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PROVING NEGLIGENCE IN MODERN PRODUCTS LIABILITY LITIGATION*

David G. Owen[†]

Negligence remains the most powerful theory of recovery in modern products liability litigation.¹ To prove a negligence claim in a products liability case, the plaintiff must establish that the product's supplier failed to exercise reasonable care for the plaintiff's safety. If the defendant is a manufacturer, such proof ordinarily involves evidence that the defendant acted unreasonably in developing, producing, or marketing a defective product. Evidence of this type normally will establish, directly or circumstantially, the components of the negligence calculus—the nature, magnitude, and likelihood of a particular risk of harm, on the one hand, weighed against the various costs and practicality of mitigating the risk, on the other.²

Many aspects of proving negligence in a products liability case are similar or identical to proving other types of products liability claims. For example, expert testimony is as important to proving negligence as it is to proving strict products liability in tort or breach of implied warranty.³ Proof of other similar accidents and subsequent remedial measures is often relevant to other types of claims as well as negligence.⁴ Proof in cases

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1. This point was made some time ago by a prominent plaintiffs' attorney, as modern products liability litigation was just getting off the ground. See Paul D. Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L. REV. 521, 531–32 (1974) (asserting that because negligence is “hot” and strict liability is “cold,” plaintiffs are more likely to win, and to collect larger verdicts, proving the former rather than the latter). More recently, an important empirical study confirmed this hypothesis, revealing that jurors in fact respond more favorably to plaintiffs—in terms of both the likelihood of success and verdict size—whose claims are based on negligence rather than strict liability. See Richard L. Cupp Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874, 924 (2002). See generally DAVID G. OWEN, PRODUCTS LIABILITY LAW § 2.1 (2005).

2. See OWEN, *supra* note 1, § 2.2.

3. See *id.* § 6.3; David G. Owen, *A Decade of Daubert*, 80 DENV. U. L. REV. 345, 347–48 (2002).

4. See OWEN, *supra* note 1, § 6.4; David G. Owen, *Proof of Product Defect*, 93 KY. L.J. (forthcoming 2005) [hereinafter Owen, *Proof of Product Defect*].

involving defective food or drink⁵ and automotive crashworthiness⁶ is quite similar regardless of the cause of action. Finally, proof of compliance with a statute or regulation, while relevant to negligence, spans all theories of products liability and so is only treated lightly here.⁷

This article addresses three cardinal types of negligence evidence in modern products liability litigation. Part I examines the effect of proof that a manufacturer violated or complied with a safety statute or regulation, often involving the doctrine of negligence per se. Part II considers the role of evidence that a manufacturer departed from or complied with some industrial safety standard. Part III explores the doctrine of *res ipsa loquitur* and describes its application to products liability litigation. The cases reveal that a plaintiff's negligence claim ordinarily is enhanced by proof that a manufacturer violated a relevant safety standard set by the government in a statute or regulation, or by industry in a code, whereas a defendant's rebuttal of such a claim typically is strengthened by proof that it complied with all governmental and industry safety standards. In cases where a plaintiff is unable to prove precisely how an accident happened, the doctrine of *res ipsa loquitur* provides a method for plaintiffs in products liability litigation to establish a defendant's negligence by circumstantial evidence.⁸ The article concludes that these forms of proof—that the product violated a governmental or industry safety code or that it malfunctioned in a manner that suggests the defendant's negligence—provide important tools for determining a defendant's negligence in modern products liability litigation.

I. VIOLATION OF STATUTE—NEGLIGENCE PER SE

A. *Statutory and Regulatory Safety Standards in Negligence Law*

In negligence actions, the trier of fact normally sets the applicable standard of care by applying the general common law standard of reasonable care and prudence to the facts and circumstances of the particular case. Products liability claims for negligence are usually

5. See OWEN, *supra* note 1, § 7.5; David G. Owen, *Manufacturing Defects*, 53 S.C. L. REV. 851, 884–904 (2002) [hereinafter Owen, *Manufacturing Defects*].

6. See OWEN, *supra* note 1, § 17.3.

7. See *id.* § 14.3; David G. Owen, *Special Defenses in Modern Products Liability Law*, 70 MO. L. REV. (forthcoming 2005) [hereinafter Owen, *Special Defenses*].

8. A parallel principle of proof, sometimes referred to as the “malfunction doctrine,” applies in most states to proof of defect in strict liability in tort. See OWEN, *supra* note 1, § 7.4; Owen, *Manufacturing Defects*, *supra* note 5, at 871–84.

adjudicated in this manner. Yet legislatures and regulatory agencies sometimes specify particular safety measures required in certain situations or particular dangerous conditions prohibited in others. Such statutes or regulations may provide explicitly for civil damages arising from their breach.⁹ More typically, however, safety statutes¹⁰ provide criminal or quasi-criminal penalties for their violation. If a manufacturer, retailer, or other products liability defendant fails to comply with a safety statute in a manner that harms a plaintiff, the doctrine of negligence per se may permit the plaintiff to establish the defendant's duty of care and breach thereof by proving the statutory violation.¹¹ In such situations, a court borrows the specific standard of conduct set forth in the statute,¹² deferring to the

9. On civil damages acts, see 3 FOWLER V. HARPER ET AL., LAW OF TORTS §17.6 (1995) [hereinafter HARPER, LAW OF TORTS].

10. While the regulatory standards of the (usually federal) product safety agencies are more frequently implicated in products liability litigation than specific legislative enactments, the term "statute" is used here for convenience to designate either type of governmental safety provision, state or federal. See, e.g., *Lukaszewicz v. Ortho Pharm. Corp.*, 510 F. Supp. 961, 964 (E.D. Wis. 1981) ("By 'statute' is meant both state and federal legislative and administrative enactments.").

11. "[T]he violation of a statute, or regulation having the force of statute, enacted for the safety of others is negligence in law or negligence *per se*." *Price v. Blood Bank of Del., Inc.*, 790 A.2d 1203, 1212–13 (Del. 2002). See generally 1 AMERICAN LAW OF PRODUCTS LIABILITY 3d §§ 12:10 to 12:38 (Timothy E. Travers et al. eds., 1987); 2 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY §§ 10.03, 55.02[3] (1990); OWEN, *supra* note 1, § 2.3; 2 DAVID G. OWEN ET AL., MADDEN AND OWEN ON PRODUCTS LIABILITY § 27.7 (2000) [hereinafter MADDEN & OWEN]; RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (Basic Principles) § 4(a) (Tentative Draft No. 1, 2001) [hereinafter RESTATEMENT (THIRD) OF TORTS]; Christopher Scott D'Angelo, *Effect of Compliance or Noncompliance with Applicable Governmental Product Safety Regulations on a Determination of Product Defect*, 36 S. TEX. L. REV. 453, 468–78 (1995); Malcolm E. Wheeler, *The Use of Criminal Statutes to Regulate Product Safety*, 13 J. LEGAL STUD. 593, 593–96 (1984); Joseph H. Ballway, Jr., Comment, *Products Liability Based upon Violation of Statutory Standards*, 64 MICH. L. REV. 1388, 1390–93 (1966) (classic treatment).

On tort law more generally, see DAN B. DOBBS, THE LAW OF TORTS §§ 133–42 (2001); HARPER, LAW OF TORTS, *supra* note 9, § 17.6; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36 (5th student ed. 1984) [hereinafter PROSSER & KEETON]; RESTATEMENT (THIRD) OF TORTS, *supra*, § 14 (2001); Charles L. B. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932); Clarence Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949); Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

For an examination of the effect of violation of or compliance with statute on proving defectiveness, a closely related issue, see OWEN, *supra* note 1, § 6.4.

12. If a statutory standard is not specific, but merely restates a general safety principle of tort law, the statute will have borrowed from the common law in which case there is no reason for a state to borrow the standard back again. Thus, the doctrine of negligence per se applies only to safety standards that are specific rather than vague and general. See, e.g., *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1201 (Alaska 1992); *Sikora v. Wenzel*, 727 N.E.2d 1277, 1280 (Ohio 2000).

legislative determination of proper behavior, in substitution for the general definition of due care.¹³

B. Negligence Per Se—The Two-Pronged Test

All safety rules, whether statutory, regulatory, or common law, are adopted to protect certain types of persons against specific risks. The scope of all such rules is limited to this extent.¹⁴ Accordingly, most courts will adopt a standard of behavior set by a statute or regulation for use in a negligence action only if it is determined that: (1) the plaintiff was injured by a type of risk¹⁵ the statute (or regulation) was intended to prevent and (2) the plaintiff was in the class of persons the statute (or regulation) was intended to protect.¹⁶ This is the classic two-pronged test for deciding whether a safety standard in a criminal safety statute may properly be used as the standard of care in a negligence action under the doctrine of negligence per se.¹⁷

13. "When the doctrine of negligence per se applies, the general standard of care of a reasonable man is replaced by a specific rule of conduct established in a statute or regulation." *Dougherty v. Santa Fe Marine, Inc.*, 698 F.2d 232, 234 (5th Cir. 1983). Compare *Lukaszewicz*, 510 F. Supp. at 964 ("A finding of 'negligence per se' serves to relieve a plaintiff in a products liability case from proving specific acts of negligence."), with *Dougherty*, 698 F.2d at 234.

