct power lines a reasonable distance away from well sites in the oilfield and the risk which gave rise to this particular injury.

[2] Plaintiff could have stopped on the roadway, on a shell driveway across the roadway from this particular site, or at any of the numerous other places where there was a shelled area. Because the power lines crossed the main road at least six times, there were at least six points on the main road that posed this exact hazard to an inattentive worker who stopped his truck to repair the crane.

Questions and Notes

1. *Pre-emption*. Sometimes the United States Congress decides to substitute its own regulatory scheme for the ordinary duties of reasonable care and resultant "regulation" by state tort law. This has been done in the case of tobacco companies; *see Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); and for certain farm products under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA); *see Didier v. Drexel Chemical Co.*, 86 Wash.App. 795, 938 P.2d 364 (1997) (farmer's claim against chemical manufacturer for damage caused by liquid growth retardant were preempted, including failure to warn, express and implied warranty, consumer protection, and negligence claims, as well as claims against wholesaler and retailer).

2. What Evidence Establishes Negligence?

Introductory Note. It is one thing to agree upon the definition of the *standard* by which the defendant's conduct should be judged; it is another thing to determine what kinds of evidence can be used to *prove* what would have been reasonable care under the circumstances, and whether or not the defendant's conduct met that standard. Although such questions shade into the substantive area of evidence law, tort law contains its own determinations of how a plaintiff can prove negligence. Remember[1] that the job of the jury is to determine what the facts are; the job of the judge is to decide what the law is. The law is communicated to the jury through the form of jury instructions, and by the judge's determination of whether or not there is enough question about the facts to require the jury's deliberation. Thus, an understanding of the operation of the negligence principle requires that we examine the kinds of cases in which courts decide how negligence can be proved.

[1] It may be helpful for you to review Appendix A, The History of a Simple Torts Case, for clarification of these points.

a. Juror Experience

Sometimes jurors have enough experience with the defendant's activity that they can use their own standard of what would be reasonable under the circumstances. For example, when the injury is caused by an everyday behavior such as driving, shoveling a sidewalk, using household tools, etc., the plaintiff can ask the jury to decide that the defendant was negligent based upon their own judgment as to what a reasonable person would do in the same or similar circumstances. However, in many cases the plaintiff will want to supplement the jurors' experience with additional arguments for finding the defendant negligent.

b. The Use of Industry Custom

BENNETT v. LONG ISLAND R. CO.
163 N.Y. 1, 57 N.E. 79 (1900)

PARKER, C.J.

The defendant, while building an extension to its railroad of about 10 miles in length, put in for temporary use a switch without either lock or target, and by means of that switch, while open, a caboose propelled by an engine was run at considerable speed into a flat car loaded with rails standing on the side track. The plaintiff, an employe of the defendant, was, with a number of other employes, in the caboose, en route to the point where they were to begin the labors of the day; and, discovering that a collision was imminent, he jumped, receiving injuries to the right arm, for which damages have been awarded to him by the judgment now under review. The switch had been in use for a number of months, was perfect of its kind, and when the engine and caboose passed by it the night before the accident the switch was closed; and, had it not been opened by human agency between that time and the return of the engine and caboose the next morning, the accident could not have happened. Neither passenger nor freight trains had been run over this track down to this time, nor were they so run for several months thereafter; and no engine was run over this road in the time intervening the passing of this engine and caboose at night, and their return in the morning. There was some evidence of threats of mischief by one or more Italians who had formerly been employed in the construction of the road, and of the close proximity of one of them at the time of the accident; and, while there was not sufficient evidence to require a finding that the switch had been thrown open by one of them, the fact was conclusively established that there was no defect in the switch, and that it required a man to open it. Therefore it must have been opened either by a fellow servant or by an outsider, and in either event the defendant is not liable to respond to this plaintiff for the results of such an act, because in the former case it was the act of a co-employee; in the latter, the felonious act of a third party. The Penal Code makes an interference with a switch by a third party a felony. Section 636. The learned trial justice correctly charged the jury as to these propositions, and with his conception of the law the appellate division agreed. The question submitted to the jury were whether defendant should have provided a lock for the switch "for the purpose of securing it against trespassers who might inadvertently throw it out of place, or prevent temptation to persons maliciously minded, who might find it so easy to turn the switch, by having it secured, to make it more difficult," and also "whether or not it was its duty to have provided a signal, called a "target," so that an approaching construction train could have seen it at a distance so far that they could have stopped the train in time to prevent the accident," and, in effect, that an affirmative finding would establish the liability of the defendant to respond to the plaintiff in damages. The prevailing opinion at the appellate division agreed with this view of the law, and justified the trial court, upon those grounds only, in refusing to dismiss the complaint, ad submitting the case to the jury.

When the plaintiff rested, he had proved the character of the switch, that it was closed the night before and open at the moment of the accident, and that it was without lock or target, but had not offered any evidence tending to show that it was customary to either lock or place targets on switches made use of during the construction of railroads. The motion for nonsuit having been denied, the defendant proceeded to introduce evidence tending to show that the switch actually used was such as is ordinarily used during the construction of railroads, and that, during constructions, switches are never locked and never targeted. William A. Cattell, formerly assistant

chief engineer on defendant's railroad, testified that the siding in question was put in for temporary use during the construction of the railroad, and, further, that during his 12 years' experience on various railroads, in which he had much familiarity with construction work, he did not think he had ever seen a locked switch on a construction track, and targets very seldom, if ever. The assistant engineer on the New York division of the Pennsylvania Railroad testified that he had had 18 years of experience on various railroads, was familiar with construction work on new railroads, and had never seen a switch locked on tracks in process of construction, nor had he ever seen targets on such switches; and, of this particular switch, he said it was of the regular standard variety of switch found on construction work, and that it was not customary to lock or target such switches during the process of construction. No witness was called who attempted to contradict the testimony given by these witnesses. At the close of the trial, therefore, the uncontradicted testimony showed that the switch in use had not only performed its work perfectly during the months that it had been in operation, and was a perfect switch of its kid, but, further, that the switch was of the standard variety found on construction work, and that it was not customary either to lock or target such switches. The question, therefore, was presented to the court, on a motion for a nonsuit, whether the jury could be permitted to say, notwithstanding this evidence, that the defendant failed in the duty which it owed to its employes, in not providing the switch with a lock or target, or both.

The rule of law is that the master's duty to his servants does not require him to furnish the best known appliances, but such only as are reasonably safe; and the test by which to determine whether he has performed that duty is not satisfied by an answer to the inquiry whether better appliances might have been obtained, but whether the selection made was reasonably prudent and careful. *Stringham v. Hilton*, 111 N.Y. 195, 18 N.E. 870, 1 L.R.A. 483; *Kern v. Refining Co.*, 125 N.Y. 50, 25 N.E. 1071; *De Vau v. Railroad Co.*, 130 N.Y. 632, 28 N.E. 532; *Harley v. Manufacturing Co.*, 142 N.Y. 31, 36 N.E. 813. Applying the test prescribed by the cases above cited to the evidence presented by this record, for the purpose of determining whether this defendant, as master, discharged its full duty, the result is necessarily reached that this defendant fully performed its obligation to its employes engaged in the construction of its road when it made selection of this particular switch, without putting on it either a lock or target. True, it might have made use of one or both of these appliances; but, according to the record, the switch selected was such as is generally and efficiently used on construction work by other railroads, and hence in making selection of it the defendant acted with reasonable care and prudence. The best known appliance for completed railroads that are in actual operation is a switch with a lock and a target, but the defendant was not called upon during the construction of this road to do more than to furnish a switch that was reasonably safe. In *Brick v. Railroad Co.*, 98 N.Y. 211, this court had before it a case where the plaintiff's intestate lost his life while riding upon a construction train over a dilapidated railroad, which the defendant was engaged in reconstructing; and in denying the plaintiff's right to recover the court asserted the general principle that it is the duty of the master to provide and maintain for the use of his employes suitable machinery and other instrumentalities for the performance of the duties enjoined upon them, and within that principle is generally included the duty of a railroad to provide a track sufficient for the purpose in view, and to maintain it in good order. But the court further said that, while this principle is generally applicable to railroads which are in a state of completion, it must be considered with some qualification in reference to a road which has become dilapidated and out of repair, and is in the process of being reconstructed. "It may be assumed, we think, that the deceased, in performing the services in which he was engaged, and in traveling on the construction train, understood that he was not working upon a road that was finished and in good repair, but upon one which, having been long neglected, and little traveled, —latterly only by construction trains, — subjected him to greater risks and perils than would be incurred under ordinary circumstances, and in entering defendant's service he assumed hazards incident to the same." The reasoning in that case is as applicable generally to the construction of a railroad as to its reconstruction. The master who, while constructing a railroad, makes use of such appliances as the experience of others engaged in similar work has shown to be sufficient and reasonably safe, performs his duty. Therefore this defendant performed its duty in selecting and using

the switch in question; for, according to the evidence contained in this record, it selected the kind of switch that had been in use on other railroads during construction, —a switch that had stood the practical test of user for so long a time that it had become the custom to use it without either lock or target during the period of construction by railroads generally, and particularly by all those with which the witnesses had become familiar during their long and varied experience in railroad building. The record, therefore, was barren of any evidence authorizing a jury to find that in selecting this switch for use during construction, without either lock or target, the defendant acted unreasonably or imprudently, and therefore the motion to dismiss the complaint should have been granted. The judgment should be reversed, and a new trial granted, with costs to abide the event.

GRAY, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. CULLEN, J., not sitting.

Judgment reversed, etc.

T.J. HOOPER

60 F.2d 737 (2d Cir. 1932)

[*The defendant, owner of tugboats, had been found liable for the loss of ship and cargo when a severe storm sank two barges that the defendant was towing. Defendant appealed; one of the issues was whether or not the defendant should have anticipated the severe weather. - ed.*]

L. HAND, Circuit Judge

* * *

Moreover, the "Montrose" and the "Hooper" would have had the benefit of the evening report from Arlington had they had proper receiving sets. This predicted worse weather; it read: "Increasing east and southeast winds, becoming fresh to strong, Friday night and increasing cloudiness followed by rain Friday." The bare "increase" of the morning had become "fresh to strong." To be sure this scarcely foretold a gale of from forty to fifty miles for five hours or more, rising at one time to fifty-six; but if the four tows thought the first report enough, the second ought to have laid any doubts. The master of the "Montrose" himself, when asked what he would have done had he received a substantially similar report, said that he would certainly have put in. The master of the "Hooper" was also asked for his opinion, and said that he would have turned back also, but this admission is somewhat vitiated by the incorporation in the question of the statement that it was a "storm warning," which the witness seized upon in his answer. All this seems to us to support the conclusion of the judge that prudent masters, who had received the second warning, would have found the risk more than the exigency warranted; they would have been amply vindicated by what followed. To be sure the barges would, as we have said, probably have withstood the gale, had they been well found; but a master is not justified in putting his tow to every test which she will survive, if she be fit. There is a zone in which proper caution will avoid putting her capacity to the proof; a coefficient of prudence that he should not disregard. Taking the situation as a whole, it seems to us that these masters would have taken undue chances, had they got the broadcasts.

They did not, because their private radio receiving sets, which were on board, were not in working order. These belonged to them personally, and were partly a toy, partly a part of the equipment, but neither furnished by the owner, nor supervised by it. It is not fair to say that there was a general custom among coastwise carriers so to equip their tugs. One line alone did it; as for the rest, they relied upon their crews, so far as they can be said to have relied at all. An adequate receiving set suitable for a coastwise tug can now be got at small cost and is reasonably reliable if kept up; obviously it is a source of great protection to their tows. Twice every day they can receive these predictions, based upon the widest possible information, available to every vessel within two or three hundred miles and more. Such a set is the ears of the tug to catch the spoken word, just as the master's binoculars are her eyes to see a storm signal ashore. Whatever may be said as to other vessels, tugs towing heavy coal laden barges, strung out for half a mile, have little power to manoeuvre, and do not, as this case proves, expose themselves to weather which would not turn back stauncher craft. They can have at hand protection against dangers of which they can learn in no other way.

Is it then a final answer that the business had not yet generally adopted receiving sets? There

are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. *Ketterer v. Armour & Co.* (C.C.A.) 247 F. 921, 931, L.R.A. 1918D, 798; *Spang Chalfant & Co. v. Dimon, etc., Corp.* (C.C.A.) 57 F.(2d) 965, 967. Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission. *Wabash R. Co. v. McDaniels*, 107 U.S. 454, 459-461, 2 S. Ct. 932, 27 L. Ed. 605; *Texas & P.R. Co. v. Behymer*, 189 U.S. 468, 470, 23 S. Ct. 622, 47 L. Ed. 905; *Shandrew v. Chicago, etc., R. Co.*, 142 F. 320, 324, 325 (C.C.A. 8); *Maynard v. Buck*, 100 Mass. 40. But here there was no custom at all as to receiving sets; some had them, some did not; the most that can be urged is that they had not yet become general. Certainly in such a case we need not pause; when some have thought a device necessary, at least we may say that they were right, and the others too slack. The statute (section 484, title 46, U.S. Code (46 USCA § 484)) does not bear on this situation at all. It prescribes not a receiving, but a transmitting set, and for a very different purpose; to call for help, not to get news. We hold the tugs [liable] therefore because had they been properly equipped, they would have got the Arlington reports. The injury was a direct consequence of this unseaworthiness.

Decree affirmed.

Questions and Notes

1. What is the relationship between the existence of a custom and a finding on the issue of negligence?

2. One torts expert has commented that "this case [*T.J. Hooper*] has had an enormous influence in the product liability context, especially after the SECOND RESTATEMENT. The single sentence that `a whole calling may have unduly lagged in the adoption of new and available devices,' 60 F.2d at 740, has itself been worth billions of dollars in transfer payments." Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193 (1989).

c. Statutory Violations

Introductory Note. Sometimes the defendant's conduct will violate a statutory duty. For example, suppose that there is an automobile accident in which *A* is injured by a car driven by *B*. What is the relevance of the fact that *B* was exceeding the speed limit at the time of the accident?

MARTIN v. HERZOG

228 N.Y. 164, 126 N.E. 814 (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. *Highway Law*, § 286, subd. 3, and section 332 (CONSOL. LAWS, c. 25). Negligence is charged against the plaintiff's intestate, the driver of the wagon, in that he was traveling without lights. *Highway Law*, § 329a, as amended by LAWS 1915, c. 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 beam of light from his lamps pointed to the right as the wheels of his car turned along the curve toward the left; and, looking in the direction of the plaintiff's approach, he was peering into the shadow. The case against him must stand, therefore, if at all, 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. It was argued on the same assumption in this court. In such circumstances, it is not important whether the hour might have been made a question for the jury. *Todd v. Nelson*, 109 N.Y. 316, 325, 16 N.E. 360. A controversy put out of the case by the parties is not to be put into it by us. We say this by way of preface to our review of the contested rulings. 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 defendant requested a ruling that the absence of a light on the plaintiff's vehicle was "prima facie evidence of contributory negligence." This request was refused, and the jury were again instructed that they might consider the absence of lights as some evidence of negligence, but that it was not conclusive evidence. 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*, § 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. POLLOCK, TORTS (10th Ed.) p. 458; CLARK & LINSEIL, TORTS (6th Ed.) p. 493; SALMOND, JURISPRUDENCE (5th Ed.) pp. 351, 363; *Texas & Pac. Ry. Co. v. Right*, *supra*, 241 U.S. 43, 36 Sup. Ct. 482, 60 L. Ed. 874; *Chicago, B. & Q. Ry. Co. v. U.S.*, 220 U.S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582.

In the conditions here present they come together and coalesce. A rule less rigid has been applied where the one who complains of the omission is not a member of the class for whose protection the safeguard is designed. *Amberg v. Kinley*, *supra*; *Union Pac. Ry. Co. v. McDonald*, 152 U.S. 262, 283, 14 Sup. Ct. 619, 38 L. Ed. 434; *Kelley v. N.Y. State Rys.*, 207 N.Y. 342, 100 N.E. 1115; *Ward v. Hobbs*, 4 App. Cas. 13.... [T]he omission of a safeguard prescribed by statute is ... held not merely some evidence of negligence, but negligence in itself. *Massoth v. D. & H. Canal Co.*, *supra*. *Cf. Cordell v. N.Y.C. & H.R.R.R. Co.*, *supra*.

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. *Scott v. International Paper Co.*, 204 N.Y. 49, 97 N.E. 413; *Fitzwater v. Warren*, 206 N.Y. 49, 97 N. 99 N.E. 1042, 42 L.R.A.(N.S.) 1229; *Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874. 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. "Proof of negligence in the air, so to speak, will not do." POLLOCK TORTS (10th Ed.) p. 472.

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. *Lambert v. Staten Island R. R. Co.*, 70 N.Y. 104, 109, 110; *Walsh v. Boston R.R. Co.*, 171 Mass. 52, 58, 50 N.E. 453. *The Pennsylvania*, 19 Wall. 125, 136, 137, 22 L. Ed. 148; *Fisher v. Village of Cambridge*, 133 N.Y. 527, 532, 30 N.E. 663. If nothing else is shown to break the connection, we have a case, prima facie sufficient, of negligence contributing to the result.

There may, indeed, be times when the lights on a highway are so many and so bright that lights on a wagon are superfluous. If that is so, it is for the offender to go forward with the evidence, and prove the illumination as a kind of substituted performance. The plaintiff asserts that she did so here. She says that the scene of the accident was illumined by moonlight, by an electric lamp, and by the lights of the approaching car. Her position is that, if the defendant did not see the buggy thus illumined, a jury might reasonably infer that he would not have seen it anyhow. We may doubt whether there is any evidence of illumination sufficient to sustain the jury in drawing such an inference; but the decision of the case does not make it necessary to resolve the doubt, and so we leave it open, It is certain that they were not required to find that lights on the wagon were superfluous. They might reasonably have found the contrary. They ought, therefore, to have been informed what effect they were free to give, in that event, to the viation of the statute. They should have been told, not only that the omission of the light was negligence, but that it was "prima facie evidence of contributory negligence"; *i.e.*, that it was sufficient in itself unless its probative force was overcome (THOMAS, J., in court below) to sustain a verdict that the decedent was at fault. *Kelly v. Jackson*, 6 Pet. 622, 632, 8 L. Ed. 523.

Here, on the undisputed facts, lack of vision, whether excusable or not, was the cause of the disaster. The defendant may have been negligent in swerving from the center of the road; but he did not run into the buggy purposely, nor was he driving while intoxicated, nor was he going at such a reckless speed that warning would of necessity have been futile. Nothing of the kind is shown. The collision was due to his failure to see at a time when sight should have been aroused and guided by the statutory warnings. Some explanation of the effect to be given to the absence of those warnings, if the plaintiff failed to prove that other lights on the car or the highway took their place as equivalents, should have been put before the jury. The explanation was asked for and refused.

We are persuaded that the tendency of the charge, and of all the rulings, following it, was to minimize unduly, in the minds of the triers of the facts, the gravity of the decedent's fault. Errors may not be ignored as unsubstantial, when they tend to such an outcome. A statute designed for the protection of human life is not to be brushed aside as a form of words, its commands reduced to the level of cautions, and the duty to obey attenuated into an option to conform.

The order of the Appellate Division should be affirmed, and judgment absolute directed on the stipulation in favor of the defendant, with costs in all courts.

[*The dissenting opinion is omitted. - ed.*]

TEDLA v. ELLMAN

280 N.Y. 124, 19 N.E.2d 987 (1939)
LEHMAN, Judge

While walking along a highway, Anna Tedla and her brother, John Bachek, were struck by a passing automobile, operated by the defendant [Ellman]. She was injured and Bachek was killed. Bachek was a deaf-mute. His occupation was collecting and selling junk. His sister, Mrs. Tedla, was engaged in the same occupation. They often picked up junk at the incinerator of the village of Islip. At the time of the accident they were walking along "Sunrise Highway" and wheeling baby carriages containing junk and wood which they had picked up at the incinerator. It was about six o'clock, or a little earlier, on a Sunday evening in December. Darkness had already set in. Bachek was carrying a lighted lantern, or, at least, there is testimony to that effect. The jury found that the accident was due solely to the negligence of the operator of the automobile. The defendants do not, upon this appeal, challenge the finding of

negligence on the part of the operator. They maintain, however, that Mrs. Tedla and her brother were guilty of contributory negligence as matter of law.

Sunrise Highway, at the place of the accident, consists of two roadways, separated by a grass plot. There are no footpaths along the highway and the center grass plot was soft. It is not unlawful for a pedestrian, wheeling a baby carriage, to use the roadway under such circumstances, but a pedestrian using the roadway is bound to exercise such care for his safety as a reasonably prudent person would use. *The Vehicle and Traffic Law* (CONSOL. LAWS, c. 71) provides that "Pedestrians walking or remaining on the paved portion, or traveled part of a roadway shall be subject to, and comply with, the rules governing vehicles, with respect to meeting and turning out, except that such pedestrians shall keep to the left of the center line thereof, and turn to their left instead of right side thereof, so as to permit all vehicles passing them in either direction to pass on their right. Such pedestrians shall not be subject to the rules governing vehicles as to giving signals." Section 85, subd. 6. Mrs. Tedla and her brother did not observe the statutory rule, and at the time of the accident were proceeding in easterly direction on the east bound or right-hand roadway. The defendants moved to dismiss the complaint on the ground, among others, that violation of the statutory rule constitutes contributory negligence as matter of law. They did not, in the courts below, urge that any negligence in other respect of Mrs. Tedla or her brother bars a recovery. The trial judge left to the jury the question whether failure to observe the statutory rule was a proximate cause of the accident; he left to the jury no question of other fault or negligence on the part of Mrs. Tedla or her brother, and the defendants did not request that any other question be submitted. Upon this appeal, the only question presented is whether, as matter of law, disregard of the statutory rule that pedestrians shall keep to the left of the center line of a highway constitutes contributory negligence which bars any recovery by the plaintiff.

