

## NEGLIGENCE PER SE AND RES IPSA LOQUITUR: KISSING COUSINS

Aaron D. Twerski\*

At first glance, negligence per se and res ipsa loquitur appear to have little in common, except that they are found adjacent to each other in the chapter on negligence in most torts casebooks.<sup>1</sup> However, the two doctrines actually share a common theme. In both, plaintiffs seek to prove negligence based on a generalization. A defendant can prevail only by showing that the generalization should not apply to the particular facts of his or her case. The *Restatement (Third) of Torts*, in these two areas, would be more effective and more principled if it focused on the issue of when it is proper to rely on a generalization and when we must abandon the generalization in favor of a more fact-sensitive inquiry into the actor's conduct. General principles can be articulated that explain important aspects of these two doctrines; however, they seem to get lost in the detailed application of the *Restatement (Third)*'s various sections. As a former *Restatement* reporter, I am sensitive to academicians taking potshots at carefully crafted rules and comments.<sup>2</sup> I admire the work Professors Green and Powers have produced,<sup>3</sup> so much so that I feel free to critique their work and suggest some modifications that I believe would enhance their final work product.

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\* Irwin and Jill Cohen Professor of Law, Brooklyn Law School. B.S., University of Wisconsin-Milwaukee, 1970; J.D., Marquette University, 1965; A.B., Beth Medrash Elyon Research Institute, 1962.

1. See, e.g., MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* 75–109 (8th ed. 2006); THOMAS C. GALLIGAN ET AL., *TORT LAW: CASES, PERSPECTIVES, AND PROBLEMS* 207–30 (4th ed. 2007); ROBERT E. KEETON ET AL., *TORT AND ACCIDENT LAW: CASES AND MATERIALS* 398–440 (4th ed. 2004); VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS* 204–58 (11th ed. 2005); AARON D. TWERSKI & JAMES A. HENDERSON, JR., *TORTS: CASES AND MATERIALS* 161–92 (2d ed. 2008).

2. The author was a coreporter with Professor James A. Henderson, Jr. for the *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIAB.* (1998).

3. In another forum, the author has expressed some difference of opinion with the drafting of *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM* § 7 (Proposed Final Draft No. 1, 2005). See Aaron D. Twerski, *The Cleaver, the Violin and the Scalpel: Duty and the Restatement (Third) of Torts*, 60 *HASTINGS L.J.* 1, 3–5 (2008).

## I. NEGLIGENCE PER SE AND EXCUSED VIOLATION

The sections setting forth the doctrine of negligence per se and their corresponding comments<sup>4</sup> lay out rules that are relatively uncontroversial. "An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and . . . the accident victim is within the class of persons the statute is designed to protect."<sup>5</sup> A court will instruct the jury that the statutory standard of care governs the case.<sup>6</sup> The jury might have to decide (if the issue were contested) whether the actor did, in fact, violate the standard of care and whether his or her breach was the factual cause of the injury.<sup>7</sup> I have several qualms with the negligence-per-se sections. First, they read as an inexorable command to the trial judge that, absent excuse, he or she must direct a verdict on the standard of care. Second, the notion that there is an exhaustive list of excused violations that exempts the actor from civil liability for his or her failure to comply with the statutory standard of care<sup>8</sup> seems to be wrong. Furthermore, the excused-violation section is in need of a better-stated rationale to support its black-letter rule.

Let me start with a common-sense proposition. In ordinary tort cases, judges direct verdicts on the standard of care when they conclude that an actor's conduct, without question, either falls below that which is expected of a reasonable person or clearly meets the standard of reasonable care.<sup>9</sup> For the most part, the Learned Hand B < PL risk-utility test<sup>10</sup> guides the judge in deciding whether the standard should be set by the trial judge or whether the issue is for the jury.<sup>11</sup> When a statute is presented to the court as setting the standard of care, it is the role of the trial judge to decide whether to import the statutory standard as the mandatory standard of care. For the reasons set forth in *Restatement (Third)* section 14, comments *b* and *c*, the statutory standard is an important source of law that informs the trial judge as to the appropriate standard of care.<sup>12</sup> But the trial judge is not an automaton who must mechanically adopt the statutory standard of care as appropriate to

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4. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM §§ 14–15 (Proposed Final Draft No.1, 2005).

5. *Id.* § 14.

6. *See id.* § 14 cmt. c.

7. *See id.* § 14 cmt. h.

8. *See id.* § 15.

9. *See id.* § 8 cmts. b–c.

10. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

11. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 3 cmt. f & illus. 1–2 (Proposed Final Draft No.1, 2005).

12. *See id.* § 14 cmts. b–c. The rationale set forth in these comments is particularly well stated and should guide trial judges in deciding whether to remove the issue of the standard of care from jury determination.

the case. Consider *Stachniewicz v. Mar-Cam Corp.*,<sup>13</sup> a casebook favorite. In that case, “[a] fight erupted in a bar between . . . persons of American Indian ancestry and . . . other [patrons].”<sup>14</sup> The fight was preceded by racially charged remarks and shouting between the two groups.<sup>15</sup> At some point, an altercation took place, and the plaintiff was knocked down and injured.<sup>16</sup> The attacker was part of a group that had been drinking in the defendant’s establishment for two and one-half hours before the fight broke out.<sup>17</sup>

Plaintiff argued that the defendant bar owner had violated a statute and a regulation and was thus negligent per se.<sup>18</sup> The statute provided: “No person shall give or otherwise make available any alcoholic liquor to a person visibly intoxicated.”<sup>19</sup>

The regulation promulgated by the Liquor Control Board was of a different nature: “No licensee shall permit or suffer any loud, noisy, disorderly[,] or boisterous conduct, or any profane or abusive language, in or upon his licensed premises, or permit any visibly intoxicated person to enter or remain upon his licensed premises.”<sup>20</sup>

The trial court held that the violation of neither the statute nor the regulation constituted negligence per se.<sup>21</sup> On appeal the Oregon Supreme Court held that the violation of the statute was not appropriate for use as a standard of conduct in the case.<sup>22</sup> The court noted that the statute made it illegal to serve liquor to someone already visibly intoxicated<sup>23</sup> and reasoned that the standard of care that would be imported from the statute would be “particularly inappropriate for the awarding of civil damages because of the extreme difficulty, if not impossibility, of determining whether a third party’s injuries would have been caused, in any event, by the already inebriated person.”<sup>24</sup> The regulation, on the other hand, was designed to keep bars free from abusive behavior by patrons, so it was clearly applicable to the bar owner’s failure to keep order and prevent barroom brawls.<sup>25</sup>

What is interesting about the *Stachniewicz* decision is that the court did not view the Oregon statute as automatically applicable to a tort case. Instead, it looked at the facts of the case and decided

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13. 488 P.2d 436 (Or. 1971).

14. *Id.* at 437.

15. *Id.*

16. *Id.* at 437–38.

17. *Id.* at 438.

18. *Id.*

19. *Id.* (quoting OR. REV. STAT. § 471.410(3) (1969)).

20. *Id.* (quoting OR. ADMIN. R. 10-065(2) (1970)).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 439.

that adopting the statutory standard would raise causation problems that were not readily justiciable.<sup>26</sup> Use of the regulatory standard, however, was far more appropriate under the facts of the case.<sup>27</sup> The parties had been boisterous and unruly for a considerable period of time and should have been shown the door well before the altercation took place.<sup>28</sup>

The problem with section 14 of the *Restatement (Third)* is that it reads as a command to the trial judge that unless the case implicates an "excused violation," he or she is mandated to utilize the statute as the standard of care. The trial judge should be empowered to use his or her own good sense as to whether a statute is appropriate for use in a civil tort action, but there is nothing in the *Restatement (Third)* comments indicating that a trial judge may decide whether or not to use the statutory standard of care. The *Stachniewicz* court's refusal to apply the Oregon statute was not predicated on a finding of an excused violation; rather, the court refused to apply the statute because it did not fit well into the structure of a tort case.

My most serious concern, however, pertains to the *Restatement (Third)* section dealing with excused violations of statutes. Section 15 sets forth five situations in which violation of the statute is "excused," thus freeing the court from adopting the statutory standard.<sup>29</sup> The term "excused violation" almost certainly can be attributed to Justice Cardozo's opinion in *Martin v. Herzog*,<sup>30</sup> where he declared, "We think the unexcused [failure to comply with the statute] is more than some evidence of negligence. It is negligence in itself."<sup>31</sup> I have always had difficulty with the term "excused violation." Who is doing the excusing? Section 15, comment *a*, declares that recognizing excuses "prevents the negligence per se

26. *Id.* at 438.

27. *See id.* at 439; *supra* note 25 and accompanying text.

28. *Stachniewicz*, 488 P.2d at 437-38.