If the relevant statutes and regulations are numerous and complex, a plaintiff may need expert testimony to explain the standards they establish and their breach to establish their applicability to the litigation. See, e.g., *McNeil Pharm. v. Hawkins*, 686 A.2d 567, 580–85 (D.C. 1996).

14. See *Hill v. Lundin & Assocs. Inc.*, 256 So. 2d 620, 623 (La. 1972); RESTATEMENT (THIRD) OF TORTS, *supra* note 11, § 14 cmts.; Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 73 (1956).

15. Note that courts and commentators often use the term "harm" for "risk of harm." See, e.g., PROSSER & KEETON, *supra* note 11, § 36 at 227. The *Third Restatement* changes type of "harm" to type of "accident." RESTATEMENT (THIRD) OF TORTS, *supra* note 11, § 14.

16. "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 if the accident victim is within the class of persons the statute is designed to protect." RESTATEMENT (THIRD) OF TORTS, *supra* note 11, § 14.

The *Second Restatement of Torts* formulates the doctrine in a four-part test, including class of persons, interest, harm, and hazard. RESTATEMENT (SECOND) OF TORTS § 286 (1965).

17. Many courts and commentators state the two-pronged test in reverse order, asking first if the plaintiff is included in the protected class. Yet, because the class of plaintiffs intended to be protected by a statute is largely a subset of the hazards the legislature sought to prevent, the *Third Restatement's* ordering is preferable in suggesting that analysis begin with an inquiry into the risks prevented, from which the class of protected victims tumbles easily.

1. Risks Prevented

As for the types of risk sought to be prevented, courts have ruled that the federal Motor Vehicle Safety Act, enacted to reduce traffic accidents and deaths, sought to prevent deaths in an accident caused by a manufacturer's deficient recall of a car with defective steering in violation of the Act's recall provisions;¹⁸ that an FDA regulation requiring drug manufacturers to report adverse reactions to the agency was intended to prevent just such reactions;¹⁹ and that a state housing standards act was designed to protect against the risks of unsafe construction and installation of mobile homes, including failing to be anchored to the ground.²⁰ On the other hand, a statute requiring motor vehicles to be equipped with turn signals does not apply to a road grader which is statutorily exempted therefrom;²¹ a statute prohibiting the sale of cars equipped with hood ornaments that protrude beyond the face of the radiator grill applies only to the hazard of hood ornaments on moving cars piercing people, not the risk of people piercing themselves on the hood ornament of a car at rest;²² a statute requiring that gasoline be dispensed only into safe containers is intended to prevent the risk of leaks, not the risk that gasoline bought in a cup might be used to throw on a person to facilitate catching her on fire;²³ a statute that prohibits false statements to the government²⁴ is a "truth" statute, not a "safety statute" protecting users against risks from prescription drugs;²⁵ and an act requiring insurers of total-loss vehicles to send their titles and plates to the Department of Revenue is an "antitheft" act, not a safety statute designed to prevent such vehicles from being defectively rebuilt and thereafter causing accidents.²⁶

18. See *Lowe v. Gen. Motors Corp.*, 624 F.2d 1373, 1377 (5th Cir. 1980) (involving a violation of National Highway Traffic Safety Administration regulations governing automotive recalls).

19. See *Stanton v. Astra Pharm. Prods., Inc.*, 718 F.2d 553, 564 (3d Cir. 1983) (involving a drug manufacturer who failed to file adverse reaction reports required by FDA regulation).

20. See *Gem Homes, Inc. v. Contreras*, 861 S.W.2d 449, 452 (Tex. App. 1993) (home rolled over in storm).

21. See *Cook v. Caterpillar, Inc.*, 849 S.W.2d 434, 438-39 (Tex. App. 1993).

22. See *Hatch v. Ford Motor Co.*, 329 P.2d 605, 608 (Cal. Dist. Ct. App. 1958).

23. See *Walcott v. Total Petroleum, Inc.*, 964 P.2d 609, 613 (Colo. Ct. App. 1998).

24. "Whoever . . . knowingly and willfully falsifies . . . a material fact; makes any materially false, fictitious, or fraudulent statement or representation . . . shall be [in violation of this statute]." 18 U.S.C. § 1001 (2004).

25. See *McNeil Pharm. v. Hawkins*, 686 A.2d 567, 580 (D.C. 1996) (discussing an action on behalf of patient who died of severe liver failure following administration of defendant's pharmaceutical).

26. See *Treadwell Ford, Inc. v. Campbell*, 485 So. 2d 312, 317-18 (Ala. 1986).

2. Plaintiffs Protected

As for the class of plaintiffs sought to be protected, the federal Motor Vehicle Safety Act, enacted to reduce traffic accidents and deaths, was intended to protect the driver and passenger in a car that was dangerously defective in violation of the act;²⁷ an FDA regulation prohibiting the use of sulfites on raw fruits and vegetables seeks to protect sulfite-sensitive individuals from consuming food so treated;²⁸ and a state statute requiring manufacturers of toxic products to supply purchasers with a material safety data sheet (MSDS) is designed to protect users of the product, often the purchaser's employees.²⁹ But an act requiring insurers to return titles and licenses of total-loss vehicles to the Department of Revenue seeks to protect owners of vehicles from thefts, not pedestrians injured by runaway vehicles defectively rebuilt;³⁰ a driving permit requiring paraplegic drivers to be accompanied by co-drivers is intended to protect persons on the highways, not the paraplegic driver himself while using a defective wheelchair lift on a vehicle at rest;³¹ a state statute barring hood ornaments from protruding beyond the front hood is intended to protect persons who might be struck by moving cars, not those who impale themselves on (an ornament on) a car at rest;³² and a statute prescribing standards for the use of LP gas is intended to protect users in commercial settings, not contractors using such gas to heat houses they are building.³³

C. Other Negligence Per Se Requirements

An essential element of every negligence per se action is that the defendant actually *violated* the pertinent statute or regulation, as proof that the safety standard contained therein was breached.³⁴ Indeed, a court confronting a negligence per se claim sometimes may choose to reverse the normal duty-breach order of decisionmaking by first considering the issue of breach, because if the statute was not breached, there is no reason to proceed to the sometimes more difficult analytical task of applying the two-

27. See *Lowe v. Gen. Motors Corp.*, 624 F.2d 1373, 1380 (5th Cir. 1980).

28. See *Allen v. Delchamps, Inc.*, 624 So. 2d 1065, 1067 (Ala. 1993) (noting that sale of celery hearts treated with sodium bisulfite was in violation of FDA regulation).

29. *Byrne v. SCM Corp.*, 538 N.E.2d 796, 813 (Ill. App. Ct. 1989).

30. See *Treadwell Ford, Inc.*, 485 So. 2d at 317-18.

31. See *Keegan v. Joytech Int'l, Inc.*, No. E029026, 2002 WL 982643, at *5 (Cal. Ct. App. May 14, 2002).

32. See *Hatch v. Ford Motor Co.*, 329 P.2d 605, 608 (Cal. Dist. Ct. App. 1958).

33. See *Trinity Universal Ins. Co. v. Streza*, 8 P.3d 613, 616-17 (Colo. Ct. App. 2000).

34. See, e.g., *McNeil Pharm. v. Hawkins*, 686 A.2d 567, 582 (D.C. 1996); *Cook v. Caterpillar, Inc.*, 849 S.W.2d 434, 439 (Tex. App. 1993).

pronged relevancy test. Further, even if a plaintiff establishes that a statute was breached and meets the two-pronged test, so that it may be used to set the relevant standard of care, the plaintiff still must prove each of the other elements of a negligence claim.³⁵ Moreover, application of the negligence per se doctrine to any particular case is discretionary, and a court usually should decline to adopt a statutory standard that is obsolete, arcane, trivial, amounts to little more than a general common law rule of reasonable care, is otherwise vague and of little help to the judicial branch in setting a standard of reasonable care in a particular situation,³⁶ or “if sufficient policy considerations militate against it.”³⁷ Nor will a court apply a statutory standard if the violation was not a cause in fact,³⁸ or not a proximate cause,³⁹ of the plaintiff’s harm.

35. See, e.g., *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 622 (10th Cir. 1998) (“The violation of a statute constitutes negligence per se only if the other elements of negligence are present.”).