… Until by chapter 114 of the Laws of 1933, it adopted subdivision 6 of section 85, quoted above, there was no special statutory rule for pedestrians walking along a highway. Then for the first time it reversed, for pedestrians, the rule established for vehicles by immemorial custom, and provided that pedestrians shall keep to the left of the center line of a highway.

The plaintiffs showed by the testimony of a State policeman that "there were very few cars going east" at the time of the accident, but that going west there was "very heavy Sunday night traffic." Until the recent adoption of the new statutory rule for pedestrians, ordinary prudence would have dictated that pedestrians should not expose themselves to the danger of walking along the roadway upon which the "very heavy Sunday night traffic" was proceeding when they could walk in comparative safety along a roadway used by very few cars. In is said that now, by force of the statutory rule, pedestrians are guilty of contributory negligence as matter of law when they use the safer roadway, unless that roadway is left of the center of the road. Disregard of the statutory rule of the road and observance of a rule based on immemorial custom, it is said, is negligence which as matter of law is a proximate cause of the accident, though observance of the statutory rule might, under the circumstances of the particular case, expose a pedestrian to serious danger from which he would be free if he followed the rule that had been established by custom. If that be true, then the Legislature has decreed that pedestrians must observe the general rule of conduct which it has prescribed for their safety even under circumstances where observance would subject them to unusual risk; that pedestrians are to be charged with negligence as matter of law for acting as prudence dictates. It is unreasonable to ascribe to the Legislature an intention that the statute should have so extraordinary a result, and the courts may not give to a statute an effect not intended by the Legislature.

* * *

Negligence is failure to exercise the care required by law. Where a statute defines the standard of care and the safeguards required to meet a recognized danger, then, as we have said, no other measure may be applied in determining whether a person has carried out the duty of care imposed by law. Failure to observe the standard imposed by statute is negligence, as matter of law. On the other hand, where a statutory general rule of conduct fixes no definite standard of care which would under all circumstances tend to protect life, limb or property but merely codifies or supplements a common-law rule, which has always

been subject to limitations and exceptions; or where the statutory rule of conduct regulates conflicting rights and obligations in manner calculated to promote public convenience and safety, then the statute, in the absence of clear language to the contrary, should not be construed as intended to wipe out the limitations and exceptions which judicial decisions have attached to the common-law duty; nor should it be construed as an inflexible command that the general rule of conduct intended to prevent accidents must be followed even under conditions when observance might cause accidents. We may assume reasonably that the Legislature directed pedestrians to keep to the left of the center of the road because that would cause them to face traffic approaching in that lane and would enable them to care for their own safety better than if the traffic approached them from the rear. We cannot assume reasonably that the Legislature intended that a statute enacted for the preservation of the life and limb of pedestrians must be observed when observance would subject them to more imminent danger.

* * *

I have so far discussed the problem of the plaintiffs' right to compensation for the damages caused by defendants' negligence as if it depended solely upon the question of whether the pedestrians were at fault, and I have ignored the question whether their alleged fault was a proximate cause of the accident. In truth, the two questions cannot be separated completely. If the pedestrians had observed the statutory rule of the road they would have proceeded easterly along the roadway on the left of the center grass plot, and then, it must be conceded, they would not have been struck by the automobile in which the defendants were riding, proceeding in the same direction along the roadway on the right. Their presence on the roadway where they were struck was an essential condition of their injury. Was it also as matter of law a proximate cause of the accident? "The position of a vehicle which has been struck by another may or many not have been one of the causes of the striking. Of course, it could not have been struck if it had not been in the place where the blow came. But this is a statement of an essential condition, and not of a cause of the impact. The distinction is between that which directly or proximately produces or helps to produce, a result as an efficient cause and that which is a necessary condition or attendant cause of it.... That is, a contributing cause of an accident, is usually a question for a jury, to be determined by the facts of the particular case." *Newcomb v. Boston Protective Department*, 146 Mass. 596, 604, 16 N.E. 555, 559, 4 Am. St. Rep. 354. Here the jury might find that the pedestrians avoided a greater, indeed an almost suicidal, risk by proceeding along the east bound roadway; that the operator of the automobile was entirely heedless of the possibility of the presence of pedestrians on the highway; and that a pedestrian could not have avoided the accident even if he had faced oncoming traffic. Under those circumstances the question of proximate cause, as well as the question of negligence, was one of fact.

In each action, the judgment should be affirmed, with costs.

CRANE, C.J., and HUBBS, LOUGHRAN, and RIPPEY, JJ., concur.

O'BRIEN and FINCH, JJ., dissent on the authority of *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814.

Judgments affirmed.

Questions and Notes

1. Can you square the holding in *Tedla* with *Martin v. Herzog*? If so, how; if not, which case was wrongly decided?

2. In *Rumpelheimer v. Haddock*, or "Port to Port" (A.P. HERBERT, UNCOMMON LAW, 237-242) the defendant's boat collided with the plaintiff's motor-car; the court decided that admiralty law prescribed the method by which the two should pass.

3. The RESTATEMENT (2D), TORTS, provides the following definitions of negligence per se and excuse:

§ 286. When Standard of Conduct Defined by Legislation or Regulation Will Be Adopted

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose

purpose is found to be exclusively or in part (a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results.

§ 288A. Excused Violations

(1) An excused violation of a legislative enactment or an administrative regulation is not negligence.

(2) Unless the enactment or regulation is construed not to permit such excuse, its violation is excused when

(a) the violation is reasonable because of the actor's incapacity;

(b) he neither knows nor should know of the occasion for compliance;

(c) he is unable after reasonable diligence or care to comply;

(d) he is confronted by an emergency not due to his own misconduct;

(e) the compliance would involve a greater risk of harm to the actor or to others.

§ 288B. Effect of Violation

(1) The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.

(2) The unexcused violation of an enactment or regulation which is not so adopted may be relevant evidence bearing on the issue of negligent conduct.

NETTLETON v. THOMPSON

117 Idaho 308, 787 P.2d 294 (1990)

HART, Judge Pro Tem

This is a tort case. The appellant, Agnes Nettleton, brought this action against the respondents, Steve and Chris Thompson, alleging that she was entitled to recover damages due to injuries sustained while she was visiting the Thompsons' home as an invitee. A jury found in favor of the Thompsons. On appeal, Nettleton contends that the trial judge erred when he instructed the jury that the Thompsons' negligence in failing to maintain their home according to local building code standards could be excused if the jury found that the Thompsons were unaware of any building code violations. Moreover, Nettleton argues that the trial judge erred by permitting the Thompsons to introduce certain evidence indicating their ignorance of the building code standards. For the reasons explained below, we vacate the judgment in favor of the Thompsons, and remand this case to the district court for a new trial.

The essential facts of this case are as follows. Nettleton was invited into the Thompsons' home as a prospective renter/buyer. While in the home, Nettleton fell down a stairway leading into the Thompsons' basement and sustained multiple injuries. Nettleton sued the Thompsons for damages, alleging that the stairway did not meet Kootenai County building code standards as outlined by the 1976 edition of the Uniform Building Code (U.B.C.), and that the Thompsons' failure to maintain the stairway according to these standards constituted negligence per se. Specifically, Nettleton contended that the stairway violated the U.B.C. because it contained no handrail, and because variations in the tread (the width of the horizontal part of each individual stair) exceeded U.B.C. limits.

Prior to trial, Nettleton filed a motion for partial summary judgment on the question of whether the alleged U.B.C. violations constituted negligence per se. In a memorandum opinion and order, the district judge held that lack of a handrail and variations in the tread constituted violations of the U.B.C., but he did not find the Thompsons negligent, concluding only that the "jury in this action shall be instructed on negligence per se."

During trial, the Thompsons introduced evidence to show that they were unaware that the stairway violated the U.B.C. This evidence included certificates that the Thompsons had paid their previous years' property taxes, and testimony by the Thompsons that a county tax assessor had visited their home on at least two separate occasions without mentioning any U.B.C. violation. On the first morning of trial, Nettleton had anticipated this evidence and she moved,

unsuccessfully, to have it excluded. The Thompsons also testified that they had experienced no other problems or injuries as a result of the alleged defects in the stairway's design. At the conclusion of trial, the jury received an instruction pertaining to negligence per se, with the following language:

> You are further instructed that for the purposes of this action, the Thompson's [sic] maintenance, use and occupancy of the residence while the same was in violation of the Uniform Building Code constitutes negligence unless you find that such violation was excused.
>
> A violation of the Uniform Building Code may be excused and is not negligence if the Thompsons, in the exercise of ordinary care neither knew nor should have known their maintenance, use and occupancy of the residence was in violation of the Uniform Building Code.

The jury returned a special verdict finding that there was no unexcused negligence on the part of the Thompsons in maintaining the stairway. This appeal by Nettleton followed.

Nettleton contends that the jury instructions incorrectly reflect Idaho law concerning excuse from negligence per se. Nettleton contends that the defense of excuse may be used only when violation of a statute arises out of circumstances beyond the control of the violator. Based upon this premise, Nettleton submits that the trial judge should not have instructed the jury on excuse because the Thompsons were in a position to remedy the U.B.C. violations by fixing the defects in the stairway.

Preliminarily, we note our standard of review of the court's instruction. On appeal, instructions must be viewed as a whole to determine whether the jury was properly and adequately instructed. *Davis v. Bushnell*, 93 Idaho 528, 465 P.2d 652 (1970). If the court's instructions, considered as a whole, fairly and adequately presented the issues and state the applicable law, no error is committed. *Zolber v. Winters*, 109 Idaho 824, 712 P.2d 525 (1985). Generally, determining whether a trial court has adequately instructed the jury in the applicable law is a question of law; therefore, we will exercise free review. *See Suitts v. First Security Bank of Idaho*, 110 Idaho 15, 713 P.2d 1374 (1985).

In Idaho, violation of a city ordinance may constitute negligence per se. *Stephens v. Stearns*, 106 Idaho 249, 678 P.2d 41 (1984). However, in order for negligence per se to apply, several criteria must be 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 Sanchez v. Galey*, 112 Idaho 609, 617, 733 P.2d 1234, 1242 (1986). In the present case, it is unrefuted that the U.B.C. clearly specifies the requirements for building and maintaining a stairway in a residential dwelling. There has been no contention that the Thompson residence, constructed in 1978, was exempt from the 1976 U.B.C. requirements. Furthermore, the U.B.C. standards were intended to protect individuals such as Nettleton —an invitee in the Thompsons' home — from injuries resulting from falling down the stairway. Therefore, the U.B.C. standards are applicable and the Thompsons' failure to maintain their stairway accordingly constitutes negligence per se.

Because of the potentially harsh results which may flow from application of this doctrine, the Idaho Supreme Court has recognized that an excused violation of a law does not constitute negligence per se. *See State ex rel. McKinney v. Richardson*, 76 Idaho 9, 277 P.2d 272 (1954); 57 AM. JUR. 2D *Negligence* § 753-58 (1989) (hereinafter *Negligence.*) The Court's recognition of this principle thus creates a rebuttable presumption of negligence per se for violation of a law in the absence of excuse or justification. *See Negligence*, § 753; *see State ex rel. McKinney v. Richardson*, 76 Idaho at 15, 277 P.2d at 274-75. The burden of proving excuse of a violation rests with the violator. *See Impson v. Structural Metals, Inc.*, 487 S.W.2d 694, 695-96 (Texas 1972); *cf. Bale v. Perryman*, 85 Idaho 435, 440, 380 P.2d 501, 503 (1963) (violation may be explained by defendant showing conduct was excusable). In *Bale* our Supreme Court enunciated several categories of excuse in the context of motor vehicle accidents; those categories did not include ignorance of the law.

In the present case, the Thompsons contend that their ignorance of U.B.C. requirements

constitutes an excuse. Relying closely upon the language of RESTATEMENT (SECOND) OF TORTS, § 288A(2)(b) (1965), they aver that they neither knew, nor should have known, that the condition of the stairway violated U.B.C. standards. In support of their contentions, the Thompsons argue that their payments of property taxes and the county tax assessor's visits to their home impliedly indicate that the county had approved of the stairway construction. When these facts are considered in light with their ignorance of any defects in the stairway, the Thompsons submit that the trial judge properly instructed the jury on the question of excuse to their violation of the U.B.C.

We disagree. Generally, a defendant may establish excuse or justification for violation of a statute or ordinance if the defendant's conduct could nevertheless be said to fall within the standard of reasonable care under the circumstances. *See Hall v. Warren*, 632 P.2d 848 (Utah 1981), later appeal, 692 P.2d 737 (1984); *see Nichols v. Sonneman*, 91 Idaho 199, 206, 418 P.2d 562, 569 (1966); *Bale v. Perryman*, 85 Idaho at 440, 380 P.2d at 503. Furthermore, whether a defendant's per se negligence is excused is a question for the jury to decide. *Stephens v. Stearns*, *supra*. We agree with these standards. However, the decisions of the Idaho Supreme Court indicate that, in order to warrant an excuse instruction, the defendant must establish that his or her conduct was objectively reasonable under the circumstances. For instance, in *Bale v. Perryman*, *supra*, the plaintiff brought an action to recover damages incurred in a motor vehicle accident in which he attempted to pass a truck driven by the defendant. In determining that the plaintiff was negligent per se, the Court found that the only evidence presented by the plaintiff to show that his negligent driving should be excused was his subjective belief that the other driver would not turn into his line of travel. 85 Idaho at 440, 380 P.2d at 504.

Implicit in all these decisions is the notion that proof of excuse must be established by more than the violator's ignorance of the law or the violator's subjective belief that his or her conduct was in accord with a reasonable standard of behavior. Rather, these decisions indicate that excuse can only be established by evidence that the individual had an objectively reasonable explanation for violating the law. This reasoning is persuasive; it would be incongruous to permit an alleged tortfeasor to subjectively define the scope or extent of the duty owed under the law.

In the present case, we conclude that the Thompsons failed to produce an objectively reasonable explanation for the existence of the U.B.C. violations. Therefore, the trial judge was not warranted in giving the jury an excuse instruction. The evidence which the Thompsons offered at trial consisted of records of their real property tax payments, evidence indicating that their home had been visited by the county tax assessor, as well as the Thompsons' assertions that they were unaware of any U.B.C. violations. The Thompsons argue that the tax evidence was relevant because it was a factor in establishing that the county had failed to put them on notice of any building code violations. We disagree.

In summary, we hold that Nettleton has proven that the U.B.C. violations in the Thompsons' stairway constitute negligence per se, and that the Thompsons have failed to establish an excuse or justification for violating those standards. We therefore vacate the judgment in favor of the Thompsons and remand this case to the district court for a new trial. *Leliefeld v. Johnson*, 104 Idaho 357, 370, 659 P.2d 111, 124 (1983). Costs to appellant. No attorney fees on appeal.

SWANSTROM, J., concurs.

BURNETT, Judge, specially concurring.

I agree that today's case is distinguishable from *Stephens v. Stearns*, 106 Idaho 249, 678 P.2d 41 (1984), and that negligence per se is not excused by mere ignorance of the law. I write separately to emphasize that negligence per se is not a doctrine of absolute liability. It differs from common law negligence only insofar as it replaces a general duty of reasonable care with a more specific duty of obedience to a legislative command.

As noted in the lead opinion, negligence per se is subject to exceptions where performance is impossible or nonperformance is otherwise justified. Thus, an exception might exist where a defendant has no actual or imputed knowledge of the facts invoking application of a legislative standard. In this case, however, the Thompsons had actual or imputed knowledge of the variations in stair width and the lack of a stair handrail in

their home. These facts were discernible, and they invoked application of the Uniform Building Code, as adopted by the municipal ordinance.

The Thompsons may have thought the stairs would not pose an undue risk to anyone. Such an evaluation of the risk might be relevant to an issue of reasonable care, but it would not be relevant to the duty imposed by the doctrine of negligence per se. The duty was legislatively prescribed. A new trial is required to determine what liability, if any, flows from a breach of that duty.

Questions and Notes

1. How does a finder of fact conclude that there is negligence per se?

2. What happens if negligence per se is found?

3. What happens if negligence per se is not found?

4. A famous case in the history of negligence per se is *Gorris v. Scott*, [1874] 9 L.R. (Exch.) 125, in which a sheepowner sued the owner of a ship that lost the sheep during transport. The sheepowner based his negligence claim on a statute that required sheep to be kept in pens during the voyage. Instead, the sheep were left on the deck of the ship and washed overboard. The defendant replied that the purpose of the statute was to protect other animals from contamination, not to avoid loss from storms. Who should have prevailed?

5. Some states (*e.g.*, Washington) do not impose negligence per se but rather permit the jury to use a statutory violation as evidence of negligence. (*See* R.C.W. 5.40.050, barring negligence per se except in cases involving certain building code violations or driving while intoxicated.) What difference would it make to the plaintiff (or to the defendant) if an unexcused statutory violation were treated merely as evidence, rather than as a conclusive presumption, of negligence?

6. A special problem arises with the application of the negligence per se doctrine to children. Should children be held to a standard that takes into account their age (*see Robinson v. Lindsay, supra*), or should they be expected to abide by the standard set by the statute? Most jurisdictions use the statute as a guideline as to what a reasonable jury would do, but allow the jury to take into account the child's age in evaluating whether the child was negligent. DIAMOND, LEVINE & MADDEN, UNDERSTANDING TORTS § 6.05.

d. Res Ipsa Loquitur

Introductory Note. As noted earlier, the plaintiff bears the burden of producing evidence upon which the jury can conclude that the defendant should be held liable. In many cases the defendant's conduct is known, and it is up to the jury to decide whether the defendant's conduct measured up to the standard of reasonable care. However, in some cases the evidence of *what the defendant did* is missing for some reason: it may have been destroyed in an explosion, or may have happened so long ago that witnesses are unavailable. Does the plaintiff then lose because he cannot carry his burden of proof? Not always. Tort law employs a doctrine called "res ipsa loquitur," which is discussed in the following cases.

(The term "res ipsa loquitur" is usually pronounced "race ipsuh loh-kwitur." For amusing advice on how to pronounce Latin terms, please consult *Rex v. Venables and Others*, or "The Dead Pronunciation," found in A.P. HERBERT, UNCOMMON LAW 360-364.)

JUDSON v. GIANT POWDER CO.

107 Cal. 549, 40 P. 1020 (1895)

GAROUTTE, J.

Respondents recovered judgment for the sum of $41,164.75, as damages for acts of negligence. This appeal is prosecuted from such judgment, and from an order denying a motion for a new trial. The damages to respondents' property were occasioned by an explosion of nitroglycerine in process of manufacture into dynamite, in appellant's powder factory, situated upon the shore of the Bay of San Francisco. Appellant's factory buildings were arranged around the slope of a hill

facing the bay. Nearest to respondents' property was the nitro glycerine house; next was the washing house; next were the mixing houses; then came the packing houses; and finally the two magazines used for storing dynamite. These various buildings were situated from 50 to 150 feet apart, and a tramway ran in front of them. The explosion occurred in the morning during working hours, and originated in the nitro-glycerine house. There followed, within a few moments of time, in regular order, the explosion of the other buildings, the two magazines coming last; but, though last, they were not least, for their explosion caused the entire downfall and destruction of respondents' factory, residences, and stock on hand. There is no question but what the cause of this series of explosions following the first is directly traceable, by reason of fire or concussion, to the nitro-glycerine explosion. Of the many employees of appellant engaged in and about the nitro-glycerine factory at the time of the disaster, none were left to tell the tale. Hence any positive testimony as to the direct cause of the explosion is not to be had. The witnesses who saw and knew, like all things else around, save the earth itself, were scattered to the four winds.

* * *

2. It is contended that respondents offered no evidence tending to show that the explosion of the nitro-glycerine factory was occasioned by the negligence of appellant, and this contention brings us to the consideration of a most important principle of law. In addition to the fact of an explosion being established, the respondent offered expert testimony, to the effect that if the factory was properly conducted, and the employees careful during the process of manufacturing, an explosion would not occur. For the present we lay aside the evidence of the experts, and meet squarely and directly the question presented: Does the proof of the explosion draw with it a presumption of negligence sufficient to establish a prima facie case for a recovery? While the cases are not in entire accord in holding that a presumption of negligence arises from the fact of the explosion, still they largely preponderate upon that side, and we think but few well-considered cases can be found looking the other way. All courts agree that, where contractual relations exist between the parties, as in cases of common carriers, proof of the accident carries with it the presumption of negligence, and makes a prima facie case. This proposition is elementary and uncontradicted. Therefore the citation of authority is unnecessary. Yet we know of no sound reason, and have found none stated in the books, why this principle of presumptions should be applicable to cases involving contractual relations, and inapplicable to cases where no contractual relations exist.... In speaking to this question, it is said in COOLEY ON TORTS (page 799): "The rule applied to carriers of passengers is not a special rule to govern only their conduct, but is a general rule which may be applied wherever the circumstances impose upon one party alone the obligation of special care." The author then cites the case of a householder engaged in repairing his roof. A piece of slate falls therefrom, and injures a traveler upon the street. He then says: "True, the act of God, or some excusable accident, may have caused the slate to fall, but the explanation should come from the party charged with the special duty of protection."

* * *

In concluding this branch of the case, we can only reiterate that the true rule appears to be found in section 60 of SHEARMAN AND REDFIELD ON NEGLIGENCE, which we have already quoted; and, gauging this case by the test there prescribed, a prima facie case of negligence was established by respondents' evidence. This case seems to clearly come within the provisions of the rule there declared. There is nothing to distinguish it in principle from the army of cases that have been held to come directly within its provisions. Appellant was engaged in the manufacture of dynamite. In the ordinary course of things, an explosion does not occur in such manufacture if proper care is exercised. An explosion did occur, Ergo, the real cause of the explosion being unexplained, it is probable that it was occasioned by a lack of proper care. The logic is unassailable, and the principle of law of presumptions of fact erected thereon is as sound as the logic upon which it is based.