29. *Restatement (Third)* provides:

§15. Excused Violations

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

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

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

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

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

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

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 15 (Proposed Final Draft No. 1, 2005).

30. 126 N.E. 814 (N.Y. 1920).

31. *Id.* at 815.

doctrine from being applied in many . . . cases in which public officials might well find it inappropriate to prosecute the person who technically is a law violator.”<sup>32</sup> In my view, whether public officials would prosecute the violator is beside the point. The real problem facing the trial judge is that statutes are written in universalist “thou shalt never” language. Negligence is fact specific. It asks whether the behavior of the actor was reasonable under the circumstances.

In statutory-violation cases, there is good reason to utilize the general statutory standard of behavior. But when the judge concludes that the statutory standard does not fairly apply to the particular facts before the court, then he or she should send the case to the jury on the reasonable-person standard rather than directing a verdict on the standard of care. The problem with *Restatement (Third)* sections 14 and 15 as written is that they mandate the use of the statute, subject to excuse, when they should be geared toward determining whether the statutory standard can fairly be applied to the specific facts of the case. Consider the example set forth in section 15, comment *a*, which allows for excusing the violation of a statute that requires all motor-vehicle owners to have well-functioning brakes when the brakes fail without any negligence on the part of the owner.<sup>33</sup> These “equipment” statute cases are almost always badly reasoned.<sup>34</sup> Courts go to great lengths to avoid applying these statutes, but their labors are for naught. These statutes have no place in a negligence case—but not, as the *Restatement (Third)* suggests, because the defendant expended “reasonable efforts to comply”<sup>35</sup> with them. They do not apply because they do not establish a standard of care. If the statute mandated that the owner of a vehicle is to have his brakes inspected six times a year, then it would provide a standard of care that a

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32. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 15 cmt. a (Proposed Final Draft No.1, 2005).

33. *Id.* § 15 cmt. c.

34. *See, e.g.,* *Gowins v. Merrell*, 541 P.2d 857, 861 (Okla. 1975) (holding that the violation of a statute requiring motor vehicles to be equipped with adequate brakes is negligence per se unless defendant neither knew nor should have known of the faulty condition of the brakes); *Freund v. DeBuse*, 506 P.2d 491, 493 (Or. 1973) (holding that the violation of vehicle-equipment statute is negligence per se unless defendant introduces evidence of reasonable conduct in failing to discover the defect in the equipment). The violation of the equipment statute should never be found to be negligence per se since, as noted in the text, it does not set a standard of care. Some courts rely on statutes requiring an owner/operator of certain types of equipment to maintain it in good working condition in order to justify imposing strict liability. Since the legislatures have not provided for tort liability in the event that such statutes are violated, the imposition of strict liability is the work of the courts alone and has nothing to do with negligence per se. *See* DAN B. DOBBS, *THE LAW OF TORTS* § 141, at 332 (2000).

35. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 15 cmt. c (Proposed Final Draft No.1, 2005).

court could sensibly apply in a negligence case. But a statute that says that brakes should be in good operating order does not speak to a standard of care. I cannot order my brakes to stop. The comments to the *Restatement (Third)* look for an excuse for not applying a statute that was never relevant in the first place. The *Restatement (Third)* gets into trouble because it views statutes as inexorable mandates subject to exceptions rather than as sensible sources of law that can be helpful in deciding whether to direct a verdict.

Another example—this one my own. A's wife unexpectedly goes into early labor. She calls the obstetrician, who tells her, "I don't like what I am hearing. Get to the hospital immediately. Every minute counts." A drives his wife to the hospital and exceeds the speed limit by fifteen miles per hour. At an intersection, A is unable to bring his car to a stop and collides with a car that has the right of way, injuring its driver, B. A is clearly in violation of the speed-limit statute, but A should not be held negligent per se. Whether A acted as a reasonable person under the circumstances is a legitimate jury issue, but the statutory standard has no place in the case. Perhaps one could argue that A's conduct falls within the scope of section 15(e), which excuses statutory violations when "the actor's compliance with the statute would involve a greater risk of physical harm to the actor or to others than noncompliance."<sup>36</sup> But that exception seems to apply to situations where the actor is faced with a different kind of emergency—for example, a child darts out into the driver's lane of traffic, causing the driver to swerve into the opposite lane to avoid hitting the child. It takes some straining to apply that exception where the driver has reasons to violate the statute that do not stem from road-related emergencies.