36. See, e.g., *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1201 (Alaska 1992) (stating trial court did not abuse discretion in refusing to adopt standard of state drug misbranding statute that merely requires labeling to contain adequate warnings and instructions); *In re Shigellosis Litig.*, 647 N.W.2d 1, 9 (Minn. Ct. App. 2002) (holding no negligence per se in food poisoning case for violation of Federal Food, Drug, and Cosmetic Act prohibition against sale of adulterated food because the Act fails to particularize any affirmative standard of care); *Jones v. GMRI, Inc.*, 551 S.E.2d 867, 873 (N.C. Ct. App. 2001) (stating no negligence per se in case of metal in meatball and state pure food act); *Sikora v. Wenzel*, 727 N.E.2d 1277, 1280 (Ohio 2000) (stating that negligence per se applies where statute sets out a “positive and definite standard of care” but not where it “contains a general, abstract description of a duty”); see also *Dougherty v. Santa Fe Marine, Inc.*, 698 F.2d 232, 234 (5th Cir. 1983) (holding that violation of one Coast Guard regulation was not negligence per se where it was contradicted by another).

37. *McNeil Pharm.*, 686 A.2d at 579 (quoting *District of Columbia v. White*, 442 A.2d 159, 164 (D.C. 1982)).

38. See, e.g., *Alexander v. Smith & Nephew, P.L.C.*, 98 F. Supp. 2d 1310, 1320 (N.D. Okla. 2000) (stating that negligence per se claim failed in part on causation grounds because plaintiff’s orthopedic surgeon knew that the medical device had not been approved for inserting bone screws in vertebral pedicles, but he relied on his own judgment in recommending this surgery); *Harden v. Danek Med., Inc.*, 985 S.W.2d 449, 453 (Tenn. Ct. App. 1998) (indicating that surgeon chose to make “off-label” use of product, relying on his own experience and judgment).

39. See, e.g., *Brooks v. Howmedica, Inc.*, 236 F.3d 956, 967 (8th Cir. 2001); *Gaines-Tabb*, 160 F.3d at 623 (holding that defendant’s manufacture and sale of ammonium nitrate used by terrorists to bomb federal building in Oklahoma City was not the proximate cause of injuries due to “the intervention of a supervening cause—the unforeseeable, nearly unprecedented, criminal bombing of the Murrah Building. Absent proximate cause there can be no negligence, *per se* or otherwise.”); *Walcott v. Total Petroleum, Inc.*, 964 P.2d 609, 611–12 (Colo. Ct. App. 1998) (holding that a filling station’s sale of gasoline in paper cup to a customer was not a proximate cause of injuries to a person on whom customer threw gasoline to set that person on fire).

D. Licensing Statutes

Whether on grounds of proximate causation or scope of risk, a defendant's violation of a licensing statute generally does not amount to negligence per se.⁴⁰ Thus, a restaurant's failure to obtain an operating license from the health department, a drug manufacturer's failure to obtain proper FDA approval of a new drug or medical device,⁴¹ or an aircraft manufacturer's failure to obtain proper certification from the FAA for a new airplane, each may subject the manufacturer to administrative penalties, but none of these violations converts the defendant into an outlaw and subject to absolute liability. Food sold by an unlicensed restaurant may be just as pure and tasty as food sold by a restaurant that licensing officials grade as "A." A drug or medical device may be reasonably safe despite it not being approved for use by the FDA. An uncertified plane may be entirely airworthy and equally as safe as a plane approved by the FAA. In such cases, a plaintiff may not rest upon the defendant's violation of a certification rule but must prove the defendant's negligence another way.⁴²

E. Excuses

Treating a defendant's violation of a statute as a breach of duty amounts to a form of "strict" liability: liability flows merely from the defendant's breach of statute rather than from demonstrative proof of how the defendant was at fault. That is, a plaintiff may establish a breach of the duty of care without specific evidence showing how the defendant's actions were unreasonable, in how they foreseeably exposed the plaintiff to an undue risk of harm.⁴³ Yet this strictness in the basis of liability usually is fleeting, for

40. See PROSSER & KEETON, *supra* note 11, § 36, at 226; Charles O. Gregory, *Breach of Criminal Licensing Statutes in Civil Litigation*, 36 CORNELL L.Q. 622, 630-42 (1951).

41. See, e.g., *Talley v. Danek Med., Inc.*, 179 F.3d 154, 159-60 (4th Cir. 1999) (holding that FDA premarketing approval regulations are administrative in nature and do not establish a standard of care or quality in the case of pedicle screws sold for unapproved purposes); *King v. Danek Med., Inc.*, 37 S.W.3d 429, 453-60 (Tenn. Ct. App. 2000) (same). See generally James M. Beck & John A. Valentine, *Challenging the Viability of FDCA-Based Causes of Action in the Tort Context: The Orthopedic Bone Screw Experience*, 55 FOOD & DRUG L.J. 389 (2000).

Breach of federal statutes and regulations also raise issues of federal preemption. See OWEN, *supra* note 1, § 14.3.

42. See, e.g., *Talley*, 179 F.3d at 159-60; *Keegan v. Joytech Int'l, Inc.*, No. E029026, 2002 WL 982643, at *4-*5 (Cal. Ct. App. May 14, 2002) (involving a paraplegic truck driver's violation of special licensing statute); *King*, 375 S.W.3d at 453-60.

43. See, e.g., *Ross Labs. v. Thies*, 725 P.2d 1076, 1081 (Alaska 1986) (involving a retailer's unknowing violation of misbranding provisions of state food, drug, and cosmetic act: "the basis for the retailer's liability perhaps could as aptly be called strict liability per se"); *Magna Trust Co. v. Ill. Cent. R.R.*, 728 N.E.2d 797, 805-06 (Ill. App. Ct. 2000); see also Elliott

most courts in most situations reset liability back on a fault foundation by providing a broad range of excuses that cover most situations in which a defendant could not reasonably have avoided the violation or the harm.⁴⁴ Many courts accept the list of excuses set forth in the *Restatement of Torts* which relieves a defendant of liability in negligence for a violation of a statute or administrative regulation if the violation is due to the defendant's incapacity, unawareness of a need for compliance,⁴⁵ inability to comply,⁴⁶ an emergency not due to the defendant's own misconduct, or if compliance would have presented a greater risk of harm than did the violation.⁴⁷ While these traditional negligence per se excuses may not be relevant to most products liability litigation,⁴⁸ they sometimes are germane⁴⁹ in which case they should be available as in any other context.⁵⁰

F. Procedural Effect

Jurisdictions vary in the procedural effect accorded to a statutory or regulatory violation.⁵¹ Some courts, perhaps a majority,⁵² hold that such a violation conclusively establishes the defendant's negligence. That is, an

v. City of New York, 747 N.E.2d 760, 762 (N.Y. 2001) (observing that violation of statute that creates specific duty "constitutes negligence per se, or may even create absolute liability").

44. See *Sikora v. Wenzel*, 727 N.E.2d 1277, 1281 (Ohio 2000); DOBBS, *supra* note 11, §§ 140–41; PROSSER & KEETON, *supra* note 11, § 36, at 227–29. And sometimes courts simply refuse to apply negligence per se. See, e.g., *Mehlman v. Diamond Sparklers, Inc.*, No. 99-CV-3700SJ, 2002 WL 32096585, at *4 (E.D.N.Y. Oct. 4, 2002) (refusing to rule that violation of statute criminalizing sale of fireworks in New York resulted in strict or absolute liability).

45. See, e.g., *Sikora*, 727 N.E.2d at 1281. But see *Ross Labs.*, 725 P.2d at 1080–81 (Alaska 1986); *Dura Corp. v. Harned*, 703 P.2d 396, 410 (Alaska 1985) (stating manufacturer's ignorance of standards of nationally recognized safety code no excuse).

46. See, e.g., *Roth v. I & M Rail Link, L.L.C.*, 179 F. Supp. 2d 1054, 1063 (S.D. Iowa 2001) (impossibility of compliance, meaning "not reasonably practicable").