3. Questions of negligence in the storage of the gunpowder become unnecessary to consider, owing to our views upon the main question discussed. Neither do we find anything in the record, bearing upon the measure or amount of damages declared and decreed by the court, demanding a new trial of the case.

For the foregoing reasons, the judgment and order are affirmed.

Questions and Notes

1. The RESTATEMENT (2D), TORTS, provides the following:

§ 328 D. Res Ipsa Loquitur

(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

Note that although the three elements do not specifically mention it, many commentators have suggested that the primary rationale for using res ipsa loquitur is in situations where the defendant has superior access to the information that would explain the cause of the accident. The Restatement does not make this a requirement (§ 328D, cmt. k), but it is a useful guideline to distinguish those cases where res ipsa makes the most sense.

2. If there were no doctrine of res ipsa loquitur, would the plaintiff be able to prove negligence in *Judson*? If so, how? If he could not, should the plaintiff lose?

3. In *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1945), a plaintiff sustained nerve damage in his shoulder and arm while under anesthetic for an appendectomy. The damage was apparently caused by two hard objects left on the table upon which the plaintiff was placed during surgery. Plaintiff could not identify who had left them there. The court held that the doctrine of res ipsa loquitur was appropriate in this case since the injury was of the sort unlikely to occur without negligence, was caused by instruments exclusively controlled by the defendants, and was not contributed to by the plaintiff. The court concluded it would be unreasonable to force the plaintiff to prove who had caused his injury when such knowledge was known only by the defendants. Is *Ybarra* an appropriate case for the application of the res ipsa doctrine? Why or why not?

4. Courts differ on the procedural effect of the res ipsa inference. Some hold that where the facts of the case permit the inference of negligence the plaintiff is relieved only of the burden of producing evidence, but he still bears the risk of nonpersuasion if the jury is undecided. Thus, even if the defendant produces no additional evidence to prove that he did use reasonable care, the jury may still find for the defendant. Other courts hold that the burden of production and the risk of nonpersuasion shift to the defendant; thus, unless the defendant's evidence of reasonable care (or of some other explanation of how the accident occurred) persuades the jury that it was more probable than not that the defendant was not negligent, the plaintiff is entitled to a judgment. Do you think this is a significant difference?

MURPHY v. MONTGOMERY ELEVATOR CO.

65 Wash. App. 112, 828 P.2d 584 (1992)

PETRICH, Chief Judge

Margaret Murphy sued Montgomery Elevator Company for injuries she claims resulted when she fell while stepping out of an elevator at Humana Hospital, her place of employment. After a jury verdict for Montgomery Elevator (Montgomery), Murphy appeals, claiming instructional errors. She argues that the trial court erred in not giving the jury her proposed instruction on res ipsa loquitur and in not giving her proposed instruction that Montgomery be held to the highest standard of care, *i.e.*, that of a common carrier, to discover and correct a dangerous condition on an elevator it inspected, maintained, and repaired under contract with Humana Hospital. We affirm.

Murphy contended at trial that while she was stepping out of the elevator on March 30, 1987, the elevator dropped two to four inches after opening and that this caused her fall. Humana Hospital had a limited service contract with Montgomery to maintain the elevator. Humana did not service the elevators; Montgomery maintenanced and repaired them.

During the trial, Murphy presented the expert testimony of Joseph Cunningham, a former city elevator inspector. He testified that elevators do not suddenly drop if they have been properly maintained and that the likely cause of the misleveling was a failure in the "suicide switch." Ken Durin, a Montgomery employee, and Carl Burkland, Montgomery's expert witness, testified that a properly functioning elevator should not mislevel by more than one-half inch.

I. Res Ipsa Loquitur

Contending that the exact cause of the malfunction was indeterminable but was the result of improper service and maintenance, Murphy proposed a res ipsa loquitur instruction.[1] Res ipsa loquitur applies if the following conditions are met:

> (1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff. *Horner v. Northern Pac. Beneficial Ass'n. Hosps., Inc.*, 62 Wash. 2d 351, 359, 382 P.2d 518 (1963).[2]

Whether the doctrine applies in a given case is a question of law. *Zukowsky v. Brown*, 79 Wash. 2d 586, 592, 488 P.2d 269 (1971). *See also Brown v. Dahl*, 41 Wash. App. 565, 580-83, 705 P.2d 781 (1985) (court should give res ipsa loquitur instruction when plaintiff presents substantial evidence of each of its elements, even though defendant presented weighty, competent exculpatory evidence). Once the trial court determines that the doctrine applies, the defendant has the duty to come forward with exculpatory evidence to overcome the inference of negligence. *Metropolitan Mortgage & Securities Co. v. Washington Water Power*, 37 Wash. App. 241, 243, 679 P.2d 943 (1984).

The trial court did not err in refusing Murphy's proposed instruction. Murphy failed to satisfy the second condition of this doctrine, which requires the plaintiff to present evidence connecting the defendant with the negligence. When the plaintiff fails to show that a defendant had exclusive control of the object causing the injury, res ipsa loquitur does not apply. *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wash. 2d 42, 58, 785 P.2d 815 (1990) (John Doe donated blood, defendant collected it, and hospital transfused it). *See also Jackson v. Criminal Justice Training Commission*, 43 Wash. App. 827, 830-31, 720 P.2d 457 (1986) (not only must defendant have exclusive control, but plaintiff must have corresponding lack of control to avoid the injury); *Hughes v. King Cy.*, 42 Wash. App. 776, 784, 714 P.2d 316, *review denied*, 106 Wash. 2d 1006 (1986) (plaintiff failed to present evidence that county had any control over private drainage system); *Cusick v. Phillippi*, 42 Wash. App. 147, 155-56, 709 P.2d 1226 (1985) (absence of exclusive control when investors could have directed earlier sale of apples, and evidence established multiple possible causes of browning).

Murphy contends that Montgomery had exclusive control of the elevator because it was solely responsible for its maintenance and repair and because it had sole access to the elevators. Montgomery, on the other hand, contends that because Humana owned, operated, and supervised Montgomery's work, Montgomery did not have exclusive control. Under their contract, Montgomery was to service the elevators twice a month, and Humana was to notify Montgomery if other service work or repair needed to be made.

Franklin Simmons, the director of engineering for Humana Hospital at the time of Murphy's accident, testified that Montgomery had a service contract with Humana, that none of Humana's employees did any type of preventative maintenance on the elevators, that Humana did no repair work on the elevators, and that Humana did not help Montgomery in making any repairs. He also testified that he would periodically inspect

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[1] Murphy's proposed instruction no. 12 provided: "When an agency or instrumentality which produces injury or damage is under the control of the defendant at the time of injury or damage to plaintiff and the injury or damage which occurred would ordinarily have not resulted if the defendant had used ordinary care, then, in the absence of satisfactory explanation, you may infer that the defendant was negligent and that such negligence produced the injury or damage complained of by the plaintiff."

[2] We need not address the issue of what effect the adoption of comparative negligence has on the third element of res ipsa loquitur. *See* W.P.I. 3D at 206.

Montgomery's work, look at the elevator and elevator rooms to insure they were in proper order, and occasionally watch Montgomery service the elevators.

Ken Durin, Montgomery's service man who worked on Humana's elevators, testified that he went to Humana twice a month for two hours at a time, that he inspected, lubricated, and cleaned the parts, and that he would check the controller, which included the "suicide switch." He also testified that if a part needed replacement he would go to Humana's maintenance department for authorization, that Humana had to authorize any additional time or labor that needed to be done and that Montgomery billed Humana for that time and those parts.

Because Humana retained some control over the elevators, and because its contract with Montgomery was only a limited service contract, Montgomery did not have exclusive control of the elevators. Murphy's argument that Montgomery was the only entity which did any work on the elevators is insufficient under the reasoning of *Cusick v. Phillippi*, *supra*, which held that the failure of the investors to exercise their discretion did not give Phillippi exclusive control of the apple harvest. Similarly here, the failure of Humana to exercise its discretion did not give Montgomery exclusive control of the elevators.

* * *

Judgment affirmed.

MORGAN and SEINFELD, JJ., concur.

e. Evidence of Defendant's Safety Policies

WEBB v. CSX TRANSP., INC.
615 S.E.2d 440 (S.C. 2005)

Justice PLEICONES:

This is a railroad crossing case. Appellant/respondent (CSX) appeals a jury verdict awarding respondent/appellant (Plaintiff) $3 million actual damages in his wrongful death action; $2action; and $875,000 punitive damages. Plaintiff appeals an order finding CSX violated S.C. Code Ann. § 58-17-3420 (1976) but declining to award him damages for this breach. We affirm the order appealed by Plaintiff, but reverse the jury verdicts, and remand those claims for a new trial.

FACTS

In approximately 1912, a railroad line was constructed in the town of Pelzer. The line runs parallel to the Saluda River and crosses several existing roads. The railroad track effectively separates approximately twenty-one homes (the mill village) from the rest of Pelzer. The area is hilly, and while the railroad created grade crossings at Jordan and Stephens Streets, it made a cut under Green Street and built a wooden bridge to carry road traffic over the railway. The Green Street Bridge was the primary route for persons traveling to and from the mill village.

In July 1998, arsonists damaged the Green Street Bridge rendering it unusable by vehicles. The Jordan Street Crossing became the primary ingress/egress point. Jordan Street is horseshoe-shaped, and the crossing is located in the curve of the horseshoe. The crossing is at the bottom of a hill, so that vehicles approaching it from either direction are traveling downhill. The Jordan Street Crossing is "passive," that is, controlled only by a cross-buck.[1]

The railroad line crossing Jordan Street is used only to deliver coal to a Duke Power steam plant; there are approximately five trains a week, and the speed limit for the trains is twenty-five miles per hour. There was evidence that approximately 465 to 495 vehicles used the Jordan Street Crossing on a weekday, with less vehicular traffic on weekends.

On the evening of June 17, 2000, at approximately 6:00 p.m., Doris Medlin and her sister-in-law, Susan Webb (Plaintiff's decedent), were returning to their homes in the mill village after grocery shopping. As Mrs. Medlin drove her car across the tracks, the car was struck by a CSX train returning from the power plant after

[1] "A Crossbuck Sign is one of the oldest warning devices. It is a white regulatory, X-shaped sign with the words "Railroad Crossing" in black lettering ....[it] is a passive yield sign [and] ....is considered the same as a 'Yield Sign.'"

dropping off loaded coal cars. The train consisted of two engines hooked together, and was traveling about twenty-five miles per hour. Mrs. Medlin survived the wreck; Mrs. Webb, the front seat passenger, died about two months later from injuries sustained in the accident.

We address Plaintiff's appeal first.

PLAINTIFF'S APPEAL

Whether the trial judge erred in finding CSX's failure to repair the Green Street Bridge was not the proximate cause of this accident?

ANALYSIS

Plaintiff contends that S.C. Code Ann. § 58-17-3420 imposes a legal obligation on CSX to repair the Green Street Bridge, and that its failure to do so entitles Plaintiff to damages pursuant to S.C. Code Ann. § 58-17-3980 (1976). The circuit court agreed 3420 required CSX to repair the bridge, but held that damages were awardable under 3980 only if the failure to repair were a proximate cause of Plaintiff's decedent's death. Finding the bridge repair issue a remote rather than efficient cause of the accident, the court declined to award damages. Plaintiff argues this was error. We disagree.

* * *

CSX'S APPEAL

CSX raises a number of issues on appeal, including claims that it was entitled to a directed verdict on both of Plaintiff's negligence theories, that a number of evidentiary errors require a new trial absolute, and that, at the very least, the punitive damages award cannot stand in light of the United States Supreme Court's intervening decision in *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). We find merit in CSX's assertion of reversible error arising from Plaintiff's Green Street Bridge repair claim, and find that several other evidentiary rulings prejudiced CSX. Further, we hold that the United States Supreme Court's decision in *Campbell* requires, even in the absence of other errors, that a new punitive damages hearing be held. *See Durham v. Vinson,* 360 S.C. 639, 602 S.E.2d 760 (2004). We address CSX's appellate issues below.

BRIDGE REPAIR

* * *

B. Sight Line

Plaintiff presented testimony from several witnesses that overgrown vegetation at the Jordan Street Crossing obstructed drivers' views at the time of the accident. Plaintiff also introduced photos and videos taken within twenty-four hours after the accident demonstrating the conditions at the crossing. CSX claims, however, that since it was not shown that a regulatory agency had deemed the vegetation at that crossing unacceptable on the day of the accident, a directed verdict should have been granted. We disagree.

South Carolina Code Ann. § 58-17-1450 (1976) requires county supervisors to inspect railroad crossings at least once a year, and to give written notice to the railroad of any dangerous conditions. Section 58-17-1350 requires the railroad to maintain all grade level crossings located in a municipality in a safe manner and permits municipal officers to order modifications to the crossing. In *Armitage v. Seaboard Air Line Ry. Co.,* 166 S.C. 21, 164 S.E. 169 (1932), the plaintiff alleged that the railroad had not maintained safe crossings as required by statutes, and that this failure resulted in the plaintiff's decedent's death at a crossing. The trial judge directed a verdict because there was no evidence that the condition of the crossing contributed to the accident. On appeal, the Court first noted that the plaintiff failed to specify which statute the railroad allegedly failed to observe. Speculating ***652** that it may have been the predecessor to § 58- 17-1450 or § 58-17-1350, the Court noted there was no evidence that the railroad had failed to comply with any governmental order to improve the crossing. CSX contends *Armitage* stands for the proposition that it is insulated from liability for crossing accidents so long as it is in compliance with all regulatory requests. We disagree.

In *Crawford v. Atlantic Coast Line R. Co.,* 179 S.C. 264, 184 S.E. 569 (1936), decided four

years after *Armitage,* the Court asked whether § 58-17-1350 (also cited in *Armitage*) merely codified the railroads' common law duty to maintain a safe crossing or whether it created a statutory duty coexisting with the common law duty. *Crawford* was concerned with breach of duty and negligence and not with regulatory issues. We do not read *Armitage* to limit railroad crossing liability to situations where a railroad was on notice of an unsafe condition by virtue of an official government report. Rather, the *Armitage* Court, having been left to speculate as to the plaintiff's theory, was merely highlighting the lack of evidence of breach of any duty. Pursuant to *Crawford,* the railroad's negligent failure to maintain a safe crossing violates a statutory duty regardless whether there has been any regulatory action.

There was evidence that CSX's failure to control the weed growth at the Jordan Street crossing rendered that intersection unsafe. The directed verdict was properly denied. *Jinks, supra.*

EVIDENTIARY ISSUES

* * *

A. Subsequent Remedial Measures

In 2000, CSX initiated an aggressive program to clear cut all passive crossings. The Jordan Street Crossing was clear cut shortly before trial. At the *in limine* hearing, CSX sought to exclude evidence that this crossing had been clear cut, contending it was inadmissible as a subsequent remedial measure under Rule 407, SCRE. Plaintiff argued the clear cutting was "admissible to show that [CSX] should have done it [before the accident]," i.e., as proof of negligence. The trial judge ultimately decided to admit the evidence, relying upon in *Reiland v. Southland Equip. Serv., Inc.,* 330 S.C. 617, 500 S.E.2d 145 (Ct.App.1998).

Rule 407, SCRE provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

This rule permits admission of subsequent remedial measures only when necessary to demonstrate such things as ownership, control, impeachment, or feasibility of precautionary measures, if contested. These were not issues in this case. In *Reiland*, the Court of Appeals seems to have adopted a narrow view of Rule 407 and held that only measures taken in direct response to the accident qualify for exclusion under the rule. In our view, this narrow interpretation ignores the literal language of the rule. We hold that Rule 407 bars the introduction of any change, repair, or precaution that under the plaintiff's theory would have made the accident less likely to happen, unless the evidence is offered for another purpose.

The evidence of the clear cutting of Jordan Street was inadmissible at this trial under Rule 407. There were numerous witnesses, photos, and two videos demonstrating the condition of the crossing on the day of the accident. The evidence of the clear cutting was not necessary for the jury to understand the conditions at the time of the accident. Whether this evidence alone would require reversal is a close question. The sight line question was hotly contested, and to the extent this subsequent clear cutting evidence was used to show negligence, it prejudiced CSX. There can be no doubt, however, that the erroneous admission of the evidence coupled with the bridge repair evidence and argument requires a new trial. Whether this evidence may be admissible at a subsequent trial depends upon whether any of the exceptions in Rule 407, SCRE, applies.

* * *

STEVENS v. BOSTON ELEVATED RY. CO.

184 Mass. 476, 69 N.E. 338 (1904)

[*Plaintiff sued for personal injuries sustained in an accident involving defendant's streetcar. Defendant had issued a rule to its motormen (streetcar operators) requiring them to sound a gong when approaching an intersection. Plaintiff obtained a jury verdict in part based upon evidence that the motorman in question had not followed this rule, and that if he had done so, the accident would have been prevented. - ed.*]

KNOWLTON, C.J.

The only exception now relied on by the defendant is to the admission in evidence of the defendant' s rule in regard to sounding the gong, in connection with testimony that the defendant' s motorman disobeyed the rule, and that this disobedience was one of the causes of the accident. The decisions in different jurisdictions are not entirely harmonious upon the question now raised, but we are of opinion that the weight of authority and of reason tends to support the ruling of the judge in the present case.

It has been settled by various adjudications in this commonwealth that the adoption of additional precautions for safety by a defendant, after an accident, cannot be proved, as tending to show liability for the method used at the time of the accident. *Menard v. Boston & Maine Railroad*, 150 Mass. 386, 23 N.E. 214; *Shinners v. Proprietors, etc.*, 154 Mass. 168, 28 N.E. 10, 12 L.R.A. 554, 26 Am. St. Rep. 226; *Downey v. Sawyer*, 157 Mass. 418, 32 N.E. 654; *Hewitt v. Taunton Street Railway Company*, 167 Mass. 483, 485, 486, 46 N.E. 106; *Dacey v. New York, New Haven & Hartford Railroad Company*, 168 Mass. 479-481, 47 N.E. 418. This is the general rule in other jurisdictions. *Morse v. Minneapolis Railroad*, 30 Minn. 465, 16 N. W. 358; *Columbia Railroad Company v. Hawthorne*, 144 U.S. 202, 207, 208, 12 Sup. Ct. 591, 36 L. Ed. 405, and cases there cited.

On the other hand, the violation of rules previously adopted by a defendant in reference to the safety of third persons has generally been admitted in evidence as tending to show negligence of the defendant's disobedient servant for which the defendant is liable. The admissibility of such evidence has often been assumed by this court without discussion. *Mayo v. Boston & Maine Railroad*, 104 Mass. 137-140; *Connolly v. New York & New England Railroad Company*, 158 Mass. 8, 10, 11, 32 N.E. 937; *Floytrup v. Boston & Maine Railroad*, 163 Mass. 152, 39 N.E. 797; *Sweetland v. Lynn & Boston Railroad Company*, 177 Mass. 574, 578, 579, 59 N.E. 443, 51 L.R.A. 783. *See*, *also*, in other courts, Chicago, etc., *Railroad Company v. Lowell*, 151 U.S. 209-217, 14 Sup. Ct. 281, 38 L. Ed. 131; *Warner v. Baltimore & Ohio Railroad Company*, 168 U.S. 339-346, 18 Sup. Ct. 68, 42 L. Ed. 491. In *Floytrup v. Boston & Maine Railroad*, *ubi supra*, Mr. Justice Barker said in the opinion, "The evidence of the usage of the road that one train should not enter a station while another train was engaged in delivering passengers there was competent upon the question whether the defendant' s servants managed the train in a proper manner." Similar statements of the law may be found in numerous cases. *Dublin, Wickford & Wexford Railway Company v. Slattery*, 3 App. Cas. 1155-1163; *Delaware, etc., Railroad Company v. Ashley*, 67 Fed. 209-212, 14 C.C.A. 368; *Cincinnati Street Railway Company v. Altemeier*, 60 Ohio St. 10, 53 N.E. 300; *L.S.& M.S. Railway Company v. Ward*, 135 Ill. 511-518, 26 N.E. 520; *Georgia Railway Company v. Williams*, 74 Ga. 723-773; *Atlanta Cons. Railway Company v. Bates*, 103 Ga. 333, 30 S.E. 41. The only decision to the contrary of which we are aware is in the case of *Fonda v. Railway Company*, 71 Minn. 438-449, 74 N.W. 166, 70 Am. St. Rep. 341.

It is contended by the defendant that there is no sound principle under which such evidence can be admitted. The evidence is somewhat analogous to proof of the violation of an ordinance or statute by the defendant or his servant which is always received as evidence, although not conclusive, of the defendant's negligence. *Wright v. Malden & Melrose Railway Company*, 4 Allen, 283; *Lane v. Atlantic Works*, 111 Mass. 136; *Hall v. Ripley*, 119 Mass. 135; *Hanlon v. South Boston, etc., Railway Company*, 129 Mass. 310. Such an ordinance or statute, enacted by a body representing the interests of the public, imposes prima facie upon everybody a duty of obedience. Disobedience is therefore a breach of duty, unless some excuse for it can be shown which creates a different duty, that, as between man and man, overrides the duty imposed

by the statute or ordinance. Such disobedience in a matter affecting the plaintiff is always competent upon the question whether the defendant was negligent. So, a rule made by a corporation for the guidance of its servants in matters affecting the safety of others is made in the performance of a duty, by a party that is called upon to consider methods, and determine how its business shall be conducted. Such a rule, made known to its servants, creates a duty of obedience as between the master and the servant, and disobedience of it by the servant is negligence as between the two. If such disobedience injuriously affects a third person, it is not to be assumed in favor of the master that the negligence was immaterial to the injured person, and that his rights were not affected by it. Rather ought it to he held an implication that there was a breach of duty towards him, as well as towards the master who prescribed the conduct that he thought necessary or desirable for protection in such cases. Against the proprietor of a business, the methods which he adopts for the protection of others are some evidence of what he thinks necessary or proper to insure their safety.