If the suggestion does not come too late for inclusion, I would rewrite Section 15, comment *a* in part to include the following language:

In the vast majority of cases where an actor is in violation of a statute, the court will adopt the statutory standard as the governing standard of care and will instruct the jury that the actor is to be held to that standard. However, statutes are written in broad general terms and cannot account for a host of situations where it is clear that the defendant, for good and just reasons, should not have met the standard. Negligence is fact-sensitive, and there are occasions when the fact-sensitive nature of the conduct dictates that the jury be allowed to judge the actor's conduct based on whether the actor met the standard of a reasonable person under the circumstances. One cannot articulate a general rule as to when the actor's conduct is sufficiently fact-sensitive that the general statutory prescription should not apply. The exceptions set forth in (a)–(e) are illustrative of the kinds of situations in which courts

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36. *Id.* § 15(e).

have refused to apply the statutory standard in civil tort litigation. They are not meant to exhaust the possibilities. A trial judge must determine in each instance whether the facts are such that utilizing the statutory standard would constitute a significant departure from the standard of reasonable care that lies at the heart of the rule of negligence.

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

## II. RES IPSA LOQUITUR

The *Restatement (Third)*'s treatment of res ipsa loquitur is a vast improvement over the *Restatement (Second)*'s formulation.<sup>37</sup> If it has forever banished the requirement of "exclusive control" as a requisite for applying res ipsa, it will be an occasion for rejoicing.<sup>38</sup> Section 17, comment *a*, correctly points out that "res ipsa loquitur is circumstantial evidence of a quite distinctive form."<sup>39</sup> The doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case. "Instead, the finding of likely negligence is derived from knowledge of the causes of the type or category of accidents involved."<sup>40</sup> Put simply, res ipsa relies on a generalization that negligence is the best explanation for a given category of events. The inherent weakness of the generalization is that it cannot speak to what a particular defendant did on a given day or time. The defendant with some justification is put out because there is no evidence to link him or her to the generalization.

37. *Restatement (Third)* provides:

§ 17. Res Ipsa Loquitur

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

*Id.* § 17; *cf.* RESTATEMENT (SECOND) OF TORTS § 328D cmt. g (1965) (entitled "Defendant's exclusive control" and stating that the plaintiff is usually able to prove that the defendant is responsible for the event that caused the injury by showing that the defendant was in exclusive control of the instrumentality that caused the harm).

38. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 17 cmt. b (Proposed Final Draft No.1, 2005). This author has said that "[w]hoever first gave voice to the exclusive control articulation should be shot at sunrise." TWERSKI & HENDERSON, *supra* note 1, at 186.

39. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 17 cmt. a (Proposed Final Draft No.1, 2005).

40. *Id.*

Almost the only way for a defendant to defeat a *res ipsa* case is to provide some evidence that the generalization was not operative at the time the accident took place.<sup>41</sup> What transpires if the defendant does, in fact, present evidence that a non-negligent alternative cause was operative at the crucial time in question? Comment *d* is vague. At one point it suggests that such alternative-cause evidence is for the court to determine whether *res ipsa* is available.<sup>42</sup> But then it quickly goes on to say that such alternative-cause evidence can influence the jury in assessing plaintiff's *res ipsa* claim.<sup>43</sup> As an example of how evidence of a particular accident can influence how a jury would deal with a plaintiff's *res ipsa* claim, comment *d* posits an airplane crash in bad weather. Unexpected wind shear can be one cause of the accident. "If, on the day of the crash, a large storm was in progress, the possibility of wind shear as a cause of the crash is considerably enhanced."<sup>44</sup> That, according to the comment, is an argument for the jury.

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

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41. See, e.g., *Varano v. Jabar*, 197 F.3d 1, 5–6 (1st Cir. 1999) (applying Maine law and upholding trial judge's refusal to give *res ipsa* instruction because there were causes other than defendant's conduct that could have led to plaintiff's injury); *Donnelly v. Nat'l R.R. Passenger Corp.*, 16 F.3d 941, 945 (8th Cir. 1994) (applying Kansas law and granting summary judgment to defendant since alternative cause was not negated).

42. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 17 cmt. d (Proposed Final Draft No.1, 2005).

43. *Id.*

44. *Id.*

In short, the law of negligence abhors generalizations. It is fact sensitive. At times, for good and sufficient reason, we resort to generalizations, but we do not do so without concern. The tension between the generalization and fact specificity is real and tangible. That is the dynamic that drives the case law in both negligence per se and *res ipsa loquitur*. The two concepts may not be twins, but they are kissing cousins.