47. See RESTATEMENT (SECOND) OF TORTS § 288A (1965).

48. See RESTATEMENT (THIRD) OF TORTS, *supra* note 11, § 4 cmt. d.

49. As when a drug or other chemical's risk is unforeseeable.

50. See *D'Angelo*, *supra* note 11, at 468–79.

51. See PROSSER & KEETON, *supra* note 11, § 36, at 229–31.

52. Commentators have long asserted that the conclusive effect proclaimed by Judge Cardozo in *Martin v. Herzog*, 126 N.E. 814, 815 (N.Y. 1920), that "[j]urors have no . . . power . . . [to] relax" the standard set by the legislature, is the majority rule. See, e.g., Ballway, *supra* note 11, at 1393–94 (1966) (citing sources mostly prior to 1950); see also RESTATEMENT (THIRD) OF TORTS, *supra* note 11, § 14 cmt. c reporters' note (stating that *Martin v. Herzog's* conclusive effect approach is "the strong majority rule"). Yet, because of the different meanings of the phrase "negligence per se," because of the absence of a methodical study of every jurisdiction, and because many of the more recent cases treat statutory violations as mere evidence of negligence, it is unclear whether most jurisdictions still treat the violation of statute as conclusive of negligence. Ballway, *supra* note 11, at 1396.

unexcused violation of a statute or regulation is negligence in itself, or negligence “per se.”⁵³ While such a procedural effect powerfully stamps the violation as a breach of duty as a matter of law, it nevertheless leaves open all other issues involved in a negligence cause of action, such as cause in fact, proximate cause, the plaintiff’s damage, and any affirmative defenses that might apply.⁵⁴ Many other jurisdictions treat a violation merely as evidence of negligence,⁵⁵ perhaps the best approach,⁵⁶ which the trier of fact may accept or reject as it sees fit. In a small number of jurisdictions, by common law or statute, a violation of a safety statute or regulation creates a rebuttable presumption of negligence.⁵⁷ Some jurisdictions that give conclusive status to violations of a legislature’s statutes give a lesser, mere-evidence effect to violations of a city’s ordinances⁵⁸ or regulations of administrative agencies,⁵⁹ both considered “subordinate rule-making bod[ies].”⁶⁰

53. See, e.g., *Stanton v. Astra Pharm. Prods., Inc.*, 718 F.2d 553, 564–65 (3d Cir. 1983); *Harned v. Dura Corp.*, 665 P.2d 5, 12–13 (Alaska 1983) (finding that failure of tank to conform to ASME standards, incorporated into state law, was negligence per se); *McNeil Pharm. v. Hawkins*, 686 A.2d 567, 578 (D.C. 1996) (finding that an unexcused violation renders defendant negligent as a matter of law); *Peek v. Oshman’s Sporting Goods, Inc.*, 768 S.W.2d 841, 844 (Tex. App. 1989). This is the rule of the RESTATEMENT (SECOND) OF TORTS § 288B.

54. See PROSSER & KEETON, *supra* note 11, § 36, at 229–31.

55. See, e.g., *Berish v. Bornstein*, 770 N.E.2d 961, 979 (Mass. 2002); *Horstmeyer v. Golden Eagle Fireworks*, 534 N.W.2d 835, 838 (N.D. 1995); *King v. Danek Med., Inc.*, 37 S.W.3d 429, 460 (Tenn. Ct. App. 2000).

56. According to a breach of statute any greater weight confronts a number of theoretical obstacles. See PROSSER & KEETON, *supra* note 11, § 36, at 220–22.

57. See, e.g., *Ramirez v. Plough, Inc.*, 863 P.2d 167, 172 (Cal. 1993) (citing evidence code); *Klanseck v. Anderson Sales & Serv., Inc.*, 393 N.W.2d 356, 360 (Mich. 1986). In other jurisdictions, a violation of such a statute or regulations is “prima facie” evidence of negligence, raising such a presumption but allowing an excuse. See, e.g., *Magna Trust Co. v. Ill. Cent. R.R. Co.*, 728 N.E.2d 797, 804–05 (Ill. App. Ct. 2000) (“Since the violation is only *prima facie* evidence of negligence, a defendant may prevail by showing that he acted reasonably under the circumstances.”); *Bacon v. Lascelles*, 678 A.2d 902, 907 (Vt. 1996); see also COLO. REV. STAT. § 13-21-403(2) (2004) (rebuttable presumption); KAN. STAT. ANN. § 60-3304(b) (2003) (stating a product is deemed defective unless a manufacturer shows that the violation was a reasonably prudent action). The rebuttable presumption approach is further discussed in OWEN, *supra* note 1, § 14.3.

58. See, e.g., *Elliott v. City of New York*, 747 N.E.2d 760, 761–62 (N.Y. 2001).

59. See, e.g., *Montalvo v. Rheem Textile Sys., Inc.*, No. 86-CIV-9501(SWK), 1991 WL 52777, at *3 (S.D.N.Y. Apr. 4, 1991) (stating that a violation of state workplace safety agency regulation requiring that presses be equipped with and operable by two separate push-buttons was merely evidence of negligent design, not conclusive).

60. See *Elliott*, 747 N.E.2d at 762–63 (citing *Martin v. Herzog*, 126 N.E. 814 (N.Y. 1920)). See generally PROSSER & KEETON, *supra* note 11, § 36, at 231.

G. Federal Law and Federal Courts

Negligence per se claims, being creatures of state tort law, must be distinguished from the federal doctrine prescribing when a private cause of action may be implied into a federal statute.⁶¹ More narrow than negligence per se, the federal implication doctrine allows private claims only when Congress clearly so intended.⁶² While the federal implication doctrine may be its cousin, negligence per se is an independent, substantive doctrine of state tort law applicable in both state courts⁶³ and federal diversity actions⁶⁴

61. See Paul Sherman, *Use of Federal Statutes in State Negligence Per Se Actions*, 13 WHITTIER L. REV. 831, 864–66 (1992).

62. See also *Gibson v. Wal-Mart Stores, Inc.*, 189 F. Supp. 2d 443, 448 (W.D. Va. 2002) (disallowing private claims under Federal Hazardous Substances Act and Poison Prevention Packaging Act). Compare *Swenson v. Emerson Elec. Co.*, 374 N.W.2d 690, 693 (Minn. 1985) (allowing private claim for violation of CPSC's substantial product hazard reporting regulations), with *Drake v. Honeywell, Inc.*, 797 F.2d 603, 605 (8th Cir. 1986). *Contra* *Martin v. Ortho Pharm. Corp.*, 661 N.E.2d 352, 355–57 (Ill. 1996) (involving a risk of birth limb reductions from pills used in the first trimester of a pregnancy; disallowing private claim for violation of FDA consumer information regulations). See generally *Nat'l Bank of Commerce v. Kimberly-Clark Corp.*, 38 F.3d 988, 995–96 (8th Cir. 1994) (allowing the estate of woman killed by toxic shock syndrome to sue a manufacturer for non-compliance with warning requirement of Medical Device Amendments to Food, Drug, and Cosmetic Act—type size too small, not written for sixth to eighth grade reading level, and absence of boldface or different colors for certain portions demanded by FDA prominence requirement); William R. Goetz, *Private Causes of Action Under the Reporting Rules of the Consumer Product Safety Act*, 70 MINN. L. REV. 955 (1986).

Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right, but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.

Compare *Alexander v. Sandoval*, 532 U.S. 275, 287–88 (2001) (describing how implication doctrine narrowed from *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)), with *Cort v. Ash*, 422 U.S. 66, 78 (1975) (citations omitted). *Cort*'s four-factor test has effectively been conflated back into the one determinative factor of congressional intent. See *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1338 n.5 (11th Cir. 2002).

63. See, e.g., *Wallace v. Parks Corp.*, 629 N.Y.S.2d 570, 575–76 (N.Y. App. Div. 1995) (allowing negligence claim for violating labeling requirements of Federal Hazardous Substances Act, notwithstanding federal preemption of inadequate warnings claims); *Nissan Motor Co. v. Armstrong*, 32 S.W.3d 701, 711 (Tex. App. 2000) (involving a car manufacturer's failure to report safety defect under federal law) (dictum).

64. *Milanese v. Rust-Oleum Corp.*, 244 F.3d 104, 109–10 (2d Cir. 2001) (allowing negligent "misbranding" claim for violating labeling requirements of Federal Hazardous Substances Act, although federal preemption precluded inadequate warnings claim that asserted manufacturer should have provided warnings in addition to those required by Act); *Stanton v. Astra Pharm. Prods., Inc.*, 718 F.2d 553, 564 (3d Cir. 1983) (involving a drug manufacturer that failed to file adverse reaction reports required by FDA regulation); *Loewy v. Stuart Drug & Surgical Supply, Inc.*, No. 91-CIV-7148(LBS), 1999 WL 216656, at *2–*3 (S.D.N.Y. Apr. 14,

for violations of both state⁶⁵ and federal⁶⁶ statutes and regulations, regardless of whether the implication doctrine would also allow a private claim.⁶⁷ If the negligence per se issue concerns a federal statute or regulation, an unrelated but important issue will be whether the federal law preempts the claim for negligence per se together with some or all of the plaintiff's other products liability claims, an issue of growing significance in products liability litigation.⁶⁸

1999) (pedicle screw case; violation of Medical Device Amendments to Federal Food, Drug, and Cosmetic Act); *Sharp v. Artifex, Ltd.*, 110 F. Supp. 2d 388, 392–94 (W.D. Pa. 1999) (same).