A distinction may well be made between precautions taken voluntarily before an accident, and precautions which are suggested and adopted after an accident. This distinction is pointed out in *Columbia Railroad Company v. Hawthorne*, 144 U.S. 202-207, 208, 12 Sup. Ct. 591, 36 L. Ed. 405. Mr. Justice Gray, referring to changes made by a defendant after an accident, says in the opinion, "It is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant has been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant." In *Morse v. Minneapolis & St. Louis Railway*, 30 Minn. 465, 16 N.E. 358, it is said, referring to the same subject, that "a person may have exercised all the care which the law required, and yet in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards." *See*, *also*, *Illinois Central Railroad Company v. Swisher*, 61 Ill. App. 611. In *Menard v. Boston & Maine Railroad*, 150 Mass. 386, 23 N.E. 214, and in some of the earlier cases, there is language which goes further than the decision, and which might imply that such evidence as was received in this case is incompetent, but the case is authority only for that which was decided.

Exceptions overruled.

Questions and Notes

1. What is the basis for the rule against using evidence of post-accident repairs?

2. Is it distinguishable from using a defendant's company rulebooks as evidence that the defendant was negligent?

3. Establishing Vicarious Liability (Respondeat Superior)

HAYES v. FAR WEST SERVICES, INC.
50 Wash. App. 505, 749 P.2d 178 (1988)

WILLIAMS, J.

Frederick Hayes and Judy Frounfelter brought suit for damages against Thomas McGrath and his former law firm, Torbenson, Thatcher, McGrath, Treadwell & Schoonmaker, Inc., P.S., for injuries arising out of McGrath's shooting of Hayes. On motion for summary judgment, the trial court dismissed the firm as a defendant. Hayes appeals.

The facts are these: at approximately 4:30 p.m. on February 11, 1980, McGrath went to a restaurant/cocktail establishment in Kirkland. From then until about 11 o'clock, he imbibed considerable alcohol while socializing and discussing personal and firm-related business. After 11 o'clock, McGrath continued to socialize until approximately 1:45 a.m., when he and Hayes, another bar patron, exchanged words. Shortly thereafter, the two encountered each other outside, and after another exchange, McGrath shot Hayes in what he claims was self-defense. Frounfelter, who was in the company of Hayes, is

alleged to have sustained emotional trauma.

The basic question is whether the law firm is liable on the theory of respondeat superior for damages arising out of McGrath's shooting of Hayes. The basic rule is stated in *Kuehn v. White*, 24 Wash. App. 274, 277, 600 P.2d 679 (1979):

> A master is responsible for the servant's acts under the doctrine of respondeat superior when the servant acts within the scope of his or her employment and in furtherance of the master's business. Where a servant steps aside from the master's business in order to effect some purpose of his own, the master is not liable.

See also Kyreacos v. Smith, 89 Wash. 2d 425, 429, 572 P.2d 723 (1977); *Westerland v. Argonaut Grill*, 185 Wash. 411, 55 P.2d 819 (1936).

Under the traditional interpretation of respondeat superior, there is not sufficient evidence to establish liability on the part of the law firm. Viewing the evidence in a light most favorable to the nonmoving parties, Hayes and Frounfelter, as we must, there is nothing to indicate either directly or by inference that McGrath was acting in the scope of his employment when he shot Hayes. There is no evidence McGrath transacted firm business or engaged in any promotional activities any time after 11 p.m.

But in *Dickinson v. Edwards*, 105 Wash. 2d 457, 716 P.2d 814 (1986), the Supreme Court extended the doctrine of respondeat superior, allowing a plaintiff to recover from a banquet-hosting employer if the following prima facie case is proven:

> 1. The employee consumed alcohol at a party hosted by the employer which was held to further the employer's interest in some way and at which the employee's presence was requested or impliedly or expressly required by the employer.
>
> 2. The employee negligently consumed alcohol to the point of intoxication when he knew or should have known he would need to operate a vehicle on some public highway upon leaving the banquet.
>
> 3. The employee caused the accident while driving from the banquet.
>
> 4. The proximate cause of the accident, the intoxication, occurred at the time the employee negligently consumed the alcohol.
>
> 5. Since this banquet was beneficial to the employer who impliedly or expressly required the employee's attendance, the employee negligently consumed this alcohol during the scope of his employment. *Dickinson*, at 468, 716 P.2d 814.

Appellants, citing *Dickinson v. Edwards*, *supra*, argue that McGrath's firm is liable under respondeat superior because McGrath negligently became intoxicated while acting within the scope of his employment, and his intoxication was the proximate cause of the shooting.

The decision in *Dickinson v. Edwards*, *supra*, is based on *Chastain v. Litton Systems, Inc.*, 694 F.2d 957 (4th Cir. 1982). That case employed essentially a three prong analysis: (1) was the employee's consumption of alcohol within the scope of employment, (2) did the employee's consumption of alcohol while within the scope of employment constitute negligence, and (3) did the negligent intoxication continue until the time of the incident and constitute a proximate cause of the injuries. *Chastain*, at 962; *see also Childers v. Shasta Livestock Auction Yard, Inc.*, 190 Cal. App. 3d 792, 235 Cal. Rptr. 641 (3d Dist. 1987).

Under this formulation of the rule, there is sufficient evidence to present a jury question as to whether McGrath was acting within the scope of his employment when he consumed alcohol. Prior to 8:30 p.m., McGrath met with several acquaintances, including a friend from an insurance company he had been trying to secure as a client for the firm for some time; McGrath later submitted a charge slip marked "Entertainment" to his firm for bar purchases while with the friend. From about 8:30 p.m. to 11 p.m., McGrath discussed settlement possibilities with opposing counsel on a bankruptcy case he was handling for his firm; McGrath's firm subsequently billed their client in the bankruptcy for 2.7 hours for that settlement conference. Moreover, McGrath's activities appear consistent with his firm's policies; members were encouraged to engage in promotional activities, and the firm gave partners

such as McGrath considerable discretion in billing for expenses, as evidenced by the numerous reimbursements made to McGrath for his business and entertainment expenditures.

There is also sufficient evidence to present a jury question as to whether McGrath consumed alcohol to the point of intoxication while within the scope of his employment. McGrath admitted to having several drinks prior to 11 p.m., and Hayes and several others said McGrath appeared intoxicated before the shooting.

But there is nothing in the record to show that McGrath's consumption of alcohol was negligent. Negligence necessarily involves a foreseeable risk; if an actor could not reasonably foresee any injury as the result of his act, there is no negligence and no liability. *Hunsley v. Giard*, 87 Wash. 2d 424, 435, 553 P.2d 1096 (1976). In *Dickinson v. Edwards*, *supra*, negligence was defined in terms of whether the employee knew or should have known he would be operating a motor vehicle on a public highway upon leaving the banquet. Because the employee had driven to the banquet, it was foreseeable that he would have to drive away, and the risks of driving while intoxicated are well-recognized. Such a situation is far removed from the particulars of this case. There is no evidence to suggest McGrath knew or should have known that his drinking would lead to his becoming involved in an altercation that would result in his firing a gun at another bar patron; nothing in the record shows that the cocktail lounge was a frequent scene of such incidents or that its patrons were known to be confrontational, or that when intoxicated, McGrath became violent or had ever drawn a gun. Accordingly, there is not sufficient evidence to establish liability on the part of the law firm under the application of respondeat superior set forth in *Dickinson v. Edwards*, *supra*.

The remaining arguments are insubstantial. The notion of "enterprise liability" was specifically rejected by the court in *Kuehn v. White*, 24 Wash. App. at 279-80, 600 P.2d 679, and no subsequent cases have indicated otherwise. Nothing in the record supports a finding of liability based on either a theory of negligent retention and supervision or a duty to control because of a "special relation" between McGrath and his firm. And finally, the court did not err in striking certain materials submitted by the appellants, nor was its denial of their motion for continuance an abuse of discretion.

Affirmed.

Questions and Notes

1. Obviously the plaintiff is often very interested in whether or not the defendant's employer will be liable for the defendant's negligence, since employers usually carry insurance and usually have much greater resources with which to pay a judgment. Since most people have employers, it is important to look at the possibility of *respondeat superior* whenever you are analyzing an injury. *Hayes* discusses the requirement that, to impose liability upon the employer, the evidence must establish that the negligent act was committed during the course and scope of employment. Prior to that determination, there must be a finding that the person who caused the injury was an *employee* (as distinguished from an independent contractor). The test used by most courts is whether or not the alleged employer had a *right to control* the behavior of the alleged employee. If I hire a plumber to hook up my washing machine, for example, I don't control how he does his work, and he is therefore not my employee; any negligence he commits is his responsibility, not mine. On the other hand, if I am a plumbing contractor and I hire a person to do plumbing installation for me, I do have the right to control the way the work is done and therefore that person will be considered my employee.

2. The issues of respondeat superior are addressed more fully in RESTATEMENT (2D), TORTS § 317, and in the RESTATEMENT (2D) OF AGENCY §§ 219-49.

3. Sometimes an employer can be liable for the wrongs done by an employee where the employer was negligent in the hiring or supervision of the employee. For example, in *Carlsen v. Wackenhut Corp.*, 73 Wash.App. 247, 868 P.2d 882, *review denied*, 124 Wash.2d 1022, 881 P.2d 255 (1994), the employer hired ushers (who doubled as "security") for a rock concert without adequate determination of whether they were suitable. When an employee lured a concertgoer under the stage and sexually assaulted her, the victim sued the employer for negligence. Although the trial

court dismissed on summary judgment, the appellate court held that a jury could find that there had been inadequate screening of the employees and therefore reinstated the complaint.

4. Even if there is agreement on the wisdom of holding " deep pockets" liable where negligence leads to the infliction of intentional harm, there is no consensus on whether to divide the liability between the deep pocket and the malefactor, or to make the deep pocket liable for the whole: William D. Underwood and Michael D. Morrison, *Apportioning Responsibility in Cases Involving Claims of Vicarious, Derivative, or Statutory Liability for Harm Directly Caused by the Conduct of Another*, 55 BAYLOR L. REV. 617 (2003).

5. A related principle is that of *negligent entrustment*. If the possessor of a dangerous instrument, such as a gun or a motor vehicle, negligently entrusts it to someone who is incompetent to handle it safely, the owner can be held liable to a victim who is injured thereby. For example, in *Splawnik v. DiCaprio*, 146 A.D.2d 333, 540 N.Y.S.2d 615 (1989), a gun dealer sold a loaded gun to a woman who allegedly knew that the purchaser was depressed. When she committed suicide, her estate sued the gun dealer for negligent entrustment.

6. Employers are often caught in a dilemma. If they don't pass along information that would warn others about the dangers of an employee they have fired, they face liability for failure to warn. On the other hand, if they pass along information that later turns out to have insufficient basis in fact, they may face liability for defamation. *See* J. Bradley Buckhalter, *Speak No Evil: Negligent Employment Referral and the Employer's Duty to Warn (or, How Employers Can Have Their Cake and Eat It Too)*, 22 SEATTLE U. L. REV. 265 (1998); *see also* Markita D. Cooper, *Beyond Name, Rank and Serial Number: "No Comment" Job Reference Policies, Violent Employees and the Need for Disclosure-Shield Legislation*, 5 VA. J. SOC. POL'Y & L. 287 (1998).

7. One of the difficulties faced by courts in cases of sexual harassment is whether or not to make the employer vicariously liable for torts committed by employees. In a recent case, the U.S. Supreme Court tried to strike a reasonable balance. In *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), the court decided that the plaintiff need not present evidence that the employer knew that the harassment was taking place, but the employer can present an affirmative defense of having used reasonable care to prevent the harassment. The case is analyzed in William R. Corbett, *Faragher, Ellerth, and the Federal Law of Vicarious Liability fo rSexual Harassment by Supervisors: Something Lost, Something Gained, and Something to Guard Against*, 7 WM. & MARY BILL RTS. J. 801 (1999)

§ B. Strict Liability

Introductory Note. Although negligence is the most common basis for the plaintiff's claim that he is entitled to recover damages from the defendant, it is not the exclusive basis for a tort claim. "Strict liability" is the term used to describe cases in which the plaintiff is able to recover even though the defendant has exercised reasonable care. In Chapter Six we will consider cases that impose strict liability for a defective product. Here, however, we are concerned with cases where strict liability is imposed because of the nature of the defendant's activity.[1]

[1] Some other systems, like the worker's compensation system in most states, provide compensation without proof of fault. However, they typically provide significantly smaller benefits than those available for a tort recovery. In this chapter we consider cases where the liability is similar in its structure to a negligence recovery, but eliminates the need for proving negligence.

1. The Distinction Between Strict Liability and Negligence

HELLING v. CAREY

83 Wash. 2d 514, 519 P.2d 981 (1974)

HUNTER, Associate Justice

This case arises from a malpractice action instituted by the plaintiff (petitioner), Barbara Helling.

The plaintiff suffers from primary open angle glaucoma. Primary open angle glaucoma is essentially a condition of the eye in which there is an interference in the ease with which the nourishing fluids can flow out of the eye. Such a condition results in pressure gradually rising above the normal level to such an extent that damage is produced to the optic nerve and its fibers with resultant loss in vision. The first loss usually occurs in the periphery of the field of vision. The disease usually has few symptoms and, in the absence of a pressure test, is often undetected until the damage has become extensive and irreversible.

The defendants (respondents), Dr. Thomas F. Carey and Dr. Robert C. Laughlin, are partners who practice the medical specialty of ophthalmology. Ophthalmology involves the diagnosis and treatment of defects and diseases of the eye.

The plaintiff first consulted the defendants for myopia, nearsightedness, in 1959. At that time she was fitted with contact lenses. She next consulted the defendants in September, 1963, concerning irritation caused by the contact lenses. Additional consultations occurred in October, 1963; February, 1967; September, 1967; October, 1967; May, 1968; July, 1968; August, 1968; September, 1968; and October, 1968. Until the October 1968 consultation, the defendants considered the plaintiff's visual problems to be related solely to complications associated with her contact lenses. On that occasion, the defendant, Dr. Carey, tested the plaintiff's eye pressure and field of vision for the first time. This test indicated that the plaintiff had glaucoma. The plaintiff, who was then 32 years of age, had essentially lost her peripheral vision and her central vision was reduced to approximately 5 degrees vertical by 10 degrees horizontal.

Thereafter, in August of 1969, after consulting other physicians, the plaintiff filed a complaint against the defendants alleging, among other things, that she sustained severe and permanent damage to her eyes as a proximate result of the defendants' negligence. During trial, the testimony of the medical experts for both the plaintiff and the defendants established that the standards of the profession for that specialty in the same or similar circumstances do not require routine pressure tests for glaucoma upon patients under 40 years of age. The reason the pressure test for glaucoma is not given as a regular practice to patients under the age of 40 is that the disease rarely occurs in this age group. Testimony indicated, however, that the standards of the profession do require pressure tests if the patient's complaints and symptoms reveal to the physician that glaucoma should be suspected.

The trial court entered judgment for the defendants following a defense verdict. The plaintiff thereupon appealed to the Court of Appeals, which affirmed the judgment of the trial court. *Helling v. Carey*, No. 1185-41918-1 (Wn. App., filed Feb. 5, 1973). The plaintiff then petitioned this Court for review, which we granted.

In her petition for review, the plaintiff's primary contention is that under the facts of this case the trial judge erred in giving certain instructions to the jury and refusing her proposed instructions defining the standard of care which the law imposes upon an ophthalmologist. As a result, the plaintiff contends, in effect, that she was unable to argue her theory of the case to the jury that the standard of care for the specialty of ophthalmology was inadequate to protect the plaintiff from the incidence of glaucoma, and that the defendants, by reason of their special ability, knowledge and information, were negligent in failing to give the pressure test to the plaintiff at an earlier point in time which, if given, would have detected her condition and enabled the defendants to have averted the resulting substantial loss in her vision.

We find this to be a unique case. The testimony of the medical experts is undisputed concerning the standards of the profession for the specialty of ophthalmology. It is not a question in this case of the defendants having any greater special ability, knowledge and information than other ophthalmologists which would require the

defendants to comply with a higher duty of care than that "degree of care and skill which is expected of the average practitioner in the class to which he belongs, acting in the same or similar circumstances." *Pederson v. Dumouchel*, 72 Wash. 2d 73, 79, 431 P.2d 973 (1967). The issue is whether the defendants' compliance with the standard of the profession of ophthalmology, which does not require the giving of a routine pressure test to persons under 40 years of age, should insulate them from liability under the facts in this case where the plaintiff has lost a substantial amount of her vision due to the failure of the defendants to timely give the pressure test to the plaintiff.

The defendants argue that the standard of the profession, which does not require the giving of a routine pressure test to persons under the age of 40, is adequate to insulate the defendants from liability for negligence because the risk of glaucoma is so rare in this age group. The testimony of the defendant, Dr. Carey, however, is revealing as follows:

> **Q.** Now, when was it, actually, the first time any complaint was made to you by her of any field or visual field problem? **A.** Really, the first time that she really complained of a visual field problem was the August 30th date. [1968] **Q.** And how soon before the diagnosis was that? **A.** That was 30 days. We made it on October 1st. **Q.** And in your opinion, how long, as you now have the whole history and analysis and the diagnosis, how long had she had this glaucoma? **A.** I would think she probably had it ten years or longer. **Q.** Now, Doctor, there's been some reference to the matter of taking pressure checks of persons over 40. What is the incidence of glaucoma, the statistics, with persons under 40? **A.** In the instance of glaucoma under the age of 40, is less than 100 to one per cent. The younger you get, the less the incidence. It is thought to be in the neighborhood of one in 25,000 people or less. **Q.** How about the incidence of glaucoma in people over 40? **A.** Incidence of glaucoma over 40 gets into the two to three per cent category, and hence, that's where there is this great big difference and that's why the standards around the world has been to check pressures from 40 on.

The incidence of glaucoma in one out of 25,000 persons under the age of 40 may appear quite minimal. However, that one person, the plaintiff in this instance, is entitled to the same protection, as afforded persons over 40, essential for timely detection of the evidence of glaucoma where it can be arrested to avoid the grave and devastating result of this disease. The test is a simple pressure test, relatively inexpensive. There is no judgment factor involved, and there is no doubt that by giving the test the evidence of glaucoma can be detected. The giving of the test is harmless if the physical condition of the eye permits. The testimony indicates that although the condition of the plaintiff's eyes might have at times prevented the defendants from administering the pressure test, there is an absence of evidence in the record that the test could not have been timely given.

Justice Holmes stated in *Texas & Pac. Ry. v. Behymer*, 189 U.S. 468, 470, 23 S. Ct. 622, 623, 47 L. Ed. 905 (1903):

> What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.

In *The T.J. Hooper*, 60 F.2d 737, on page 740 (2d Cir. 1932), Justice Hand stated:

> [I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. *Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.* (Italics ours.)

Under the facts of this case reasonable prudence required the timely giving of the pressure test to this plaintiff. The precaution of giving this test to detect the incidence of glaucoma to patients under 40 years of age is so imperative that irrespective of its disregard by the standards of the

ophthalmology profession, it is the duty of the courts to say what is required to protect patients under 40 from the damaging results of glaucoma.

We therefore hold, as a matter of law, that the reasonable standard that should have been followed under the undisputed facts of this case was the timely giving of this simple, harmless pressure test to this plaintiff and that, in failing to do so, the defendants were negligent, which proximately resulted in the blindness sustained by the plaintiff for which the defendants are liable.

There are no disputed facts to submit to the jury on the issue of the defendants' liability. Hence, a discussion of the plaintiff's proposed instructions would be inconsequential in view of our disposition of the case.

The judgment of the trial court and the decision of the Court of Appeals is reversed, and the case is remanded for a new trial on the issue of damages only.

HALE, C.J., and ROSELLINI, STAFFORD, WRIGHT and BRACHTENBACH, JJ., concur.

UTTER, Associate Justice (concurring)

I concur in the result reached by the majority. I believe a greater duty of care could be imposed on the defendants than was established by their profession. The duty could be imposed when a disease, such as glaucoma, can be detected by a simple, well-known harmless test whose results are definitive and the disease can be successfully arrested by early detection, but where the effects of the disease are irreversible if undetected over a substantial period of time.

The difficulty with this approach is that we as judges, by using a negligence analysis, seem to be imposing a stigma of moral blame upon the doctors who, in this case, used all the precautions commonly prescribed by their profession in diagnosis and treatment. Lacking their training in this highly sophisticated profession, it seems illogical for this court to say they failed to exercise a reasonable standard of care. It seems to me we are, in reality, imposing liability, because, in choosing between an innocent plaintiff and a doctor, who acted reasonably according to his specialty but who could have prevented the full effects of this disease by administering a simple, harmless test and treatment, the plaintiff should not have to bear the risk of loss. As such, imposition of liability approaches that of strict liability.

Strict liability or liability without fault is not new to the law. Historically, it predates our concepts of fault or moral responsibility as a basis of the remedy. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HAR. L. REV. 315, 383, 441 (1894). As noted in W. PROSSER, THE LAW OF TORTS § 74 (3d ed. 1964) at pages 507, 508:

> There are many situations in which a careful person is held liable for an entirely reasonable mistake.... [I]n some cases the defendant may be held liable, although he is not only charged with no moral wrongdoing, but has not even departed in any way from a reasonable standard of intent or care.... There is "a strong and growing tendency, where there is blame on neither side, to ask, in view of the exigencies of social justice, who can best bear the loss and hence to shift the loss by creating liability where there has been no fault." (Footnote omitted.)