Some courts disagree, mistakenly believing that to allow such state law claims, even in a diversity action, is somehow inconsistent with a ruling that the statute does not allow a private right of action under the implication doctrine as a matter of federal law. *See, e.g.*, *Hackett v. G.D. Searle & Co.*, 246 F. Supp. 2d 591, 594 (W.D. Tex. 2002) (“Because the FDCA does not provide for a private cause of action, many courts have held plaintiffs cannot seek to enforce it through negligence per se tort actions.”); *Rodriguez v. Am. Cyanamid Co.*, 858 F. Supp. 127, 129–31 (D. Ariz. 1994) (disallowing negligence per se claim for not meeting standards for implying cause of action into statute in a case of manufacturer of exploding bug bombs failing to comply with adverse incidents reporting requirements of FIFRA). *See generally* Beck & Valentine, *supra* note 41. But these courts and commentators miss the point: that negligence per se, as a matter of state common-law doctrine, borrows the standard of proper behavior from a state or federal statute, not because the legislature intended to create a private cause of action for breach of the statute, but because a standard of behavior specified in a statute may provide a better standard of conduct for a court to employ in a negligence case than the general tort law standard of reasonable prudence. *See, e.g.*, *Lowe v. Gen. Motors Corp.*, 624 F.2d 1373, 1381 (5th Cir. 1980) (applying Alabama law holding that a violation of federal automotive safety statute in diversity action was negligence per se; because no private right of action or federal question was involved, “*Cort v. Ash* was not at all at issue in this case.”). *See generally* Fleming James, Jr., *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95, 106 (1950–51); Thayer, *supra* note 11, at 322–28.

65. *See, e.g.*, *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 621–623 (10th Cir. 1998) (state statute and regulations governing sale of explosives) (by implication); *Montalvo v. Rheem Textile Sys., Inc.*, No. 86-CIV-9501(SWK), 1991 WL 52777, at *3 (S.D.N.Y. Apr. 4, 1991) (state workplace safety agency regulation requiring presses to be equipped with and operable by two separate push-buttons).

66. *See, e.g.*, *Sharp*, 110 F. Supp. 2d at 392–94 (violations of FDCA and MDA by pedicle screw manufacturer); *Allen v. Delchamps, Inc.*, 624 So. 2d 1065, 1067–68 (Ala. 1993) (selling celery hearts treated with sodium bisulfite in violation of FDA regulation); *Price v. Blood Bank of Del., Inc.*, 790 A.2d 1203, 1212–13 (Del. 2002) (violation of FDA blood donor screening regulations).

67. “The mere fact that the law which evidences negligence is Federal while the negligence action itself is brought under State common law does not mean that the state law claim metamorphoses into a private right of action under Federal regulatory law.” *Lowe*, 624 F.2d at 1379 (violation of Motor Vehicle Safety Act provisions governing automotive recalls); *see also In re Starlink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828, 836 (N.D. Ill. 2002) (violation of FIFRA labeling requirements could support negligence per se claims even though there is no federal private right of action under statute).

68. The doctrine of federal preemption is examined in OWEN, *supra* note 1, § 14.4.

H. Compatibility with Ordinary Negligence Claims

Finally, it is important to note that negligence per se claims are separate and independent from ordinary negligence claims, yet the two claims are quite compatible. Indeed, plaintiffs typically and properly include counts for both ordinary negligence and negligence per se in the same complaint, and a plaintiff may prevail by establishing the defendant's breach of its duty of care on either form of negligence claim.⁶⁹

I. Compliance with Statutory and Regulatory Safety Standards— Evidence of Due Care

Since a manufacturer or other product seller may be found negligent per se if it *violates* an applicable product safety statute or regulation, a defendant in a products liability case might fairly ask to be shielded from negligence liability if it *complies* with an applicable safety statute or regulation.⁷⁰ Yet, because "the lawmaking process can sometimes be insufficiently attentive to the interests of potential victims,"⁷¹ a product seller's compliance with a statutory or regulatory safety standard in a negligence action is proper evidence of a product's nondefectiveness but is not conclusive of that issue.⁷² In very unusual situations, where no special circumstances suggest the need for greater caution, a court may rule as a matter of law that a defendant's conformity to a statutory or regulatory

69. Indeed, because of the possibility that a court will exercise its discretion to deny a negligence per se claim, or find an applicable excuse, a plaintiff's lawyer who limits the complaint to a negligence per se claim and thereby loses the suit risks a subsequent action for malpractice.

70. See OWEN, *supra* note 1, § 14.3; Richard C. Ausness, *The Case for a "Strong" Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1241–47 (1996); D'Angelo, *supra* note 11, at 453–66; Robert L. Rabin, *Regulatory Compliance as a Defense to Products Liability*, 88 GEO. L.J. 2049 (2000).

71. RESTATEMENT (THIRD) OF TORTS, *supra* note 11, § 4 cmt. d; see Theresa Moran Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 VAND. L. REV. 1121, 1146–60 (1988).

72. "[C]ompliance with a statutory standard is evidence of due care, [but] it is not conclusive on the issue. Such a standard is no more than a minimum, and it does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions." PROSSER & KEETON, *supra* note 11, § 36, at 233; RESTATEMENT (THIRD) OF TORTS, *supra* note 11, § 4 cmt. b ("[C]ompliance is evidence of non-negligence but is not conclusive."). Historically, this principle was perhaps first applied in *Bradley v. Boston & Maine Railroad*, 56 Mass. 539, 543 (1848), and was restated by the Supreme Court in *Grand Trunk Railway Co. v. Ives*, 144 U.S. 408, 420–27 (1892). "In modern years, the rule has been frequently applied in products-liability cases where the defendant has complied with a federal regulatory standard." RESTATEMENT (THIRD) OF TORTS, *supra* note 11, § 16 cmt. b reporters' note.

safety standard amounts to due care as a matter of law.⁷³ A few state products liability reform statutes provide that compliance with a statute or regulation gives rise to a rebuttable presumption that the manufacturer was not negligent.⁷⁴ In the great majority of cases, however, because legislatures and regulatory agencies normally set safety standards at minimally acceptable levels, a jury is free to find that a manufacturer was negligent for failing to take further steps to improve the product's warnings,⁷⁵ design,⁷⁶ or manufacture⁷⁷ beyond the level of safety required by the government. The *Restatement (Third) of Torts* is in accord.⁷⁸ The topic of compliance with governmental safety statutes and regulations is quite complex.⁷⁹

73. See, e.g., *Ramirez v. Plough, Inc.*, 863 P.2d 167, 172–74, 176–77 (Cal. 1993) (holding that compliance with FDA's English language only warning requirement shielded drug manufacturer from also having to warn in Spanish that giving aspirin to children suffering flu might cause Reyes Syndrome); *Beatty v. Trailmaster Prods., Inc.*, 625 A.2d 1005, 1013–14 (Md. 1993) (stating that compliance with bumper height statute was complete defense); see *RESTATEMENT (THIRD) OF TORTS*, *supra* note 11, § 16 cmt. e (stating that in “unusual situations,” statutory or regulatory compliance may be conclusive).

74. See, e.g., *COLO. REV. STAT.* § 13-21-403(1) (2004); *IND. CODE* § 34-20-5-1(2) (2004). Compare *Cansler v. Mills*, 765 N.E.2d 698, 705–07 (Ind. Ct. App. 2002) (presumption rebutted; summary judgment for manufacturer reversed), with *McClain v. Chem-Lube Corp.*, 759 N.E.2d 1096, 1101–03, 1106 (Ind. Ct. App. 2001) (presumption not rebutted; summary judgment for manufacturer).

75. See, e.g., *Moss v. Parks Corp.*, 985 F.2d 736, 741 (4th Cir. 1993) (CPSC labeling regulations for paint thinner under Federal Hazardous Substances Act); *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1539–43 (D.C. Cir. 1984) (EPA-approved label for paraquat herbicide, under Federal Insecticide, Fungicide, and Rodenticide Act); *Caraker v. Sandoz Pharm. Corp.*, 172 F. Supp. 2d 1018, 1033 (S.D. Ill. 2001) (“[T]he FDA's drug labeling decisions impose only ‘minimum’ standards that are open to supplementation by state law through a jury's verdict enforcing a manufacturer's common law duty to warn.”); *Stevens v. Parke, Davis & Co.*, 507 P.2d 653, 661 (Cal. 1973) (FDA warnings requirements); *Burch v. Amsterdam Corp.*, 366 A.2d 1079, 1084–86 (D.C. 1976) (Federal Hazardous Substances Act labeling requirements).

76. See, e.g., *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54, 63 (N.M. 1995) (involving crashworthiness of aircraft design; evidence of defendant's compliance with applicable government regulations is relevant to whether it was negligent but does not conclusively establish its non-negligence).

77. Cf. *Reiter v. Zimmer Inc.*, 897 F. Supp. 154, 157–58 (S.D.N.Y. 1995) (manufacturing procedures for prosthesis implant cement allegedly failed to meet FDA “good manufacturing practices”).

78. Section 4(b) of the *Products Liability Restatement* provides that, in connection with liability for defective designs and warnings,

a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.

II. INDUSTRY STANDARDS

A. Industry Standards as Custom—In General

Custom, how a community addresses particular situations according to prevailing social norms, is one of the most rudimentary and powerful sources of law.⁸⁰ Because the standard of reasonable behavior in negligence law is grounded in community norms,⁸¹ whether a person who has caused harm to another acted or failed to act as similar persons customarily act in the same situation goes to the heart of negligence determinations. It thus is not surprising that one of the traditional definitions of negligence is the failure to exercise “ordinary” care.⁸² This definition reflects the thought that most actors most of the time seek to act in a sensible, prudent manner, reasonably balancing the costs and benefits to others as well as to themselves. And actors, in attempting to make rational choices about how to act in given situations, necessarily frame those decisions against a backdrop of the expected environment of their actions, including the customary behavior of others.

Yet people tend to be self-centered and imperfect, and persons in a complex world aiming to achieve certain primary goals can only be distracted by having to take steps to protect others from risks ancillary to the achievement of the actors’ objectives. In such situations, it is not uncommon for people to devote less care and attention to protecting others from the risks of their activities than warranted by ordinary prudence. Here, a person would be negligent for *failing* to conform to the customary level of care. In many other situations, the converse can be true: the community over time

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 4(b) (1998). While this provision is framed in terms of product defects, it draws from and embraces products liability negligence claims as well. *See Id.* cmt. e reporters’ note.

The *Restatement* provides: “An actor’s compliance with a pertinent statute, while evidence of non-negligence, does not preclude a finding that the actor is negligent under § 3 for failing to adopt precautions in addition to those mandated by the statute.” RESTATEMENT (THIRD) OF TORTS, *supra* note 11, § 16(a).

79. *See* OWEN, *supra* note 1, § 14.3.

80. *See* Robert D. Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577 (2000); Robert D. Cooter, *The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996); Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998).

81. *See, e.g.*, PROSSER & KEETON, *supra* note 11, § 33, at 193–96.

82. The person of “ordinary prudence” standard in negligence law can be traced at least to *Vaughan v. Menlove*, 132 Engl. Rep. 490, 492–93 (C.P. 1837). It still is sometimes employed. *See, e.g.*, *Morden v. Cont’l AG*, 611 N.W.2d 659, 675 (Wis. 2000). *See generally* PROSSER & KEETON, *supra* note 11, § 32, at 174.

may allow the ordinary level of care for protecting others to fall below the level of care that a reasonably prudent person would provide. Here, an actor would be negligent for *conforming* to the customary level of care. In short, while the standard of customary prudence often is the standard of reasonable prudence, sometimes it is not. In the famous *T. J. Hooper*⁸³ case, Judge Learned Hand articulated the rule, by then well established,⁸⁴ that industry practice or custom is important evidence of the reasonableness of its members' conduct but that it generally is not conclusive on due care, since the industry as a whole may have been derelict in failing to adopt precautionary measures dictated by reasonable prudence.⁸⁵ This conclusion leads to the universal rule⁸⁶ in negligence law that a defendant's conformance to or violation of applicable customary standards of care ordinarily is some evidence, but rarely conclusive, of whether a particular defendant in fact exercised due care in a particular situation.⁸⁷

83. 60 F.2d 737 (2d Cir. 1932).

84. Judge Hand drew from *Texas & Pacific Railway Co. v. Behymer*, 189 U.S. 468, 470 (1903), in which Oliver Wendell Holmes, Jr. observed, "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." *Id.*

85. See *T. J. Hooper*, 60 F.2d at 740:

[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.

Id.

86. See RESTATEMENT (THIRD) OF TORTS, *supra* note 11, § 13, which provides:

(a) An actor's compliance with the custom of the community, or of others in like circumstances, is evidence that the actor's conduct is not negligent but does not preclude a finding of negligence.

(b) An actor's departure from the custom of the community, or of others in like circumstances, in a way that increases risk is evidence of the actor's negligence but does not require a finding of negligence.

Id. On the role of evidence of custom in negligence law, there is no minority view. See *id.* cmt. b reporters' note.

87. See DOBBS, *supra* note 11, §16.3; HARPER, LAW OF TORTS, *supra* note 9, § 17.3; PROSSER & KEETON, *supra* note 11, § 33, at 193-96; RESTATEMENT (SECOND) OF TORTS § 295A; RESTATEMENT (THIRD) OF TORTS, *supra* note 11, § 13; Richard A. Epstein, *The Path to The T. J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1 (1992); Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1 (1999); Clarence Morris, *Custom and Negligence*, 42 COLUM. L. REV. 1147 (1942) (classic article).

B. Industry Standards in Products Liability Law

These negligence law principles concerning evidence of custom⁸⁸ apply to negligence claims in products liability litigation.⁸⁹ That is, evidence that a defendant failed to or did adopt a standard for a product's design, warning, or manufacturing process customarily used by manufacturers of similar products normally is relevant evidence that, if otherwise admissible,⁹⁰ the

88. The terms "custom" and "state of the art" are sometimes interchanged and often confused. See RESTATEMENT (THIRD) OF TORTS, *supra* note 11, § 2 cmt. c reporters' note, at 81–84; James Boyd & David E. Ingberman, *Should "Relative Safety" Be a Test of Product Liability?*, 26 J. LEGAL STUD. 433 (1997). "Custom" is customarily used to mean the prevailing practices in an industry. See, e.g., *Carter v. Massey-Ferguson, Inc.*, 716 F.2d 344, 347 (5th Cir. 1983) (explaining that custom means "the usual practice of the manufacturer, that is, what is done"); *Chown v. USM Corp.*, 297 N.W.2d 218, 221 (Iowa 1980) (explaining that custom means "what was being done in the industry"). While "state of the art" may mean largely the same thing as custom to business managers and engineers, the latter phrase, although variously defined, has evolved into a term of art in products liability law that essentially means the best science or technology reasonably available at the time of manufacture, in contrast to the customary, prevailing use of science or technology. See, e.g., *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1347 (Conn. 1997) ("[S]tate of the art refers to what is technologically feasible, rather than merely industry custom.").

Perhaps the best summary of the difference between the two concepts is from *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1164 (4th Cir. 1986) (Md. law):

Industry standards are the practices common to a given industry. . . often set forth in some type of code, such as a building code or electrical code, or they may be adopted by the trade organization of a given industry. State of the art is a higher standard because scientific knowledge expands much more rapidly than industry can assimilate the knowledge and adopt it as a standard.

Id. See also *Hollingsworth & Vose Co. v. Connor*, 764 A.2d 318, 334–36 (Md. Ct. Spec. App. 2000). On state of the art, see OWEN, *supra* note 1, § 10.4.

89. See Boyd & Ingberman, *supra* note 88, at 439–40; David A. Urban, Comment, *Custom's Proper Role in Strict Products Liability Actions Based on Design Defect*, 38 UCLA L. REV. 439 (1990); FRUMER & FRIEDMAN, *supra* note 11, § 13.04[5]; MADDEN & OWEN, *supra* note 11, § 27:6; 1 AMERICAN LAW OF PRODUCTS LIABILITY § 28:43; RESTATEMENT (THIRD) OF TORTS, *supra* note 11, § 2, cmt. d. On the very similar rules applied in most jurisdictions to strict liability in tort, see OWEN, *supra* note 1, § 6.4.

90. To avoid the rule against hearsay and otherwise be admissible, Federal Rule of Evidence 803(18) requires that published industry standards be reliable, meaning deemed trustworthy by other professionals in the field, and be called to the attention of or relied upon by an expert who can assist the fact finder by explaining the materials. See 2 MCCORMICK ON EVIDENCE § 321 (J. Strong ed., 5th ed. 1999) (citing FED. R. EVID. 803(18)). See generally *Brown v. Clark Equip. Co.*, 618 P.2d 267, 275–76 (Haw. 1980) (discussing hearsay problem); Daniel E. Feld, Annotation, *Admissibility in Evidence on Issue of Negligence of Codes or Standards of Safety Issued or Sponsored by Governmental Body or by Voluntary Association*, 58 A.L.R.3d 148, 153 (1974) (discussing admissibility of safety codes and standards); James L. Routh, Comment, *Admissibility of Safety Codes, Rules and Standards in Negligence Cases*, 37 TENN. L. REV. 581, 582 (1970) (same). Additionally, evidence meeting these requirements may still be excluded under Federal Rule of Evidence 403 if its probative value is outweighed by its prejudicial impact or likelihood of confusing or misleading the jury. See FED. R. EVID. 403.

defendant was or was not negligent in the manufacture and sale of its own products. Either way, evidence of applicable customs may tend to show the foreseeability of the risk as well as the cost, feasibility, utility, and acceptability among consumers of the particular safety measures the plaintiff asserts the defendant negligently failed to adopt. Thus, while a jury may normally consider evidence of customary safety standards as bearing on the standard of care and whether it was breached, such evidence is usually only part of the package of evidence offered by the parties on the particularities of the case. In addition to evidence of custom, a plaintiff generally will want to introduce specific evidence as to the foreseeability and magnitude of the risk, its hidden nature, and the feasibility, utility, and cost-effectiveness of means to avoid it. A manufacturer, on the other hand, will seek to show the opposite: that the risk was remote, open and obvious, and impracticable and costly to remove. Evidence of custom, then, usually will supplement these more basic types of proof as to particularly how and why the defendant was or was not negligent in terms of the individual elements of the calculus of risk.⁹¹

Industry customs are often developed over time and informally as a matter of trial and error by engineers working in the field.⁹² Many formal product safety standards are promulgated by standard-setting organizations, such as the American National Standards Institute (“ANSI”),⁹³ the American Standards Association (“ASA”),⁹⁴ the National Safety Council (“NSC”),⁹⁵ Underwriters’ Laboratories (“UL”),⁹⁶ the Society of Automotive Engineers (“SAE”),⁹⁷ the National Fire Protection Association,⁹⁸ and other specialized

91. “[S]tanding alone [proof of compliance with custom] does not justify a directed verdict on behalf of the actor.” RESTATEMENT (THIRD) OF TORTS, *supra* note 11, § 13 cmt. b reporters’ note.