Tort law has continually been in a state of flux. It is "not always neat and orderly. But this is not to say it is illogical. Its central logic is the logic that moves from premises —its objectives —that are only partly consistent, to conclusions —its rules — that serve each objective as well as may be while serving others too. It is the logic of maximizing service and minimizing disservice to multiple objectives." Keeton, *Is There a Place for Negligence in Modern Tort Law?*, 53 VA. L. REV. 886, 897 (1967).

When types of problems rather than numbers of cases are examined, strict liability is applied more often than negligence as a principle which determines liability. Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225, 239 (1971). There are many similarities in this case to other cases of strict liability. Problems of proof have been a common feature in situations where strict liability is applied. Where events are not matters of common experience, a juror's ability to comprehend whether reasonable care has been followed diminishes. There are few areas as difficult for jurors to intelligently comprehend as the intricate questions of proof and standards in

medical malpractice cases.

In applying strict liability there are many situations where it is imposed for conduct which can be defined with sufficient precision to insure that application of a strict liability principle will not produce miscarriages of justice in a substantial number of cases. If the activity involved is one which can be defined with sufficient precision, that definition can serve as an accounting unit to which the costs of the activity may be allocated with some certainty and precision. With this possible, strict liability serves a compensatory function in situations where the defendant is, through the use of insurance, the financially more responsible person. Peck, *Negligence and Liability Without Fault in Tort Law*, *supra* at 240, 241.

If the standard of a reasonably prudent specialist is, in fact, inadequate to offer reasonable protection to the plaintiff, then liability can be imposed without fault. To do so under the narrow facts of this case does not offend my sense of justice. The pressure test to measure intraocular pressure with the Schiotz tonometer and the Goldman applanometer takes a short time, involves no damage to the patient, and consists of placing the instrument against the eyeball. An abnormally high pressure requires other tests which would either confirm or deny the existence of glaucoma. It is generally believed that from 5 to 10 years of detectable increased pressure must exist before there is permanent damage to the optic nerves.

Although the incidence of glaucoma in the age range of the plaintiff is approximately one in 25,000, this alone should not be enough to deny her a claim. Where its presence can be detected by a simple, well known harmless test, where the results of the test are definitive, where the disease can be successfully arrested by early detection and where its effects are irreversible if undetected over a substantial period of time, liability should be imposed upon defendants even though they did not violate the standard existing within the profession of ophthalmology.

The failure of plaintiff to raise this theory at the trial and to propose instructions consistent with it should not deprive her of the right to resolve the case on this theory on appeal. Where this court has authoritatively stated the law, the parties are bound by those principles until they have been overruled. Acceptance of those principles at trial does not constitute a waiver or estop appellants from adapting their cause on appeal to such a rule as might be declared if the earlier precedent is overruled. *Samuelson v. Freeman*, 75 Wash. 2d 894, 900, 454 P.2d 406 (1969).

FINLEY and HAMILTON, JJ., concur.

Questions and Notes

1. Was the majority opinion based upon an application of strict liability or negligence? What about the concurring opinion?

2. The Washington Legislature enacted a statute in 1975 that provided that a plaintiff in a medical malpractice action would have to "prove by a preponderance of the evidence that the defendant or defendants failed to exercise that degree of skill, care, and learning possessed at that time by other persons in the same profession, and that as a proximate result of such failure the plaintiff suffered damages . . .." Nonetheless, in *Gates v. Jensen*, 92 Wash.2d 246 (1979), the Washington Supreme Court again held a physician negligent for failing to give a pressure test to a glaucoma patient.

3. In *Spano v. Perini*, 25 N.Y.2d 11, 302 N.Y.S.2d 527, 250 N.E.2d 31 (1969), the New York Court of Appeals considered a case in which a garage owner's property was damaged by blasting conducted nearby in tunnel construction. The leading New York case, *Booth v. Rome, W.& O.T.R. Co.*, 140 N.Y. 267, 35 N.E. 592 (1893) had permitted the imposition of strict liability in blasting cases only where there was a physical invasion of the property (*e.g.*, by flying debris), reasoning that (1) construction was a valuable activity, and (2) to declare a landowner's right to be free from the results of blasting would in effect declare blasting unlawful. "This sacrifice, we think, the law does not exact. Public policy is sustained by the building up of towns and cities and the improvement of property. Any unnecessary restraint on freedom of action of a property owner hinders this." *Booth*, 35 N.E. at 596. However, in *Spano* the court overruled this precedent, stating:

This rationale cannot withstand analysis.

> The plaintiff in *Booth* was not seeking, as the court implied, to "exclude the defendant from blasting" and thus prevent desirable improvements to the latter's property. Rather, he was merely seeking compensation for the damage which was inflicted upon his own property as a result of that blasting. The question, in other words, was not *whether* it was lawful or proper to engage in blasting but *who* should bear the cost of any resulting damage —the person who engaged in the dangerous activity or the innocent neighbor injured thereby. Viewed in such a light, it clearly appears that *Booth* was wrongly decided and should be forthrightly overruled. (250 N.E.2d at 34).

Is this the right question to ask in deciding whether to impose strict liability?

4. There is a continuing fascination with "no-fault" schemes for medical malpractice. For a recent review, *see* Bovbjerg, Randall R. and Frank A. Sloan, *No-fault for Medical Injury: Theory and Evidence*. 67 U. CIN. L. REV. 53 (1998). *See also infra*, Chapter Ten, Professional Negligence.

2. When Is Strict Liability Imposed?

Introductory Note. Just as we had to distinguish between identifying the standard for negligence (reasonable care) and the means by which it can be identified (negligence per se, res ipsa, etc.), so we now must shift from an understanding of what strict liability is to a consideration of the circumstances in which strict liability will be imposed upon the defendant. Remember that unless the plaintiff establishes the existence of facts that bring the case into one of the categories qualifying for strict liability, the plaintiff will be required to prove negligence in order to recover. We have already seen the imposition of strict liability in *Bierman*, although that case is unique because of its use of the small claims court standard ("substantial justice") instead of tort doctrine as such. In general, it can be said that strict liability cases represent small islands within the larger sea of cases governed by the negligence standard. As you read the subsequent cases, see if you can find a common thread connecting the cases in which strict liability is imposed.

a. Abnormally Dangerous Activities

SIEGLER v. KUHLMAN
81 Wash. 2d 448, 502 P.2d 1181 (1973)

HALE, Associate Justice

Seventeen-year-old Carol J. House died in the flames of a gasoline explosion when her car encountered a pool of thousands of gallons of spilled gasoline. She was driving home from her after-school job in the early evening of November 22, 1967, along Capitol Lake Drive in Olympia; it was dark but dry; her car's headlamps were burning. There was a slight impact with some object, a muffled explosion, and then searing flames from gasoline pouring out of an overturned trailer tank engulfed her car. The result of the explosion is clear, but the real causes of what happened will remain something of an eternal mystery.

* * *

The jury apparently found that defendants had met and overcome the charges of negligence. Defendants presented proof that both the truck, manufactured by Peterbilt, a division of Pacific Car and Foundry Company, and the tank and trailer, built by Fruehauf Company, had been constructed by experienced companies, and that the fifth wheel, connecting the two units and built by Silver Eagle Company, was the type of connecting unit used by 95 percent of the truck-trailer units. Defendants presented evidence that a most careful inspection would not have revealed the defects or fatigue in the metal connections between truck and trailer; that the trailer would not collapse unless both main springs failed; there was evidence that, when fully loaded, the tank could not touch the wheels of the tank trailer without breaking the springs because the maximum flexion of the springs was less than 1 inch. Defendants presented evidence that the drawbar was secure and firmly attached; that the tanks were built of aluminum to prevent sparks; and that, when fully loaded with 4,800 gallons of

cargo, there would be 2 or 3 inches of space between the cargo and top of the tank; that two safety cables connected the two units; that the truck and trailer were regularly serviced and repaired, and records of this preserved and put in evidence; that the unit had been subject to Interstate Commerce Commission spot checks and conformed to ICC standards; and that, at the time of the accident, the unit had traveled less than one-third of the average service life of that kind of unit. There was evidence obtained at the site of the fire that both of the mainsprings above the tank trailer's front wheels had broken as a result of stress, not fatigue — from a kind of stress that could not be predicated by inspection — and finally that there was no negligence on the driver's part.

Defendants also presented some evidence of contributory negligence on the basis that Carol House, driving on a 35-mile-per-hour road, passed another vehicle at about 45 miles per hour and although she slacked speed somewhat before the explosion, she was traveling at the time of the impact in excess of the 35-mile-per-hour limit. The trial court submitted both contributory negligence and negligence to the jury, declared the maximum speed limit on Capitol Lake Drive to be 35 miles per hour, and told the jury that, although violation of a positive statute is negligence as a matter of law, it would not engender liability unless the violation proximately contributed to the injury. From a judgment entered upon a verdict for defendants, plaintiff appealed to the Court of Appeals which affirmed. 3 Wash. App. 231, 473 P.2d 445 (1970). We granted review (78 Wash. 2d 991 (1970)), and reverse.

* * *

Strict liability is not a novel concept; it is at least as old as *Fletcher v. Rylands*, L.R. 1 Ex. 265, 278 (1866), *affirmed*, House of Lords, 3 H.L. 330 (1868). In that famous case, where water impounded in a reservoir on defendant's property escaped and damaged neighboring coal mines, the landowner who had impounded the water was held liable without proof of fault or negligence. Acknowledging a distinction between the natural and nonnatural use of land, and holding the maintenance of a reservoir to be a nonnatural use, the Court of Exchequer Chamber imposed a rule of strict liability on the landowner. The ratio decidendi included adoption of what is now called *strict liability*, and at page 278 announced, we think, principles which should be applied in the instant case:

> [T]he person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

All of the Justices in *Fletcher v. Rylands*, *supra*, did not draw a distinction between the natural and nonnatural use of land, but such a distinction would, we think, be irrelevant to the transportation of gasoline. The basic principles supporting the Fletcher doctrine, we think, control the transportation of gasoline as freight along the public highways the same as it does the impounding of waters and for largely the same reasons. *See* PROSSER, TORTS, § 78 (4th ed. 1971).

In many respects, hauling gasoline as freight is no more unusual, but more dangerous, than collecting water. When gasoline is carried as cargo —as distinguished from fuel for the carrier vehicle —it takes on uniquely hazardous characteristics, as does water impounded in large quantities. Dangerous in itself, gasoline develops even greater potential for harm when carried as freight — extraordinary dangers deriving from sheer quantity, bulk and weight, which enormously multiply its hazardous properties. And the very hazards inhering from the size of the load, its bulk or quantity and its movement along the highways presents another reason for application of the *Fletcher v. Rylands*, *supra*, rule not present in the impounding of large quantities of water — the likely destruction of cogent evidence from which negligence or want of it may be proved or disproved. It is quite probable that the most important ingredients of proof will be lost in a gasoline explosion and fire. Gasoline is always dangerous whether kept in large or small quantities because of its volatility, inflammability and explosiveness. But when several thousand gallons of it are allowed to spill across a public highway — that is, if, while in transit as freight, it is not kept impounded —the hazards to third persons are so great as to be almost beyond calculation. As a consequence of its escape from impoundment and

subsequent explosion and ignition, the evidence in a very high percentage of instances will be destroyed, and the reasons for and causes contributing to its escape will quite likely be lost in the searing flames and explosions.

That this is a sound case for the imposition of a rule of strict liability finds strong support in Professor Cornelius J. Peck's analysis in *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225 (1971). Pointing out that strict liability was imposed at common law prior to *Fletcher v. Rylands*, *supra*, that study shows the application of a rule of strict liability in a number of instances, *i.e.*, for harm done by trespassing animals; on a bona fide purchaser of stolen goods to their true owner; on a bailee for the misdelivery of bailed property regardless of his good faith or negligence; and on innkeepers and hotels at common law. But there are other examples of strict liability: The Supreme Court of Minnesota, for example, imposed liability without fault for damage to a dock inflicted by a ship moored there during a storm. *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910).

The rule of strict liability rests not only upon the ultimate idea of rectifying a wrong and putting the burden where it should belong as a matter of abstract justice, that is, upon the one of the two innocent parties whose acts instigated or made the harm possible, but it also rests on problems of proof:

> One of these common features is that the person harmed would encounter a difficult problem of proof if some other standard of liability were applied. For example, the disasters caused by those who engage in abnormally dangerous or extra-hazardous activities frequently destroy all evidence of what in fact occurred, other than that the activity was being carried on. Certainly this is true with explosions of dynamite, large quantities of gasoline, or other explosives. It frequently is the case with falling aircraft. Tracing the course followed by gases or other poisons used by exterminators may be difficult if not impossible. The explosion of an atomic reactor may leave little evidence of the circumstances which caused it. Moreover, application of such a standard of liability to activities which are not matters of common experience is well-adapted to a jury's limited ability to judge whether proper precautions were observed with such activities.
>
> Problems of proof which might otherwise have been faced by shippers, bailors, or guests at hotels and inns certainly played a significant role in shaping the strict liabilities of carriers, bailees, and innkeepers. Problems of proof in suits against manufacturers for harm done by defective products became more severe as the composition and design of products and the techniques of manufacture became less and less matters of common experience; this was certainly a factor bringing about adoption of a strict liability standard. (Footnote omitted.) C. Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225, 240 (1971).

See, *also*, G.P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972), for an analysis of the judicial philosophy relating to tort liability as affecting or affected by concepts of fault and negligence; and Comment, *Liability Without Fault: Logic and Potential of a Developing Concept*, 1970 WIS. L. REV. 1201.

Thus, the reasons for applying a rule of strict liability obtain in this case. We have a situation where a highly flammable, volatile and explosive substance is being carried at a comparatively high rate of speed, in great and dangerous quantities as cargo upon the public highways, subject to all of the hazards of high-speed traffic, multiplied by the great dangers inherent in the volatile and explosive nature of the substance, and multiplied again by the quantity and size of the load. Then we have the added dangers of ignition and explosion generated when a load of this size, that is, about 5,000 gallons of gasoline, breaks its container and, cascading from it, spreads over the highway so as to release an invisible but highly volatile and explosive vapor above it.

Danger from great quantities of gasoline spilled upon the public highway is extreme and extraordinary, for any spark, flame or appreciable

heat is likely to ignite it. The incandescent filaments from a broken automobile headlight, a spark from the heat of a tailpipe, a lighted cigarette in the hands of a driver or passenger, the hot coals from a smoker's pipe or cigar, and the many hot and sparking spots and units of an automobile motor from exhaust to generator could readily ignite the vapor cloud gathered above a highway from 5,000 gallons of spilled gasoline. Any automobile passing through the vapors could readily have produced the flames and explosions which killed the young woman in this case and without the provable intervening negligence of those who loaded and serviced the carrier and the driver who operated it. Even the most prudent and careful motorist, coming unexpectedly and without warning upon this gasoline pool and vapor, could have driven into it and ignited a holocaust without knowledge of the danger and without leaving a trace of what happened to set off the explosion and light the searing flames.

Stored in commercial quantities, gasoline has been recognized to be a substance of such dangerous characteristics that it invites a rule of strict liability — even where the hazard is contamination to underground water supply and not its more dangerous properties such as its explosiveness and flammability. *See Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138 (1969). It is even more appropriate, therefore, to apply this principle to the more highly hazardous act of transporting it as freight upon the freeways and public thoroughfares.

Recently this court, while declining to apply strict liability in a particular case, did acknowledge the suitability of the rule in a proper case. In *Pacific Northwest Bell Tel. Co. v. Port of Seattle*, 80 Wash. 2d 59, 491 P.2d 1037 (1971), we observed that strict liability had its beginning in *Fletcher v. Rylands*, *supra*, but said that it ought not be applied in a situation where a bursting water main, installed and maintained by the defendant Port of Seattle, damaged plaintiff telephone company's underground wires. There the court divided —not on the basic justice of a rule of strict liability in some cases —but in its application in a particular case to what on its face was a situation of comparatively minor hazards. Both majority and dissenting justices held, however, that the strict liability principles of *Fletcher v. Rylands*, *supra*, should be given effect in some cases; but the court divided on the question of whether underground water mains there constituted such a case.

The rule of strict liability, when applied to an abnormally dangerous activity, as stated in the RESTATEMENT (SECOND) OF TORTS § 519 (Tent. Draft No. 10, 1964), was adopted as the rule of decision in this state in *Pacific Northwest Bell Tel. Co. v. Port of Seattle*, *supra*, at 64, 491 P.2d, at 1039, 1040, as follows:

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent such harm.
>
> (2) Such strict liability is limited to the kind of harm, the risk of which makes the activity abnormally dangerous.

As to what constitutes an abnormal activity, § 520 states:

> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
>
> (a) Whether the activity involves a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) Whether the gravity of the harm which may result from it is likely to be great;
>
> (c) Whether the risk cannot be eliminated by the exercise of reasonable care;
>
> (d) Whether the activity is not a matter of common usage;
>
> (e) Whether the activity is inappropriate to the place where it is carried on; and
>
> (f) The value of the activity to the community.

[*The* ***Siegler*** *court continued its quotation from* ***Pacific Northwest Bell***:]

> Applying these factors to this system, we do not find the activity to be abnormally dangerous. There has never been a break in the system before, absent an

> earthquake, and the pipe could have been expected to last many more years. It is a system commonly used for fire protection, and its placement under ground is, of course, appropriate. We do not find § 519 of the RESTATEMENT, (Tent. Draft No. 10, 1964), or *Rylands v. Fletcher*, *supra*, applicable.

It should be noted from the above language that we rejected the application of strict liability in *Pacific Northwest Bell Tel. Co. v. Port of Seattle*, *supra*, solely because the installation of underground water mains by a municipality was not, under the circumstances shown, an abnormally dangerous activity. Had the activity been found abnormally dangerous, this court would have applied in that case the rule of strict liability.

Contrast, however, the quiet, relatively safe, routine procedure of installing and maintaining and using underground water mains as described in *Pacific Northwest Bell v. Port of Seattle*, *supra*, with the activity of carrying gasoline as freight in quantities of thousands of gallons at freeway speeds along the public highway and even at lawful lesser speeds through cities and towns and on secondary roads in rural districts. In comparing the quiescence and passive job of maintaining underground water mains with the extremely heightened activity of carrying nearly 5,000 gallons of gasoline by truck, one cannot escape the conclusion that hauling gasoline as cargo is undeniably an abnormally dangerous activity and on its face possesses all of the factors necessary for imposition of strict liability as set forth in the RESTATEMENT (SECOND) OF TORTS § 519 (Tent. Draft No. 10, 1964), above.

Transporting gasoline as freight by truck along the public highways and streets is obviously an activity involving a high degree of risk; it is a risk of great harm and injury; it creates dangers that cannot be eliminated by the exercise of reasonable care. That gasoline cannot be practicably transported except upon the public highways does not decrease the abnormally high risk arising from its transportation. Nor will the exercise of due and reasonable care assure protection to the public from the disastrous consequences of concealed or latent mechanical or metallurgical defects in the carrier's equipment, from the negligence of third parties, from latent defects in the highways and streets, and from all of the other hazards not generally disclosed or guarded against by reasonable care, prudence and foresight. Hauling gasoline in great quantities as freight, we think, is an activity that calls for the application of principles of strict liability.

The case is therefore reversed and remanded to the trial court for trial to the jury on the sole issue of damages.

HAMILTON, C.J., FINLEY, ROSELLINI, and HUNTER, JJ., and RYAN, J., pro tem., concur.

ROSELLINI, Associate Justice (concurring)

I agree with the majority that the transporting of highly volatile and flammable substances upon the public highways in commercial quantities and for commercial purposes is an activity which carries with it such a great risk of harm to defenseless users of the highway, if it is not kept contained, that the common-law principles of strict liability should apply. In my opinion, a good reason to apply these principles, which is not mentioned in the majority opinion, is that the commercial transporter can spread the loss among his customers — who benefit from this extrahazardous use of the highways. Also, if the defect which caused the substance to escape was one of manufacture, the owner is in the best position to hold the manufacturer to account.

I think the opinion should make clear, however, that the owner of the vehicle will be held strictly liable only for damages caused when the flammable or explosive substance is allowed to escape without the apparent intervention of any outside force beyond the control of the manufacturer, the owner, or the operator of the vehicle hauling it. I do not think the majority means to suggest that if another vehicle, negligently driven, collided with the truck in question, the truck owner would be held liable for the damage. But where, as here, there was no outside force which caused the trailer to become detached from the truck, the rule of strict liability should apply.

It also is my opinion that the legislature has expressed an intent that owners and operators of vehicles carrying trailers should be required to keep them under control, and that intent can be found in the statutes cited in the majority opinion.

Thus the application of the common-law principles of strict liability is in accord with the manifest legislative view of the matter.

It also should be remarked, I think, that there was in this case no evidence that the alleged negligence of the deceased, in driving faster than the posted speed, was in any sense a proximate cause of the tragedy which befell her. There was no showing that, had she been proceeding at the legal rate of speed, she could have stopped her vehicle in time to avoid being enveloped in the flames or that the gasoline would not have ignited. Thus we are not confronted in this case with a question whether contributory negligence might under some circumstances be a defense to an action of this kind. It should be understood that the court does not pass upon that question at this time.

HAMILTON, C.J., FINLEY, J., and RYAN, J., pro tem., concur.

NEILL, Associate Justice (dissenting)

The application of the doctrine of strict liability to the facts of this case is warranted, at least as the applicability is qualified by the concurring opinion of Justice Rosellini. However, to decide this case on that theory violates our established rules of appellate review. *National Indemnity Co. v. Smith-Gandy, Inc.*, 50 Wash. 2d 124, 309 P.2d 742 (1957); *State v. McDonald*, 74 Wash. 2d 474, 445 P.2d 345 (1968).