92. *See, e.g., Tri-Pak Mach., Inc. v. Hartshorn*, 644 So. 2d 118, 120 (Fla. Dist. Ct. App. 1994) (by implication).

93. *See, e.g., DiCarlo v. Keller Ladders, Inc.*, 211 F.3d 465, 468 (8th Cir. 2000) (stepladder standards); *Clarke v. LR Sys.*, 219 F. Supp. 2d 323, 334 (E.D.N.Y. 2002) (guarding standard for grinders); *Potter v. Chi. Pneumatic Tool Co.*, 694 A.2d 1319, 1326 (Conn. 1997) (vibration limits for tools).

94. *See, e.g., Poches v. J.J. Newberry Co.*, 549 F.2d 1166, 1167 (8th Cir. 1977) (discussing specifications for speed and angle of power mower blade).

95. *See, e.g., Hutchison v. Urschel Labs., Inc.*, 157 F.3d 613, 615 (8th Cir. 1998) (guarding standards for chicken dicer); *Brown v. Clark Equip. Co.*, 618 P.2d 267, 275–76 (Haw. 1980) (involving standards for operation of front end loaders).

96. *See, e.g., McKinnon v. Skil Corp.*, 638 F.2d 270, 276–77 (1st Cir. 1981) (involving lower-blade guard standards for power saw).

97. *See, e.g., Alfred v. Caterpillar, Inc.*, 262 F.3d 1083, 1087–88 (10th Cir. 2001) (discussing the design of asphalt paver speed control as lever rather than as counterintuitive rotary dial).

organizations, such as the National Spa and Pool Institute,⁹⁹ the Scaffolding and Shoring Institute,¹⁰⁰ the Industrial Stapling and Nailing Technical Association,¹⁰¹ the American Conference of Governmental and Industrial Hygienists,¹⁰² and many others.¹⁰³ Such organizations typically work closely with industry to assure that the safety standards they establish, safety “codes,” are practicable as well as useful. Although some of these organizations are more independent than others,¹⁰⁴ safety standards contained in the codes of organizations generally represent the industry’s consensus on the most appropriate balance of safety and practicality.¹⁰⁵ Because the organizations that issue such standards and codes may be heavily influenced (if not controlled) by industry, courts generally treat the admissibility of such standards the same as any other industry standards.¹⁰⁶ But the formal way in which such standards may be developed and formulated into specific codes, and industry’s commensurate reliance upon them, suggest that they sometimes should be accorded greater weight.¹⁰⁷

98. See *Soproni v. Polygon Apartment Partners*, 971 P.2d 500, 505–06 (Wash. 1999) (window standards).

99. See *Ryan v. KDI Sylvan Pools, Inc.*, 579 A.2d 1241, 1243–44 (N.J. 1990) (pool depth standards).

100. See *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637, 642 (D.C. Cir. 1988) (standards for scaffolding clips).

101. See *Baier v. Bostitch*, 611 N.E.2d 1103, 1106 (Ill. App. Ct. 1993) (contact trip on nailer should prevent tool from discharging under its own weight).

102. See *Potter v. Chi. Pneumatic Tool Co.*, 694 A.2d 1319, 1326 (Conn. 1997) (vibration limits for tools). These and other standards-setting organizations are described in 7 FRUMER & FRIEDMAN, *supra* note 11, § 91.15.

103. See 6 FRUMER & FRIEDMAN, *supra* note 11, § 76.03.

104. See, e.g., *Fayerweather v. Menard, Inc.*, No. 01-2414, 2003 WL 328788, at *2 (Wis. Ct. App. Feb. 11, 2003) (discussing composition of ANSI’s ladder committee membership as one-third from industry, one-third from users, and one-third chosen from CPSC, OSHA, labor organizations, and “outside specialists”).

105. See *Hansen v. Abrasive Eng’g & Mfg. Inc.*, 856 P.2d 625, 628 (Or. 1993) (ANSI standards are helpful in determining whether defendant was negligent because they may represent consensus on what reasonable person in industry would do).

106. However, because some standards-setting groups are comprised of members outside the industry, and because their standards are voluntary guidelines of minimum safety, they are not to be equated with “industry custom,” as such. See *Fayerweather*, 2003 WL 328788, at *3 (stating that because one-third of ANSI ladder standards committee members came from outside industry, “the standards are not evidence of ‘custom and usage’ within an industry as contemplated” by standard jury instruction, so that court’s failure to give it was not error).

107. See *Vermett v. Fred Christen & Sons*, 741 N.E.2d 954, 971 (Ohio Ct. App. 2000) (“compliance with ANSI is a compelling factor”); see also *Tri-Pak Mach., Inc. v. Hartshorn*, 644 So. 2d 118, 120 (Fla. Dist. Ct. App. 1994) (stating that trial court did not err in failing to instruct on the effect of violating “engineering industry and organizational standards” which plaintiff’s expert only generally described and which had not been reduced to “any formal industry standard or any published regulation”).

As proof of the negligence of a manufacturer's product design, courts have admitted evidence of a defendant's failure to abide by industry standards governing the design of such products as a toy action figure,¹⁰⁸ a tire,¹⁰⁹ a meat grinder,¹¹⁰ a front-end loader,¹¹¹ a cigarette lighter,¹¹² and machinery and equipment that is unguarded¹¹³ or not equipped with an emergency stop device.¹¹⁴ So, too, have courts admitted, as proof of due care, a manufacturer's compliance with design standards for a grinder,¹¹⁵ a tractor,¹¹⁶ a press,¹¹⁷ and a car.¹¹⁸

In negligence claims that a manufacturer has failed to provide adequate warnings or instructions, courts have allowed plaintiffs to introduce evidence that the defendant failed to conform to industry practices governing appropriate warnings or instructions with respect to the assembly of a floor lamp¹¹⁹ and the location of warnings on containers holding explosive materials.¹²⁰ Similarly, as evidence of due care, courts have allowed defendants to show their compliance with the customary types of

108. See *Lugo ex rel. Lopez v. L.J.N. Toys, Ltd.*, 552 N.E.2d 162, 162–63 (N.Y. 1990) (involving injury to plaintiff's eye when an 8-pointed detachable star from Voltron-Defender of the Universe was thrown just as on TV; expert's testimony, based on customs and standards in toy safety community, that detachable star rendered design defective because Voltron would throw his star on TV was sufficient to create question for jury and withstand defendant's motion for summary judgment).

109. See *Morden v. Cont. AG*, 611 N.W.2d 659, 675–76 (Wis. 2000).

110. See *De Pree v. Nutone, Inc.*, 422 F.2d 534, 535–36 (6th Cir. 1970) (UL standards for cutter plate).

111. See *Brown v. Clark Equip. Co.*, 618 P.2d 267, 275–76 (Haw. 1980) (National Safety Council standards).

112. See *Glover v. BIC Corp.*, 987 F.2d 1410, 1417 (9th Cir. 1993) (ASTM standards for extinguishment).

113. See, e.g., *Cigna Ins. Co. v. Oy Saunatec, Ltd.*, 241 F.3d 1, 12–13 (1st Cir. 2001) (applying Massachusetts law); *Cacevic v. Simplimatic Eng'g Co.*, 645 N.W.2d 287, 291–92 (Mich. Ct. App. 2001) (ANSI standards for guarding palletizer); *Wallner v. Kitchens of Sara Lee, Inc.*, 419 F.2d 1028, 1032 (7th Cir. 1969) (American Safety Standards Institute standards for guarding conveyor).

114. See *Almazan v. CTB, Inc.*, No. CIV.A.SA-99-CA355PMA, 2000 WL 33348244, at *10 (W.D. Tex. Apr. 27, 2000) (ASME standards).

115. See *Clarke v. LR Sys.*, 219 F. Supp. 2d 323, 334 (E.D.N.Y. 2002) (ANSI guarding standard for grinders).

116. See *Spieker v. Westgo, Inc.*, 479 N.W.2d 837, 843–44 (N.D. 1992) (power take-off driveline).

117. See *Vermett v. Fred Christen & Sons Co.*, 741 N.E.2d 954, 971 (Ohio Ct. App. 2000) (ANSI safeguards for press).

118. See *Hasson v. Ford Motor Co.*, 650 P.2d 1171, 1182–83 (Cal. 1982) (SAE standards for automotive brakes).

119. See *Creadore v. Shades of Light*, No. 01-CIV-4110(GBD), 2003 WL 152003, at *2 (S.D.N.Y. Jan. 21, 2003) (UL guidelines).