Plaintiff seeks money redress for the death of an exemplary young woman whose life was horribly terminated in a tragic accident. A jury absolved the defendants from culpability. Irrespective of our sympathy, that jury verdict must stand unless error was committed at the trial. On appeal, the Court of Appeals affirmed the verdict and judgment. *Siegler v. Kuhlman*, 3 Wash. App. 231, 473 P.2d 445 (1970). We granted review. 78 Wn. 2d 991 (1970). The only issue brought to this court by the appeal is the procedural effect of res ipsa loquitur….

I would affirm the trial court and the Court of Appeals.

STAFFORD, J., concurs.

SIEGLER v. KUHLMAN

Questions and Notes

1. In *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wash. 2d 495, 687 P.2d 212 (1984), natural gas leaked from a pipeline, allegedly as the result of negligence by a telephone company employee. The ground above the pipeline was frozen, and so the gas found its way into the plaintiff's house, where it exploded. When the plaintiff sued, should the court have imposed strict liability upon the gas company for damage caused by the explosion?

2. In *Crosby v. Cox Aircraft Co. of Washington*, 109 Wash. 2d 581, 746 P.2d 1198 (1987), the defendant's airplane crashed into the plaintiff's house. Based upon *Siegler*, would the plaintiff be required to establish negligence, or does strict liability apply? *See also* RESTATEMENT (SECOND) OF TORTS (1977) § 520A.

3. Apparently the theory of strict liability was not argued on appeal by the plaintiff; the plaintiff relied upon the doctrine of res ipsa loquitur. Do you think that doctrine would have provided a recovery in this case?

4. In an article cited in the case, Professor George Fletcher suggested that strict liability is appropriate where the defendant's activity imposes a "non-reciprocal risk" upon the plaintiff. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). Do you agree? Is the concept of "non-reciprocal risk" a useful one for distinguishing cases that should be governed by the negligence standard from those in which strict liability can be imposed?

5. Suppose *D* is driving his car at a lawful speed through a residential area. *P*, a three-year-old child, runs out into the street to chase a ball; *D* is unable to stop in time and *P* is struck by the car, suffering serious injuries. Must *P* prove that *D* was negligent in order to recover? Or should *D* be subject to strict liability? Explain your reasoning.

6. The treatment of contributory negligence on the part of the plaintiff is in a state of flux. The RESTATEMENT (2D) OF TORTS originally provided that contributory negligence is not a defense to a claim based on strict liability for abnormally dangerous activities. § 524(1). This may have been

a result of the contributory negligence rule, which in many jurisdictions barred the plaintiff's claim if he was in any way at fault. Now that the comparative negligence principle has replaced the absolute bar with a percentage reduction in proportion to fault, the rationale for § 524(1) no longer applies. Most jurisdictions now use comparative fault to allow a percentage reduction if the plaintiff is found to be at fault. This issue is taken up in more detail in Chapter Five, *infra*.

7. Recent statutes have imposed what amounts to strict liability on the generators of hazardous wastes, and the owners of property where those wastes are disposed. One estimate puts the cost of cleaning up existing hazardous waste sites at $100 billion. *Pollution and Contamination Losses: Insurance Claims Under Property and Liability Policies*, DEFENSE RESEARCH INSTITUTE (Goldstein, ed., 1988). In *Kenney v. Scientific, Inc.*, 204 N.J. Super. 228, 497 A.2d 1310 (1985), it was held that both the operator of the waste dump and those responsible for generating the wastes would be strictly liable under New Jersey law for any damages such wastes caused when loosed on the environment: "A company which creates the Frankenstein monster of abnormally dangerous waste should not expect to be relieved of accountability ... merely because the company entrusts the monster's care to another...." 497 A.2d at 1320-21. In *Kenney*, some 625 defendants were alleged to have generated toxic materials which found their way to the dump. Because of the enormous amount of money at stake, there is an abundance of literature on this subject. *See* Note, *Developments in the Law: Toxic Waste Legislation*, 99 HARV. L. REV. 1458 (1986).

8. The determination of what is an abnormally dangerous activity is made by the judge, not the jury, since the ruling applies to that activity as a whole, not just the facts of a particular case. *See Klein v. Pyrodyne Corp.*, 117 Wash. 2d 1, 810 P.2d 917 (1991).

b. Invasion of Property Rights —Nuisance

FLETCHER v. RYLANDS

Court of Exchequer, 1865, 34 L.J. Rep., N.S. 177

MARTIN, B.

The circumstances of this case raise two questions. First, assuming the plaintiff and defendants to be the owners of two adjoining closes [parcels] of land, and at some time or other beyond living memory coal had been worked under both closes and that the workings under the close of the defendants communicated with the workings under the close of the plaintiff, but of the existence of such workings both plaintiff and defendants were ignorant, and that the defendants, without any negligence or default whatever, made a reservoir upon their own land for the purpose of collecting water to supply a manufactory, and that the water escaped from an old shaft at the bottom of the reservoir into the old workings below the defendants' close, and thence into the plaintiff's close, and did damage there, are the defendants responsible?

The second question is, assuming the defendants not to be responsible upon the above state of facts, does it make any difference that the defendants employed a competent engineer and competent contractors who were ignorant of the existence of the old workings, and who selected the site of the reservoir and planned and constructed it, and on the part of defendants themselves there was no personal negligence or default whatever, but in point of fact reasonable and proper care and skill were not exercised by and on behalf of the persons so employed with reference to the old shafts found at the bottom of the reservoir, to provide for the sufficiency of the reservoir to bear the pressure of the water, which, when filled to the height proposed, it would have to bear.

* * *

First, I think there was no trespass. In the judgment of my brother Bramwell, to which I shall hereafter refer, he seems to think the act of the defendants was a trespass, but I cannot concur, and I own it seems to me that the cases cited by him, *viz.*, *Leame v. Bray* (3 East, 593) and *Gregory v. Piper* (9 B.& C. 591) prove the contrary. I think the true criterion of trespass is laid down in the

judgments in the former case, that to constitute trespass the act doing the damage must be immediate, and that if the damage be mediate or consequential (which I think the present was), it is not a trespass. Secondly, I think there was no nuisance in the ordinary and generally understood meaning of that word, that is to say, something hurtful or injurious to the senses. The making a pond for holding water is a nuisance to no one. The digging a reservoir in a man's own land is a lawful act. It does not appear that there was any embankment, or that the water in the reservoir was ever above the level of the natural surface of the land, and the water escaped from the bottom of the reservoir, and in ordinary course would descend by gravitation into the defendants' own land, and they did not know of the existence of the old workings. To hold the defendants liable would therefore make them insurers against the consequence of a lawful act upon their own land when they had no reason to believe or suspect that any damage was likely to ensue.

[*The second question was also answered in the negative; Baron Martin found that there was no reason to suspect any danger, and therefore found no negligence. - ed.*]

BRAMWELL, B.

* * *

I agree with Mr. Mellish, that the case is singularly wanting in authority, and, therefore, while it is always desirable to ascertain the principle on which a case depends, it is especially so here.

Now, what is the plaintiff's right? He had the right to work his mines to their extent, leaving no boundary between himself and the next owner. By so doing, he subjected himself to all consequences resulting from natural causes; among others, to the influx of all water naturally flowing in; but he had a right to be free from what has been called foreign water —that is, water artificially brought or sent to him directly, or indirectly by its being sent to where it would flow to him. * * *

I proceed to deal with the arguments the other way. It is said, there must be a trespass or nuisance with negligence. I do not agree with that, and I think *Bonomi v. Blackhouse*, 9 H.L. Cas. 903; s.c. 27 LAW J. REP., N.S., Q.B. 378, and *ante*, Q.B. 181, shows the contrary. But why is not this a trespass? —*see Gregory v. Piper*, 9 B.& C. 591. Wilfulness is not material —*see Leame v. Bray*, 3 East, 593. Why is it not a nuisance? The nuisance is not in the reservoir, but in the water escaping. As in *Bonomi v. Blackhouse*, 9 H.L. Cas. 903; s.c. 27 LAW J. REP., N.S., Q.B. 378, and *ante*, Q.B. 181, the act was lawful, the mischievous consequence was a wrong. Where two carriages come in collision, if there is no negligence in either, it is as much the act of the one driver as of the other that they meet. The cases of carriers and innkeepers are really cases of contract, and, though exceptional, furnish no evidence that the general law, in cases wholly independent of contract, is not what I have stated. The old common law liability for fire created a liability beyond what I contend for here.

I think, therefore, on the plain ground that the defendants have caused water to flow into the plaintiff's mines, which, but for the defendants' act, would not have gone there, this action is maintainable. I think that the defendants' innocence, whatever may be its moral bearing on the case, is immaterial in point of law. But I may as well add, that if the defendants did not know what would happen, their agents knew that there were old shafts on their land; knew, therefore, that they must lead to old workings; knew that those old workings might extend in any direction, and, consequently, knew damage might happen. The defendants surely are as liable as their agents would be. Why should not both be held to act at their peril? But I own, this seems to me, rather to enforce the rule, that knowledge and wilfulness are not necessary to make the defendant liable, than to give the plaintiff a separate ground of action. My judgment is for the plaintiff.

[*POLLOCK, C.B., voted with MARTIN, B.*]

FLETCHER v. RYLANDS

L.R. 1 Ex. 265 (1866)

May 14, 1866. BLACKBURN, J., read the following judgment of the court

This was a Special Case stated by an arbitrator under an order of nisi prius, in which the question for the court is stated to be whether the plaintiff is entitled to recover any, and, if any, what, damages from the defendants by reason of the matters

thereinbefore stated. In the Court of Exchequer, POLLOCK, C.B., and MARTIN, B., were of opinion that the plaintiff was not entitled to recover at all, BRAMWELL, B., being of a different opinion. The judgment in the Court of Exchequer was, consequently, given for the defendants in conformity with the opinion of the majority of the court. The only question argued before us was whether this judgment was right, nothing being said about the measure of damages in case the plaintiff should be held entitled to recover.

We have come to the conclusion that the opinion of BRAMWELL, B., was right, and that the answer to the question should be that the plaintiff was entitled to recover damages from the defendants by reason of the matters stated in the Case, and consequently that the judgment below should be reversed; but we cannot, at present, say to what damages the plaintiff is entitled. It appears from the statement in the Case, that the plaintiff was damaged by his property being flooded by water which, without any fault on his part, broke out of a reservoir constructed on the defendants' land by the defendants' orders and maintained by the defendants. It appears from the statement in the Case, that the coal under the defendants' land had, at some remote period, been worked out, but that this was unknown at the time when the defendants gave directions to erect the reservoir, and the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for this latent defect in the defendants' subsoil. It further appears from the Case that the defendants selected competent engineers and contractors and make the reservoir, and themselves personally continued in total ignorance of what we have called the latent defect in the subsoil, but that the persons employed by them, in the course of the work, became aware of the existence of ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings. It is found that the defendants personally were free from all blame, but that in fact, proper care and skill was not used by the persons employed by them to provide for the sufficiency of the reservoir with reference to these shafts. The consequence was, that the reservoir, when filled with water, burst into the shafts, the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief. The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible.

The question of law, therefore, arises: What is the liability which the law casts upon a person who like the defendants, lawfully brings on his land something which, though harmless while it remains there, will naturally do mischief if it escape out of his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land, and keep it there in order that it may not escape and damage his neighbour's, but the question arises whether the duty which the law casts upon him under such circumstances is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect. Supposing the second to be the correct view of the law, a further question arises subsidiary to the first, namely, whether the defendants are not so far identified with the contractors whom they employed as to be responsible for the consequences of their want of skill in making the reservoir in fact insufficient with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts went to.

We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is prima facie answerable for all the damages which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of vis major, or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn

is eaten down by the escaped cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. On authority this, we think, is established to be the law, whether the thing so brought be beasts or water, or filth or stenches.

The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape, that is, with regard to tame beasts, for the grass they eat and trample upon, although nor for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick or bulls to gore, but if the owner knows that the beast has that the beast has a vicious propensity to attack man he will be answerable for that too. As early as [1480] BRIAN, C.J., lays down the doctrine in terms very much resembling those used by LORD HOLT in *Tenant v. Goldwin*, which will be referred to afterwards. It was trespass with cattle. Plea: that the plaintiff's land adjoined a place where the defendant had common; that the cattle strayed from the common, and the defendant drove them back as soon as he could. It was held a bad plea. BRIAN, C.J., says:

> It behoves him to use his common so that it shall do no hurt to another man, and if the land in which he has common be not inclosed, it behoves him to keep the beasts in the common, and out of the land of any other.

He adds, when it was proposed to amend by pleading that they were driven out of the common by dogs,

> that although that might give a right of action against the master of the dogs, it was no defence to the action of trespass by the person on whose land the cattle went.

In *Cox v. Burbidge*, WILLIAMS, J., says (13 C.B.N.S. at p. 438):

> I apprehend the law to be perfectly plain. If I am the owner of an animal in which, by law, the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial.

So in *May v. Burdett*, the court, after an elaborate examination of the old precedents and authorities, came to the conclusion that a person keeping a mischievous animal is bound to keep it secure at his peril. And in 1 HALE'S PLEAS OF THE CROWN, p. 430, Lord Hale states that where one keeps a beast knowing that its nature or habits were such that the natural consequences of his being loose is that he will harm men, the owner

> must at his peril keep him up safe from doing hurt, for though he uses his diligence to keep him up, if he escapes and does harm, the owner is liable to answer damages;

though, as he proceeds to show, he will not be liable criminally without proof of want of care.

No case has been found in which the question of the liability of noxious vapours escaping from a man's works by inevitable accident has been discussed, but the following case will illustrate it. Some years ago several actions were brought against the occupiers of some alkali works of Liverpool for the damage alleged to be caused by the chlorine fumes of their works. The defendants

proved that they had, at great expense, erected a contrivance by which the fumes of chlorine were condensed, and sold as muriatic acid, and they called a great body of scientific evidence to prove that this apparatus was so perfect that no fumes possibly could escape from the defendants' chimneys. On this evidence it was pressed upon the juries that the plaintiff's damage must have been due to some of the numerous other chimneys in the neighbourhood. The juries, however, being satisfied that the mischief was occasioned by chlorine, drew the conclusion that it had escaped from the defendants' works somehow, and in each case found for the plaintiff. No attempt was made to disturb these verdicts on the ground that the defendants had taken every precaution which prudence or skill could suggest to keep those fumes in, and that they could not be responsible unless negligence were shown, yet if the law be as laid down by the majority of the Court of Exchequer it would have been a very obvious defence. If it had been raised, the answer would probably have been that the uniform course of pleading in actions for such nuisances is to say that the defendant caused the noisome vapours to arise on his premises and suffered them to come on the plaintiff's without stating that there was any want of care or skill on the defendant's part; and that *Tenant v. Goldwin* showed that this was founded on the general rule of law he whose stuff it is must keep it so that it may not trespass. There is no difference in this respect between chlorine and water; both will, if they escape, do damage, the one by scorching and the other by drowning, and he who brings them on his land must at his peril see that they do not escape and do that mischief.

* * *

But it was further said by MARTIN, B., that when damage is done to personal property, or even to the person by collision, neither upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible. This is no doubt true, and this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as, for instance, where an unruly horse gets on the footpath of a public street and kills a passenger: *Hammack v. White*, or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering: *Scott v. London Dock Co.* Many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and, that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger, and persons who, by the license of the owners, pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what prima facie was a trespass can be explained on the same principle, namely, that the circumstances were such as to show that the plaintiff had taken the risk upon himself. But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what there might be, nor could he in any way control the defendants, or hinder their building what reservoirs they liked, and storing up in them what water they pleased, so long as the defendants succeeded in preventing the water which they there brought from interfering with the plaintiff's property.

The view which we take of the first point renders it unnecessary to consider whether the defendants would or would not be responsible for the want of care and skill in the persons employed by them. We are of opinion that the plaintiff is entitled to recover, but as we have not heard any argument as to the amount, we are not able to give judgment for what damages. The parties probably will empower their counsel to agree on the amount of damages; should they differ on the principle the case may be mentioned again.

[*The defendants appealed to the House of Lords. - ed.*]

RYLANDS v. FLETCHER

L.R. 3 H.L. 330 (1868)

LORD CAIRNS

* * *

The principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully, have used that close for any purpose for which it might, in the ordinary course of the enjoyment of land, be used, and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain on him to have done so by leaving or by interposing some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature.

* * *

LORD CRANWORTH

Applying the principles of these decisions to the case now before the House, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The plaintiff had a right to work his coal through the lands of Mr. Whitehead and up to the old workings. If water naturally rising in the defendants' land (we may treat the land as the land of the defendants for the purpose of this case) had by percolation found its way down to the plaintiff's mine through the old workings and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the defendants they would have done no more than they were entitled to do, for, according to the principle acted on in *Smith v. Kenrick*, the person working the mine under the close in which the reservoir was made had a right to win and carry away all the coal without leaving any wall or barrier against Whitehead's land. But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however, skilfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible. I concur, therefore, with my noble and learned friend in thinking that the judgment below must be affirmed, and that there must be judgment for the defendant in error.

Questions and Notes

1. The defendant's actions in this case were held to be a *trespass*, a direct invasion of the plaintiff's person or property. Trespass is one of the ancient forms of action recognized at common law, distinguished from trespass *on the case*, or an action *in case*, which is an injury to the person or property of the plaintiff, but caused indirectly. For example, if the defendant negligently drove his cart so that a log fell out and struck another cart driver, breaking his arm, the plaintiff could sue for trespass *vis et armis* (literally, "with force of arms"), and proof of negligence was not required. However, if the defendant negligently allowed a log to fall out of his cart, and the plaintiff later hit the log and broke his arm in the collision, the plaintiff could only sue for trespass on the case, and negligence usually had to be shown. *See* Appendix C. Nonetheless, in *Fletcher v. Rylands* the court clearly considered this action to be based on trespass, rather than case.

The RESTATEMENT (2D), TORTS, provides:

> **§ 165. Liability for Intrusions Resulting from Reckless or Negligent Conduct and Abnormally Dangerous Activities**
>
> One who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or to a thing or a third person in whose security the possessor has a legally protected interest.

Is this more or less protective of a property

owner's rights than the court's description of liability in *Fletcher*?

2. One of the court's arguments in favor of strict liability was the long history of strict liability for trespasses by animals, both domesticated and "wild." When a defendant's cattle escape and eat a neighbor's crops, liability will be imposed regardless of fault. If a wild animal escapes and mauls someone, strict liability will be imposed. This is the modern rule. *See* RESTATEMENT (2D), TORTS, §§ 504-518. Note that in both cases the liability is restricted to that which makes the animal dangerous. On the other hand, animals not known to be dangerous impose only the duty to use reasonable care. *Id.*, § 518. Thus, the origin of the misunderstood "every dog gets one bite" rule: So long as the animal is not known to be ferocious, the owner is required only to use reasonable care. However, after the dog's first bite, the owner is on notice of its ferocity, and is then subject to strict liability for subsequent bites. Is this a sensible rule?

3. Students who enjoy A.P. Herbert will be amused by *Haddock v. Thwale*, or "What is a Motor-Car," found in UNCOMMON LAW 124-132.

4. Not everyone is impressed with the wisdom of *Fletcher v. Rylands:* Frank C. Woodside, III et al., *Why Absolute Liability under Rylands V. Fletcher Is Absolutely Wrong*, 29 U. DAYTON L. REV. 1 (2003).

BOHAN v. PORT JERVIS GAS LIGHT CO.

25 N.E. 246 (N.Y. 1890)

[*See dissenting opinion for facts. - ed.*]

BROWN, J.

* * *

It was claimed by the defendant, and the court refused a request to charge, "that unless the jury should find that the works of the defendant were defective, or that they were out of repair, or that the persons in charge of manufacturing gas at those works were unskillful and incapable, their verdict should be for the defendant;" and "that if the odors which affect the plaintiff are those that are inseparable from the manufacture of gas with the most approved apparatus, and with the utmost skill and care, and do not result from any defects in the works, or from want of care in their management, the defendant is not liable." An exception to this ruling raises the principal question discussed in the case. While every person has exclusive dominion over his own property, and may subject it to such uses as will subserve his wishes and private interests, he is bound to have respect and regard for his neighbor's rights. The maxim, "sic utere tuo ut alienum non laedas," limits his powers. He must make a reasonable use of his property, and a reasonable use can never be construed to include those uses which produce destructive vapors and noxious smells, and that result in material injury to the property and to the comfort of the existence of those who dwell in the neighborhood. The reports are filled with cases where this doctrine has been applied, and it may be confidently asserted that no authority can be produced holding that negligence is essential to establish a cause of action for injuries of such a character. A reference to a few authorities will sustain this assertion. In *Campbell v. Seaman*, *supra*, there was no allegation of negligence in the complaint, and there was an allegation of due care in the answer. There was no finding of negligence, and this court affirmed a recovery. In *Heeg v. Licht*, 80 N.Y. 579, an action for injuries arising from the explosion of fire-works, the trial court charged the jury that they must find for the defendant, "unless they found that the defendant carelessly and negligently kept the gunpowder on his premises." And he refused to charge upon the plaintiff's request "that the powder-magazine was dangerous in itself to plaintiff, and was a private nuisance, and defendant was liable to the plaintiff, whether it was carelessly kept or not." There was a verdict for the defendant, and this court reversed the judgment, holding that the charge was erroneous.

* * *

The principle that one cannot recover for injuries sustained from lawful acts done on one's own property, without negligence and without malice, is well founded in the law. Everyone has the right to the reasonable enjoyment of his own property, and, so long as the use to which he devotes it violates no rights of others, there is no legal cause of action against him. The wants of

mankind demand that property be put to many and various uses and employments, and one may have upon his property any kind of lawful business; and so long as it is not a nuisance, and is not managed so as to become such, he is not responsible for any damage that his neighbor accidentally and unavoidable sustains. Such losses the law regards as damnum absque injuria; and under this principle, if the steam-boiler on the defendant's property, or the gas-retort, or the naphtha tanks, had exploded, and injured the plaintiff's property, it would have been necessary for her to prove negligence on the defendant's part to entitle her to recover. *Losee v. Buchanan*, 51 N.Y. 476. But where the damage is the necessary consequence of just what the defendant is doing, or is incident to the business itself, or the manner in which it is conducted, the law of negligence has no application, and the law of nuisance applies. *Hay v. Cohoes Co.*, 2 N.Y. 159; *McKeon v. See*, 51 N.Y. 300. The exception to the refusal to charge the first proposition above quoted was not therefore well taken.

* * *

HAIGHT, J. (dissenting)

This action was brought to recover damages alleged to have been sustained by the plaintiff in consequence of offensive odors proceeding from the gas-works of the defendant, and to obtain an injunction restraining the defendant from permitting further emission of such odors. The complaint alleges negligent and unskillful construction of the works, and also negligence in the use and maintenance thereof. The trial resulted in a verdict for damages, upon which the court awarded a judgment for an injunction.

… A nuisance, as it is ordinarily understood, is that which is offensive, and annoys and disturbs. A common or public nuisance is that which affects the people, and is a violation of a public right, either by direct encroachment upon public property or by doing some act which tends to a common injury, or by the omitting of that which the common good requires, and which it is the duty of a person to do.

Public nuisances are founded upon wrongs that arise from the unreasonable, unwarrantable, or unlawful use of property, or from improper, indecent, or unlawful conduct, working an obstruction of injury to the public, and producing material annoyance, inconvenience, and discomfort. Founded upon a wrong, it is indictable and punishable as for a misdemeanor. It is the duty of individuals to observe the rights of the public, and to refrain from doing of that which materially injures and annoys or inconveniences the people; and this extends even to business which would otherwise be lawful, for the public health, safety, convenience, comfort, or morals is of paramount importance; and that which affects or impairs it must give way for the general; good. In such cases, the question of negligence is not involved, for its injurious effect upon the public makes it a wrong which it is the duty of the courts to punish rather than to protect. But a private nuisance rests upon a different principle. It is not necessarily founded upon a wrong, and consequently cannot be indicted and punished as for an offense. It is founded upon injuries that result from the violation of private rights, and produce damages to but one or few persons. Injury and damage are essential elements, and yet they may both exist, and still the act or thing producing them not be a nuisance. Every person has a right to the reasonable enjoyment of his own property; and so long as the use to which he devotes it violates no rights of another, however much damage other may sustain therefrom, his use is lawful, and it is damnum absque injuria. *Thurston v. Hancock*, 12 Mass. 222. So that a person may suffer inconvenience and be annoyed, and if the act or thing is lawful, and no rights are violated, it is not such a nuisance as the law will afford a redress; but if his rights are violated, as, for instance, if a trespass has been committed upon his land by the construction of the eaves of a house so that the water will drip thereon, or by the construction of a ditch or sewer so that the water will flow, over and upon his premises, or if a brick-kiln be burned so near his premises as that the noxious gases generated therefrom are borne upon his premises, killing and destroying his trees and vegetation, it will be a nuisance of which he may be awarded damages. *Campbell v. Seaman*, 63 N.Y. 568. Hence it follows that in some instances a party who devotes his premises to a use that is strictly lawful in itself may, even though his intentions are laudable and motives good, violate the rights of those adjoining him, causing them injury and damage, and thus become liable as for a nuisance. It therefore

becomes important that the courts should proceed with caution, and carefully consider the rights of the parties, and not declare a lawful business a nuisance except in cases where rights have been invaded, resulting in material injury and damage. People living in cities and large towns must submit to some inconvenience, annoyance, and discomforts. They must yield some of their rights to the necessity of business which from the nature of things must be carried on in populous cities. Many things have to be tolerated that under other circumstances would be abated, the necessity for their existence outweighing the ill results that proceed therefrom.

… In the case of *Heeg v. Licht*, 80 N.Y. 579, the defendant had constructed upon his premises a powder-magazine, in which he kept stored a quantity of powder, which, without apparent cause, exploded, damaging the plaintiff's building. It was held that the plaintiff could recover, without showing carelessness or negligence. MILLER, J., in delivering the opinion of the court, says: "The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, and might in some localities render it a private nuisance. In such a care the rule which exonerates a party engaged in a lawful business when free from negligence has no application." The rule we have contended for is thus recognized and conceded. There is a distinction between an action for a nuisance in respect to an act producing a material injury to property and one in respect to an act producing personal discomfort.

BOOMER v. ATLANTIC CEMENT CO.

26 N.Y.2d 219, 257 N.E.2d 870 (1970)

BERGAN, Judge

Defendant operates a large cement plant near Albany. These are actions for injunction and damages by neighboring land owners alleging injury to property from dirt, smoke and vibration emanating from the plant. A nuisance has been found after trial, temporary damages have been allowed; but an injunction has been denied.

The public concern with air pollution arising from many sources in industry and in transportation is currently accorded ever wider recognition accompanied by a growing sense of responsibility in State and Federal Governments to control it. Cement plants are obvious sources of air pollution in the neighborhoods where they operate.

But there is now before the court private litigation in which individual property owners have sought specific relief from a single plant operation. The threshold question raised by the division of view on this appeal is whether the court should resolve the litigation between the parties now before it as equitably as seems possible; or whether, seeking promotion of the general public welfare, it should channel private litigation into broad public objectives.

A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.

Effective control of air pollution is a problem presently far from solution even with the full public and financial powers of government. In large measure adequate technical procedures are yet to be developed and some that appear possible may be economically impracticable.

It seems apparent that the amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation; and of the actual effect on public health. It is likely to require massive public expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls. A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as

an incident to solving a dispute between property owners and a single cement plant —one of many — in the Hudson River valley.

The cement making operations of defendant have been found by the court of Special Term to have damaged the nearby properties of plaintiffs in these two actions. That court, as it has been noted, accordingly found defendant maintained a nuisance and this has been affirmed at the Appellate Division. The total damage to plaintiffs' properties is, however, relatively small in comparison with the value of defendant's operation and with the consequences of the injunction which plaintiffs seek.

The ground for the denial of injunction, notwithstanding the finding both that there is a nuisance and that plaintiffs have been damaged substantially, is the large disparity in economic consequences of the nuisance and of the injunction. This theory cannot, however, be sustained without overruling a doctrine which has been consistently reaffirmed in several leading cases in this court and which has never been disavowed here, namely that where a nuisance has been found and where there has been any substantial damage shown by the party complaining an injunction will be granted.

The rule in New York has been that such a nuisance will be enjoined although marked disparity be shown in economic consequence between the effect of the injunction and the effect of the nuisance.

* * *

Although the court at Special Term and the Appellate Division held that injunction should be denied, it was found that plaintiffs had been damaged in various specific amounts up to the time of the trial and damages to the respective plaintiffs were awarded for those amounts. The effect of this was, injunction having been denied, plaintiffs could maintain successive actions at law for damages thereafter as further damage was incurred.

The court at Special Term also found the amount of permanent damage attributable to each plaintiff, for the guidance of the parties in the event both sides stipulated to the payment and acceptance of such permanent damage as a settlement of all the controversies among the parties. The total of permanent damages to all plaintiffs thus found was $185,000. This basis of adjustment has not resulted in any stipulation by the parties.

This result at Special Term and at the Appellate Division is a departure from a rule that has become settled; but to follow the rule literally in these cases would be to close down the plant at once. This court is fully agreed to avoid that immediately drastic remedy; the difference in view is how best to avoid it.

One alternative is to grant the injunction but postpone its effect to a specified future date to give opportunity for technical advances to permit defendant to eliminate the nuisance; another is to grant the injunction conditioned on the payment of permanent damages to plaintiffs which would compensate them for the total economic loss to their property present and future caused by defendant's operations. For reasons which will be developed the court chooses the latter alternative.

If the injunction were to be granted unless within a short period —*e.g.*, 18 months — the nuisance be abated by improved methods, there would be no assurance that any significant technical improvement would occur.

The parties could settle this private litigation at any time if defendant paid enough money and the imminent threat of closing the plant would build up the pressure on defendant. If there were no improved techniques found, there would inevitably be applications to the court at Special Term for extensions of time to perform on showing of good faith efforts to find such techniques.

Moreover, techniques to eliminate dust and other annoying by-products of cement making are unlikely to be developed by any research the defendant can undertake within any short period, but will depend on the total resources of the cement industry nationwide and throughout the world. The problem is universal wherever cement is made.

For obvious reasons the rate of the research is beyond control of defendant. If at the end of 18 months the whole industry has not found a technical solution a court would be hard put to close down this one cement plant if due regard be given to equitable principles.

On the other hand, to grant the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do justice between the contending parties. All of the attributions of economic loss to the properties on which plaintiffs' complaints are based will have

been redressed.

The nuisance complained of by these plaintiffs may have other public or private consequences, but these particular parties are the only ones who have sought remedies and the judgment proposed will fully redress them. The limitation of relief granted is a limitation only within the four corners of these actions and does not foreclose public health or other public agencies from seeking proper relief in a proper court.

It seems reasonable to think that the risk of being required to pay permanent damages to injured property owners by cement plant owners would itself be a reasonable effective spur to research for improved techniques to minimize nuisance.

The power of the court to condition on equitable grounds the continuance of an injunction on the payment of permanent damages seems undoubted. (*See*, *e.g.*, the alternatives considered in *McCarty v. Natural Carbonic Gas Co.*, *supra*, as well as *Strobel v. Kerr Salt Co.*, *supra*.)

The damage base here suggested is consistent with the general rule in those nuisance cases where damages are allowed. "Where a nuisance is of such a permanent and unabatable character that a single recovery can be had, including the whole damage past and future resulting therefrom, there can be but one recovery" (66 C.J.S. *Nuisances* § 140, p. 947). It has been said that permanent damages are allowed where the loss recoverable would obviously be small as compared with the cost of removal of the nuisance (*Kentucky-Ohio Gas Co. v. Bowling*, 264 Ky. 470, 477, 95 S.W.2d 1).

* * *

Thus it seems fair to both sides to grant permanent damages to plaintiffs which will terminate this private litigation. The theory of damage is the "servitude on land" of plaintiffs imposed by defendant's nuisance. (*See United States v. Causby*, 328 U.S. 256, 261, 262, 267, 66 S. Ct. 1062, 90 L. Ed. 1206, where the term "servitude" addressed to the land was used by Justice Douglas relating to the effect of airplane noise on property near an airport.)

The judgment, by allowance of permanent damages imposing a servitude on land, which is the basis of the actions, would preclude future recovery by plaintiffs or their grantees (*see Northern Indiana Public Serv. Co. v. W.J.& M.S. Vesey*, *supra*, p. 351, 200 N.E. 620).

This should be placed beyond debate by a provision of the judgment that the payment by defendant and the acceptance by plaintiffs of permanent damages found by the court shall be in compensation for a servitude on the land.

Although the Trial Term has found permanent damages as a possible basis of settlement of the litigation, on remission the court should be entirely free to re-examine this subject. It may again find the permanent damage already found; or make new findings. The orders should be reversed, without costs, and the cases remitted to Supreme Court, Albany County to grant an injunction which shall be vacated upon payment by defendant of such amounts of permanent damage to the respective plaintiffs as shall for this purpose be determined by the court.

JASEN, Judge (dissenting)

I agree with the majority that a reversal is required here, but I do not subscribe to the newly enunciated doctrine of assessment of permanent damages, in lieu of an injunction, where substantial property rights have been impaired by the creation of a nuisance.

* * *

I see grave dangers in overruling our long-established rule of granting an injunction where a nuisance results in substantial continuing damage. In permitting the injunction to become inoperative upon the payment of permanent damages, the majority is, in effect, licensing a continuing wrong. It is the same as saying to the cement company, you may continue to do harm to your neighbors so long as you pay a fee for it. Furthermore, once such permanent damages are assessed and paid, the incentive to alleviate the wrong would be eliminated, thereby continuing air pollution of an area without abatement.

It is true that some courts have sanctioned the remedy here proposed by the majority in a number of cases, but none of the authorities relied upon by the majority are analogous to the situation before us. In those cases, the courts, in denying an injunction and awarding money damages, grounded their decision on a showing that the use to which the property was intended to be put was primarily

for the public benefit. Here, on the other hand, it is clearly established that the cement company is creating a continuing air pollution nuisance primarily for its own private interest with no public benefit.

This kind of inverse condemnation (*Ferguson v. Village of Hamburg*, 272 N.Y. 234, 5 N.E.2d 801) may not be invoked by a private person or corporation for private gain or advantage. Inverse condemnation should only be permitted when the public is primarily served in the taking or impairment of property. (*Matter of New York City Housing Auth. v. Muller*, 270 N.Y. 333, 343, 1 N.E.2d 153, 156; *Pocantico Water Works Co. v. Bird*, 130 N.Y. 249, 258, 29 N.E. 246, 248.) The promotion of the interests of the polluting cement company has, in my opinion, no public use or benefit.

Nor is it constitutionally permissible to impose servitude on land, without consent of the owner, by payment of permanent damages where the continuing impairment of the land is for a private use. (*See Fifth Ave. Coach Lines v. City of New York*, 11 N.Y.2d 342, 347, 229 N.Y.S.2d 400, 403, 183 N.E.2d 684, 686; *Walker v. City of Hutchinson*, 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178.) This is made clear by the State Constitution (art. I, § 7, subd. (a)) which provides that "[p]rivate property shall not be taken for *public use* without just compensation" (emphasis added). It is, of course, significant that the section makes no mention of taking for a *private use*.

In sum, then, by constitutional mandate as well as by judicial pronouncement, the permanent impairment of private property for private purposes is not authorized in the absence of clearly demonstrated public benefit and use.

I would enjoin the defendant cement company from continuing the discharge of dust particles upon its neighbors' properties unless, within 18 months, the cement company abated this nuisance.

* * *

Questions and Notes

1. This case raises questions about what *remedies* to use in nuisance cases. The court must not only decide whether the defendant has invaded some protected right of the plaintiff, but must also decide what to do about it. Most of the time, the plaintiff in a tort case is interested in money damages. In this case the plaintiff also sought a form of *equitable* relief, an injunction. The difference between remedies in *equity* and remedies *at law* is quite complex, and will be covered in greater depth in your Civil Procedure class. In a nutshell, the two forms of relief reflect a historical development in the British courts in which some courts were permitted to award damages, while other courts (more closely controlled by the Crown) were able to award "equitable" relief —to order the defendant to do the fair thing. The standards in courts of law and in courts of equity were different, and having the two systems compete for the same legal business made for fascinating (although quite confusing) legal developments. Virtually all jurisdictions now use the same court system to dispense whichever remedies seem appropriate. For a discussion of the history of law and equity, consult a civil procedure text such as JAMES & HAZARD, CIVIL PROCEDURE §§ 1.3-1.5.

SPUR INDUSTRIES v. DEL E. WEBB DEVELOPMENT CO.

108 Ariz. 178, 494 P.2d 700 (1972)

CAMERON, Vice Chief Justice

From a judgment permanently enjoining the defendant, Spur Industries, Inc., from operating a cattle feedlot near the plaintiff Del E. Webb Development Company's Sun City, Spur appeals. Webb cross-appeals. Although numerous issues are raised, we feel that it is necessary to answer only two questions. They are:

1. Where the operation of a business, such as a cattle feedlot is lawful in the first instance, but becomes a nuisance by reason of a nearby residential area, may the feedlot operation be enjoined in an action brought by the developer of the residential area?

2. Assuming that the nuisance may be enjoined, may the developer of a completely new town or urban area in a previously agricultural area be required to indemnify the operator of the feedlot who must move or cease operation because of the

presence of the residential area created by the developer?

* * *

It is clear that as to the citizens of Sun City, the operation of Spur's feedlot was both a public and a private nuisance. They could have successfully maintained an action to abate the nuisance. Del Webb, having shown a special injury in the loss of sales, had a standing to bring suit to enjoin the nuisance. *Engle v. Clark*, 53 Ariz. 472, 90 P.2d 994 (1939); *City of Phoenix v. Johnson*, *supra*. The judgment of the trial court permanently enjoining the operation of the feedlot is affirmed.

Must Del Webb Indemnify Spur?

A suit to enjoin a nuisance sounds in equity and the courts have long recognized a special responsibility to the public when acting as a court of equity:

> **§ 104. Where public interest is involved.**
>
> Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. Accordingly, the granting or withholding of relief may properly be dependent upon considerations of public interest.... 27 AM. JUR. 2D, *Equity*, page 626.

In addition to protecting the public interest, however, courts of equity are concerned with protecting the operator of a lawfully, albeit noxious, business from the result of a knowing and willful encroachment by others near his business.

In the so-called "coming to the nuisance" cases, the courts have held that the residential landowner may not have relief if he knowingly came into a neighborhood reserved for industrial or agricultural endeavors and has been damaged thereby:

> Plaintiffs chose to live in an area uncontrolled by zoning laws or restrictive covenants and remote from urban development. In such an area plaintiffs cannot complain that legitimate agricultural pursuits are being carried on in the vicinity, nor can plaintiffs, having chosen to build in an agricultural area, complain that the agricultural pursuits carried on in the area depreciate the value of their homes. The area being *primarily agricultural*, and opinion reflecting the value of such property must take this factor into account. The standards affecting the value of residence property in an urban setting, subject to zoning controls and controlled planning techniques, cannot be the standards by which agricultural properties are judged.
>
> People employed in a city who build their homes in suburban areas of the county beyond the limits of a city and zoning regulations do so for a reason. Some do so to avoid the high taxation rate imposed by cities, or to avoid special assessments for street, sewer and water projects. They usually build on improved or hard surface highways, which have been built either at state or county expense and thereby avoid special assessments for these improvements. It may be that they desire to get away from the congestion of traffic, smoke, noise, foul air and the many other annoyances of city life. But with all these advantages in going beyond the area which is zoned and restricted to protect them in their homes, they must be prepared to take the disadvantages. *Dill v. Excel Packing Company*, 183 Kan. 513, 525, 526, 331 P.2d 539, 548, 549 (1958). *See also East St. Johns Shingle Co. v. City of Portland*, 195 Or. 505, 246 P.2d 554, 560-562 (1952).

And:

> a party cannot justly call upon the law to make that place suitable for his residence which was not so when he selected it.... *Gilbert v. Showerman*, 23 Mich. 448, 455, 2 Brown 158 (1871).

Were Webb the only party injured, we would feel justified in holding that the doctrine of "coming to the nuisance" would have been a bar to the relief asked by Webb, and, on the other hand, had Spur located the feedlot near the outskirts of a city and had the city grown toward the feedlot,

Spur would have to suffer the cost of abating the nuisance as to those people locating within the growth pattern of the expanding city:

> The case affords, perhaps, an example where a business established at a place remote from population is gradually surrounded and becomes part of a populous center, so that a business which formerly was not an interference with the rights of others has become so by the encroachment of the population.... *City of Ft. Smith v. Western Hide & Fur Co.*, 153 Ark. 99, 103, 239 S.W. 724, 726 (1922).

We agree, however, with the Massachusetts court that:

> The law of nuisance affords no rigid rule to be applied in all instances. It is elastic. It undertakes to require only that which is fair and reasonable under all the circumstances. In a commonwealth like this, which depends for its material prosperity so largely on the continued growth and enlargement of manufacturing of diverse varieties, `extreme rights' cannot be enforced.... *Stevens v. Rockport Granite Co.*, 216 Mass. 486, 488, 104 N.E. 371, 373 (1914).

There was no indication in the instant case at the time Spur and its predecessors located in western Maricopa County that a new city would spring up, full-blown, alongside the feeding operation and that the developer of that city would ask the court to order Spur to move because of the new city. Spur is required to move not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public.

Del Webb, on the other hand, is entitled to the relief prayed for (a permanent injunction), not because Webb is blameless, but because of the damage to the people who have been encouraged to purchase homes in Sun City. It does not equitable or legally follow, however, that Webb, being entitled to the injunction, is then free of any liability to Spur if Webb has in fact been the cause of the damage Spur has sustained. It does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result.

Having brought people to the nuisance to the foreseeable detriment of Spur, Webb must indemnify Spur for a reasonable amount of the cost of moving or shutting down. It should be noted that this relief to Spur is limited to a case wherein a developer has, with foreseeability, brought into a previously agricultural or industrial area the population which makes necessary the granting of an injunction against a lawful business and for which the business has no adequate relief.

It is therefore the decision of this court that the matter be remanded to the trial court for a hearing upon the damages sustained by the defendant Spur as a reasonable and direct result of the granting of the permanent injunction. Since the result of the appeal may appear novel and both sides have obtained a measure of relief, it is ordered that each side will bear its own costs.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Questions and Notes

1. Feedlot operators received more sympathetic treatment in a recent Idaho case. *Carpenter v. Double R Cattle Co.*, 108 Idaho 602, 701 P.2d 222 (1985).

2. Is there a difference between the treatment of damage caused by "nuisance" and damage caused by "negligence"? If so, what is it?

3. Should such a distinction be made? Why or why not?

4. In *Armory Park Neighborhood Ass'n v. Episcopal Community Services in Arizona*, 148 Ariz. 1, 8, 712 P.2d 914, 921 (1985), the plaintiffs' association brought an action to enjoin the defendant from providing free meals to indigent persons because, before and after mealtime, center clients frequently trespassed, urinated, defecated, drank and littered on the plaintiffs' property.

Should the court have granted the injunction? Why or why not?

5. Prosser comments, "So far as there is one central idea, it would seem that it is that liability must be based upon conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interests of others." PROSSER & KEETON, § 2, at 6. In this quotation, is "unreasonable" synonymous with "negligent"?

c. Animals

WILLIAMS v. JOHNSON

781 P.2d 922 (Wy. 1989)

CARDINE, Chief Justice

Appellant, Thomas Williams, was delivering mail in a Cheyenne neighborhood when he was attacked by two dogs owned by appellees, Daniel and Jennifer Johnson. The dogs attacked appellant while he was standing on the porch of a house next door to appellees' house. Although the dogs inflicted no direct injury on appellant, they frightened him and he injured his knee in an attempt to avoid the attack. Williams sued to recover compensation for his injury. The trial court entered summary judgment in favor of the Johnsons. Williams now appeals, asserting that the district court erred in its determination that, in order to defeat the summary judgment motion, he must raise an issue of fact concerning Johnsons' knowledge of the dangerous propensities of their dogs.

We affirm.

The only issue raised by appellant is this:

> The court below erred in ruling that as a matter of law, appellants must have had notice of the dangerous propensities of their dogs.

Appellant's complaint, filed in June 19, 1987, generally alleged appellees' liability based on the facts outlined above, but omitted reference to any particular theory of recovery. His "Pre-trial Memorandum," however, limited the factual and legal issues which he considered material to appellees' liability to the following:

> 1. Was appellant attacked by dogs owned by appellee?
>
> 2. Was such an attack the proximate cause of his injury?
>
> 3. Could appellees be held liable for that injury if they had no notice of the vicious nature of their dogs?
>
> 4. Could appellant obtain compensation for injury sustained as a result of a dog attack, during which there was no physical contact by the attacking dogs?

In opposition to the summary judgment motion, appellant argued that he need not prove appellees' knowledge of the vicious propensities of their dogs. That contention was consistent with the position he advanced at the pretrial conference, at which time appellant considered himself entitled to recover upon proof of: (1) injury, (2) proximately caused, (3) by attacking dogs owned by appellees. Appellees' summary judgment motion asserts that because of absence of any knowledge of dangerous propensities, appellees are entitled to judgment as a matter of law. We agree.

This court has recognized three distinct theories of recovery under which appellant could have argued the particular facts of this case. The first is the common law theory of strict liability of an owner who keeps an animal knowing of its dangerous propensities as articulated in RESTATEMENT, SECOND, TORTS § 509 (1977); *Abelseth v. City of Gillette*, 752 P.2d 430, 433-34 (Wyo. 1988). The second is also a common law cause of action, for negligence in the care and control of domestic animals. *Endresen v. Allen*, 574 P.2d 1219, 1221-22 (Wyo. 1978). Finally, we have recognized a theory of negligence premised on duties created by state statutes or municipal ordinances which alter the duties imposed by common law by making it unlawful for owners of domestic animals to permit them to run at large. *Id.* at 1222-25; *see also Nylen v. Dayton*, 770 P.2d 1112, 1116 (Wyo. 1989).

Under the common law, the owner of a vicious dog, if he had knowledge of a dangerous propensity, was held strictly liable for any harm proximately caused by the animal's vicious behavior. Such liability attached despite the owner's exercise of utmost care to control the

animal. RESTATEMENT, SECOND, TORTS § 509 (1977); *Abelseth*, 752 P.2d at 433-34; *Larsen v. City of Cheyenne*, 626 P.2d 558, 560 (Wyo. 1981). The common law also provided that the owner of an animal which was not vicious or not known to be vicious, but which was prone to some other potentially harmful behavior, could be held liable under a theory of negligence for any injury proximately caused by such behavior. In such cases the owner was only liable if, having knowledge of the particular propensities which created a foreseeable risk of harm, he failed to exercise reasonable care in his control of the animal. Thus, if the owner of a dog knew of its proclivity for leaping fences and chasing cars, he could be held liable for failure to take reasonable measures to confine the animal should it escape from his property and cause an accident. RESTATEMENT, SECOND, TORTS § 518 (1977); *Endresen*, 574 P.2d at 1221-22.

Common to both of these causes of action are certain facts which must be put in issue to defeat defendant's summary judgment motion, *i.e.*, (1) the owner, (2) of an animal with a propensity for potentially harmful behavior, (3) must know of that propensity, and (4) such behavior must be the proximate cause of injury to the plaintiff. In this case, appellees denied knowledge of harmful propensities. Appellant claimed knowledge of dangerous propensities was unnecessary to a common law cause of action. Appellant therefore failed to assert facts, by affidavit or otherwise, which would place in issue appellees' knowledge of the vicious nature of their dogs. This was fatal to his maintaining a cause of action under these common law theories. His suit was premised on these theories, and the district court, therefore, correctly granted appellees' summary judgment motion.

Appellant's argument on appeal, however, characterizes his suit as one based on appellees' duties under Cheyenne's municipal ordinances. He asserts that these ordinances alter the elements necessary to the common law actions and render appellees liable, despite their lack of knowledge concerning the dangerous propensities of their animals. Appellant bases that argument on our discussion in *Endresen v. Allen*, in which we explained that a dog owner's common law duty may be altered by a municipal ordinance that prohibits owners from permitting animals to run at large. We noted that, while the unconditional prohibition of such an ordinance creates a duty to restrain animals from running at large without reference to the owner's knowledge of their propensities to escape or cause harm, the ordinance does not relieve a plaintiff from the obligation of establishing that a failure to restrain was a result of the owner's negligence. Thus, we rejected the notion that a prima facie case of negligence could result from the mere fact that an animal was at large. *Endresen*, 574 P.2d at 1222-25. *See also Nylen*, 770 P.2d at 1116; *Hinkle v. Siltamaki*, 361 P.2d 37, 40-41 (Wyo. 1961).

Appellant presented his claim of a cause of action under the ordinances for the first time on appeal. Parties seeking reversal of a summary judgment may not, on appeal, assert issues or theories of recovery which were not presented to the trial court. This court will not consider such issues or theories unless it is apparent or reasonably discernable from the pleadings, affidavits and exhibits that they were raised below. *Teton Plumbing and Heating, Inc. v. Board of Trustees, Laramie County School District No. One*, 763 P.2d 843, 848 (Wyo. 1988); *Minnehoma Financial Company v. Pauli*, 565 P.2d 835, 838-39 (Wyo. 1977).

We conclude from our examination of the record that appellant never presented the trial court with a theory of recovery grounded in the duty which may have been created by the "running at large" ordinance. Instead, he proceeded solely upon a common law cause of action, arguing merely that the animal control ordinances taken as a whole created a presumption that the Johnsons' dogs were vicious.

Nowhere in his pleadings, affidavits, exhibits, or in his pretrial memorandum does appellant so much as mention any of these city ordinances. Appellees called this fact to the attention of the trial court in a brief supporting their summary judgment motion, which noted:

> The Plaintiff has not alleged that a state statute or city ordinance posed a duty upon the Defendants and the complaint basically alleges a negligence cause of action.
>
> Clearly, the Plaintiff is required to show that the Defendants had knowledge of the

> dangerous propensities of the animals or they are barred from recovery.

Appellant first mentioned the ordinances in his memorandum in opposition to the summary judgment motion, where he briefly quotes from a number of definitional provisions and the section prohibiting owners from permitting animals to run at large, and then relied upon the provisions to establish that the Johnsons' dogs, running at large, were presumed vicious because of the attack. Appellant summarizes his position with respect to the ordinances by stating, "It is clear, however, that the Cheyenne Municipal Ordinance has by definition abrogated the Common Law Rule and has created a presumption that an animal is vicious if it engages in an unprovoked attack."

The district court correctly concluded that Cheyenne's animal control ordinances did not provide appellant with presumptive proof that the Johnson's knew of the vicious nature of their dogs. The district court correctly determined that, under the common law theory of recovery advanced, appellant was required to present as an issue the fact appellees had knowledge of the dangerous propensities of their dogs. Accordingly, the summary judgment is affirmed.

URBIGKIT, J., files a dissenting opinion. [*omitted*]

d. Statutory Strict Liability

COOK v. WHITSELL-SHERMAN

796 N.E.2d 271 (Ind. 2003)

BOEHM, Justice.

Tamara Cook's dog bit Kenneth Whitsell-Sherman while Whitsell-Sherman was discharging his duties as a letter carrier. The liability of owners whose dogs bite mail carriers and certain other public servants is governed in Indiana by statute. We hold the effect of this statute is to render dog owners strictly liable if their dogs bite the described public servants without provocation.

We also hold Indiana Rule of Evidence 413 allows the admission into evidence of bills for actual charges for past medical treatment but does not authorize admission of written statements purporting to estimate future medical costs.

Factual and Procedural Background

On the afternoon of July 31, 1998, Kenneth Whitsell-Sherman was delivering mail as a letter carrier for the United States Postal Service. When he arrived at the home of Marva and Joseph Hart, the Harts were on the sidewalk outside their fenced yard and their eight-year-old daughter was several feet away on the sidewalk, holding Maggie, a 100-pound Rottweiler, on a leash. Maggie was owned by appellant Tamara Cook, and the Harts were taking care of her while Cook was out of town. When Whitsell-Sherman finished delivering the Hart's mail and attempted to walk around Mrs. Hart, Maggie broke free and bit Whitsell-Sherman on the left hand. Before this incident, Maggie had never demonstrated any aggressive or violent tendencies.

Whitsell-Sherman sued Cook and the Harts. The Harts did not appear and a default judgment was entered against them on both the complaint and Cook's cross claim for indemnity. After a bench trial, the trial court found that Cook was the owner of the dog and the Harts had custody and control at the time of the incident. The court concluded that Cook was liable for negligence per se and violation of a statutory duty.

* * * The trial court entered judgment for Whitsell-Sherman against Cook and the Harts in the amount of $87,000. Cook appealed and the Harts remained in default.

Indiana Code section 15-5-12-1 provides:

> If a dog, without provocation, bites any person who is peaceably conducting himself in any place where he may be required to go for the purpose of discharging any duty imposed upon him

> by the laws of this state or by the laws or postal regulations of the United States of America, the owner of such dog may be held liable for any damages suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

On appeal, the Court of Appeals agreed that Cook was the "owner" of the dog for purposes of this statute, but reversed the trial court's determination that the statute rendered the owner liable under the doctrine of negligence per se. The Court of Appeals reasoned that the statute imposed no duty upon Cook and did not alter the common law standard of reasonable care required of dog owners except to eliminate the common law presumption that a dog is harmless. The court concluded that under general rules of negligence a public servant who has been bitten by a dog must still show that the dog's owner failed to act reasonably to prevent the dog from causing harm. * * * This Court granted transfer.

I. Liability of "Owners" and Keepers to Public Servants Bitten by Dogs

At the time Maggie bit Whitsell-Sherman, Cook was Maggie's owner but not her custodian. Whether Indiana Code chapter 15-5-12 renders Cook liable under these facts is a question of law and we review it de novo.

Cook argues initially that the statute does not apply to her in this situation because at the time of the incident she was not in possession of the dog. Section 15-5-12-2 provides that "owner" as the term is used in 15-5-12-1 "includes a possessor, keeper, or harborer of a dog." Cook reasons that under this definitional section, an "owner" of a dog is the person who has control of the dog at the time of the bite. As in this case, the "keeper" may not be the person to whom the dog belongs. The Court of Appeals held that the statute applies to Cook by its terms. The statute explicitly provides that " 'owner' means the owner of a dog." Ind.Code § 15-5-12-2 (1998). The court reasoned that the fact that the statute goes on to say that "owner" also "includes" the "possessor, keeper, or harborer of a dog" does not restrict the term "owner" to those in immediate custody. Rather, it expands the definition of "owner" to include others in addition to the dog's owner. We agree that Cook's liability is governed by this statute. By providing that owner "includes" custodians, it does not substitute them for the owner if, like Cook, the owner is absent from the scene of the bite. This also seems fair because the owner is usually better able to know the dog's temperament than one to whom temporary custody is extended. The owner is ordinarily best positioned to give whatever special instructions are necessary to control the dog.

Cook argues that even if she is an owner, the trial court misapplied Section 15-5-12-1 when it held her negligent per se by reason of the statute. The common law presumes that all dogs, regardless of breed or size, are harmless. *Poznanski v. Horvath,* 788 N.E.2d 1255, 1257 (Ind.2003); *Ross v. Lowe,* 619 N.E.2d 911, 914 (Ind.1993). This presumption can be overcome by evidence of a known vicious or dangerous propensity of the particular dog. *Ross,* 619 N.E.2d at 914. The owner or keeper of a dog who knows of any vicious propensity is required to use reasonable care in those circumstances to prevent the animal from causing injury. *Id.* Furthermore, the owner of a dog is expected to use reasonable care to prevent injury that might result from the natural propensities of dogs. *Id.* "Thus, whether the owner or keeper of the animal is aware of any vicious propensity, the legal description of the duty owed is the same: that of reasonable care under the circumstances." *Id.* Cook argues that Indiana Code section 15-5-12-1 does nothing to alter this traditional framework other than to remove the common law presumption of harmlessness if a dog injures a public servant. Accordingly, she argues, the public servant injured by a dog still bears the burden of showing that the owner of the dog failed to exercise reasonable care to prevent the dog from causing injury.

We agree with Cook's view of the common law of dog bites, but we think it clear that Section 15-5-12-1 was intended to alter that common law framework if the victim is a letter carrier. A statute in derogation of the common law is presumed to be enacted with awareness of the common law. *Bartrom v. Adjustment Bureau, Inc.,* 618 N.E.2d 1, 10 (Ind.1993). Here, the legislature clearly intended to change the common law and did so by explicitly removing the common law presumption that a dog is harmless unless it acts otherwise. Some states have chosen to impose strict liability for all dog bites. As the Restatement

notes, "[s]tatutes frequently abolish the necessity of scienter and impose strict liability for all harm caused to human beings and livestock by dogs." *Restatement (Second) of Torts* § 509 cmt. f (1977). *See, e.g., Nicholes v. Lorenz,* 49 Mich.App. 86, 211 N.W.2d 550, 551 (1973) (a statute that provides "the owner of any dogs which shall ... bite any person ... shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness" places absolute liability on the owner of the dog).

The Indiana statute imposes a less sweeping revision of common law. It protects only public servants, and does not expressly set a standard of conduct or impose liability for a bite. The trial court concluded that the effect of the statute was to render the owner negligent per se. Negligence per se is ordinarily found where the actor has violated a duty imposed by law. *Elder v. Fisher,* 247 Ind. 598, 602, 217 N.E.2d 847, 850 (1966). For example, violation of a statute making it a misdemeanor to permit cattle to wander onto a highway is negligence per se. *Corey v. Smith,* 233 Ind. 452, 455, 120 N.E.2d 410, 412 (1954). Just as the Indiana statute does not explicitly create liability, it also does not expressly establish a standard of conduct. It thus does not suggest negligence per se under standard doctrine.

We nevertheless conclude the statute has the effect of rendering the owner liable for bites of public servants. Persons engaged in dangerous activities may be strictly liable to others who are injured. Specifically, owners of wild animals have been viewed as negligent per se for failure to control the animal. *See Bostock-Ferari Amusement Co. v. Brocksmith,* 34 Ind.App. 566, 568, 73 N.E. 281, 282 (1905). More recently, liability for injuries inflicted by wild animals has been viewed as strict liability doctrine. *Irvine v. Rare Feline Breeding Ctr.,* 685 N.E.2d 120, 123 (Ind.Ct.App.1997) (injuries by a tiger). Thus, possession of a wild animal is, like blasting, an unreasonably dangerous activity subjecting the actor to strict liability. The common law treated dogs, unlike tigers, as presumptively not dangerous and not subject to that liability. Otherwise stated, although a dog with a previously spotless record may present some risk of a bite, canine ownership was not an abnormally dangerous activity at common law. However, the Indiana statute puts dog owners on the same legal footing as owners of less domestic animals as far as public servants are concerned. The result is strict liability for failure to prevent injuries that are the result of the perceived dangerous propensity. In this case, the dangerous propensity is a dog bite. Keeping a tiger in the backyard is a classic example of an "abnormally dangerous" activity subjecting the keeper to strict liability. *See* Dan B. Dobbs, *The Law of Torts* § 345, at 947-48 (2001). The Indiana statute gives the postal delivery worker the same protection from dog bites that the common law gives all citizens from tiger maulings. In this case, the statute reflects a policy choice that the dog's owner and keeper should bear the loss rather than the injured public employee. Accordingly, Cook is subject to strict liability for Maggie's biting Whitsell-Sherman.

Reading the statute to impose strict liability is similar but not identical to the negligence per se theory followed by the trial court. Under negligence per se, the law accepts the legislative judgment that acts in violation of the statute constitute unreasonable conduct. A person whose acts are negligent per se can still invoke the excuses available to any negligent actor such as emergency response or lack of capacity. *See generally Restatement (Second) of Torts* § 288A; *Gore v. People's Sav. Bank,* 235 Conn. 360, 665 A.2d 1341, 1345 n. 10 (1995). Strict liability, on the other hand, assumes no negligence of the actor, but chooses to impose liability anyway. David C. Sobelsohn, *Comparing Fault,* 60 Ind. L.J. 413, 427-28 (1985).

By stating that an owner "may be held liable ... regardless of the former viciousness of such dog or the owner's knowledge of such viciousness," the statute directs that a court may hold a person liable whether or not the dog had a history of violence. Cook points to the statute's use of the word "may," and argues that the statute permits but does not require liability for the dog's first bite. She reasons that a successful plaintiff must still establish lack of reasonable care. We think "may" simply emphasizes the change in the liability scheme from the common law rule that every dog gets one free bite. Because every canine is a dangerous instrumentality as far as postal employees are concerned, the rules applicable to

wild animals apply to impose strict liability. The net result of eliminating the presumption of canine harmlessness is that the statute imposes strict liability on dog owners for bites of letter carriers and other public servants in the course of their duties. The result is that the statute's removal of the presumption in most cases leaves the bitten public servant with nothing more to prove to establish liability than who the owner is and that the dog sunk his teeth into the public servant without provocation. Failure to control the dog who bites under these circumstances renders the owner liable without more.

* * *

Conclusion

We hold that Indiana Code section 15-5-12-1 imposes strict liability on dog owners whose dogs bite public servants without provocation. We hold also that Rule 413 of the Indiana Rules of Evidence does not support the introduction into evidence of written estimates of future medical costs. Cook argues that the amount of damages assessed against her was excessive. Because there must be a new trial of damages, we need not address this issue. This case is remanded for retrial on the issue of damages.

SHEPARD, C.J., and DICKSON, and SULLIVAN, JJ. concur.

RUCKER, J., concurs in part and dissents in part with separate opinion.

RUCKER, Justice, concurring in part and dissenting in part.

I disagree with the majority's conclusion that Indiana Code section 15-5- 12-1 imposes strict liability on the owners of dogs that bite letter carriers and other public servants. Although the General Assembly abrogated the common law in this area, there is nothing in the statute to suggest that it did so by making dog owners strictly liable. Professor Prosser discussed the rationale for the imposition of strict liability against owners for injuries caused by dangerous animals. He explained that strict liability is appropriately placed:

> [U]pon those who, even with proper care, expose the community to the risk of a very dangerous thing.... The kind of "dangerous animal" that will subject the keeper to strict liability ... must pose some kind of an abnormal risk to the particular community where the animal is kept; hence, the keeper is engaged in an activity that subjects those in the vicinity, including those who come onto his property, to an abnormal risk. It is the exposing of others to an abnormal risk that is regarded as justifying strict liability.... Thus, strict liability has been imposed on keepers of lions and tigers, bears, elephants, wolves, monkeys, and other animals. No member of such a species, however domesticated, can ever be regarded as safe, and liability does not rest upon any experience with the particular animal.

Prosser and Keeton on the Law of Torts § 76, at 541-42 (5th ed.1984) (footnotes omitted). The underlying premise is that the animal itself is inherently dangerous and thus safety lies only in keeping the animal secure. *See, e.g., Irvine v. Rare Feline Breeding Ctr., Inc.,* 685 N.E.2d 120, 125 (Ind.Ct.App.1997) (discussing the imposition of strict liability on owners of wild animals), *trans. denied.*

There is nothing inherently dangerous about a dog. Indeed, as the majority correctly points out, under our common law, all dogs regardless of breed or size, are presumed to be harmless domestic animals. *Poznanski v. Horvath,* 788 N.E.2d 1255, 1258 (Ind.2003); *Ross v. Lowe,* 619 N.E.2d 911, 914 (Ind.1993). Ordinarily this presumption is overcome by evidence of a known or dangerous propensity as shown by the specific acts of the particular animal. *Poznanski,* 788 N.E.2d at 1258. However, even where the owner of a dog knows of the animal's dangerous propensity "[the] rules of liability are based upon negligence and not strict liability." *Id.* at 1259 (quoting *Alfano v. Stutsman,* 471 N.E.2d 1143, 1144 (Ind.Ct.App.1984)).

In this case the majority reasons the statute's language that an owner "*may be held liable* ... regardless of the former viciousness of such dog or the owner's knowledge of such viciousness," has the "net result" of imposing strict liability on dog owners when their dogs bite letter carriers and other public servants in the course of their duties. Slip op. at 8-9 (emphasis added). In my view this is an overly expansive reading of the statute. Had the Legislature intended to impose strict liability, it would have done so by dictating that an owner "*shall be held liable* ... etc." Absent such

language, I agree with my colleagues on the Court of Appeals that the statute removes the common law presumption that a dog is harmless in situations where an unprovoked dog bites a letter carrier or other public servant. In essence, the statute simply relieves the plaintiff of the burden of establishing a dog owner's knowledge of the dog's dangerous propensities. The plaintiff still has the burden of establishing that the dog owner failed to exercise reasonable care to prevent the dog from causing injury. On this point I therefore dissent. I concur in the remainder of the majority opinion.