120. See *Beadling v. William Bowman Assocs.*, 809 A.2d 188, 191 (N.J. Super. Ct. App. Div. 2002).

warnings or instructions used for a trampoline¹²¹ and asbestos products.¹²² While most of the cases involving evidence of industry safety standards pertain to a product's design, and occasionally to a product's warnings or instructions, as just discussed, such evidence may also involve a product's defective manufacture.¹²³

Evidence of compliance or noncompliance with an industry standard of care is almost always admissible evidence on whether the defendant exercised due care,¹²⁴ assuming the standard is applicable to the dangerous aspect of the product in question,¹²⁵ but it rarely is conclusive of a defendant's negligence.¹²⁶ Nevertheless, some courts view certain industry

121. See *Anderson v. Hedstrom Corp.*, 76 F. Supp. 2d 422, 450 (S.D.N.Y. 1999).

122. See *Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276, 281–82 (4th Cir. 1993) (N.C. law).

123. See, e.g., *Holder v. Keller Indus.*, No. 05-97-01168-CV, 2000 WL 141070, at *5 (Tex. App. Feb. 9, 2000) (involving ladder that broke constructed of low-density wood in violation of ANSI standards); *Short v. Estwing Mfg. Corp.*, 634 N.E.2d 798, 802 (Ind. Ct. App. 1994) (discussing whether hammer that broke met ANSI standards for hardness of steel); see also *Doe v. Am. Nat'l Red Cross*, 848 F. Supp. 1228, 1233 (S.D.W. Va. 1994) (assessing whether Red Cross met collection standards of blood-banking industry to protect against risk that donor might have AIDS). One of the earliest cases concerning manufacturing defect claims was *Grant v. Graham Chero-Cola Bottling Co.*, 97 S.E. 27, 28–29 (N.C. 1918) (bottle of ginger ale exploded because it was too highly charged or bottle was defective).

124. See, e.g., MICH. COMP. LAWS § 600.2946(1) (2004) (evidence of compliance admissible); WASH. REV. CODE § 7.72.050 (2004) (compliance or noncompliance); *Fidalgo v. Columbus McKinnon Corp.*, 775 N.E.2d 803, 809 (Mass. App. Ct. 2002) (dictum); *Kent Vill. Assocs. Joint Venture v. Smith*, 657 A.2d 330, 337 (Md. Ct. Spec. App. 1995) (“where relevant to the case and upon a proper evidentiary foundation, safety standards promulgated by organizations such as ANSI may be admitted to show an accepted standard of care, the violation of which may be regarded as evidence of negligence”). See generally FRUMER & FRIEDMAN, *supra* note 11, § 3.04[5] (“almost every jurisdiction”).

125. See, e.g., *Fidalgo*, 775 N.E.2d at 809.

126. See, e.g., *Gable v. Vill. of Gates Mills*, 784 N.E.2d 739, 747–48 (Ohio Ct. App. 2003) (compliance with federal standards admissible as guide in determining liability, but compliance alone is not conclusive); *Rufer v. Abbott Labs.*, No. 48909-7-I, 2003 WL 22430193, at *7 (Wash. Ct. App. Oct. 27, 2003) (holding that compliance with custom evidence is of due care, but does not conclusively disprove negligence); *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54, 64 (N.M. 1995) (stating that industry standards, “while probative of what a reasonably prudent manufacturer would do, should not be conclusive”); *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 98 (Iowa 1994) (custom of cornpicker manufacturers not to equip them with \$50 emergency stop device no defense to claim of negligent design); *Short v. Estwing Mfg. Corp.*, 634 N.E.2d 798, 802 (Ind. Ct. App. 1994); *Meseck v. Gen. Elec. Co.*, 600 N.Y.S.2d 384, 386 (App. Div. 1993) (noncompliance with industry standards is some evidence of negligence, sufficient to raise a factual question and hence avoid summary judgment, but is not conclusive on defendant's failure to exercise reasonable care); *Hasson v. Ford Motor Co.*, 650 P.2d 1171, 1182–83 (Cal. 1982) (industry standards are “minimal,” such that compliance with them does not establish due care).

In Kentucky, compliance with customary industry standards results in a rebuttable presumption that the product was not defectively designed or manufactured, applicable to any

safety codes as particularly persuasive on whether a manufacturer was¹²⁷ or was not¹²⁸ negligent, and an argument may be made for holding compliance¹²⁹ or noncompliance¹³⁰ with clear and important industry standards to be dispositive of product defectiveness in unusual situations.

III. RES IPSA LOQUITUR

A. *Nature of Doctrine*

1. Purpose

To establish a defendant's negligence, a plaintiff usually must prove, with specificity, the manner in which the defendant was negligent in making or selling the product that injured the plaintiff. Proof merely that a product malfunctioned and caused an accident normally will not suffice.¹³¹ Stated otherwise, a plaintiff typically cannot make out a *prima facie* case if he or she fails to establish just *how* the defendant was negligent and *how* that negligence caused his harm. The absence of direct evidence establishing precisely how or why a product was defective may be due to circumstances beyond the plaintiff's control, as where the product is destroyed in the accident or because there simply is no way for the plaintiff to uncover what went wrong on the assembly line long ago. Sometimes, as when the plaintiff

products liability action. *See* KY. REV. STAT. ANN. § 411.310(2) (Michie 2004). The opposite is true in Nevada. *See* M & R Inv. Co. v. Anzalotti, 773 P.2d 729, 730 (Nev. 1989) (manufacturer presumptively negligent if elevator violated ANSI standards).

127. *See, e.g.*, Morden v. Cont'l AG, 611 N.W.2d 659, 675–76 (Wis. 2000).

128. *See, e.g.*, Vermett v. Fred Christen & Sons, 741 N.E.2d 954, 971 (Ohio Ct. App. 2000) (“[C]ompliance with ANSI is a compelling factor”); McKee v. Cutter Labs., Inc., 866 F.2d 219, 224 (6th Cir. 1989).

129. *See, e.g.*, Lamb v. Kysor Indus. Corp., 305 A.D.2d 1083, 1084 (N.Y. 2003) (evidence that saw guard met industry standards at time of manufacture sufficient to establish product was not defective as matter of law); Wilder v. Toyota Motor Sales, U.S.A. Inc., 23 Fed. Appx. 155, 157 (4th Cir. 2001) (“While conformity with industry custom does not absolve a manufacturer or seller of a product from liability, such compliance may be conclusive when there is no evidence to show that the product was not reasonably safe.”).

130. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 876 (1998) (arguing that defendant's violation of clear industry standard should be conclusive proof of product's defectiveness).

131. *See* PROSSER & KEETON, *supra* note 11, § 39, at 242–57; DOBBS, *supra* note 11, § 154, at 370–75.

encounters a bug¹³² or a mouse¹³³ in his Coke or a toe in his chewing tobacco,¹³⁴ the circumstantial evidence surrounding the misadventure quite strongly suggests that the product's defective condition resulted from some negligent act or omission of the defendant manufacturer or other supplier.¹³⁵ In situations such as these, negligence law contains a device that allows a plaintiff to establish a prima facie case without direct evidence of how specifically the product failed or how the defendant may have been negligent—"res ipsa loquitur."

Res ipsa loquitur ("res ipsa") is an established doctrine of circumstantial evidence,¹³⁶ applied by name in nearly every state,¹³⁷ that may assist a plaintiff in proving a negligence claim in a products liability case as in any other type of case.¹³⁸ The doctrine originated from a casual remark by Chief Baron Pollock during argument with counsel in *Byrne v. Boadle*,¹³⁹ where a pedestrian, hit on the head by a barrel of flour that rolled out of a second story window over the defendant's shop beside the street where the plaintiff

132. See, e.g., *Birmingham Coca-Cola Bottling Co. v. Sellers*, 39 So. 2d 706, 707 (Ala. Ct. App. 1949) ("a cockroach or bug of some kind"); *Okla. Coca-Cola Bottling Co. v. Newton*, 237 P.2d 627, 628 (Okla. 1951) (fly).

133. See, e.g., *Eisenbeiss v. Payne*, 25 P.2d 162, 164 (Ariz. 1933); *Moss v. Coca Cola Bottling Co.* 229 P.2d 802, 803 (Cal. Dist. Ct. App. 1951); *Harris v. Coca-Cola Bottling Co.*, 183 N.E.2d 56, 58 (Ill. App. Ct. 1962); *Trembley v. Coca-Cola Bottling Co. of Chi.*, 138 N.Y.S.2d 332, 333 (App. Div. 1955). See generally R.D. Hursh, Annotation, *Presumption or Prima Facie Case of Negligence Based on Presence of Foreign Substance in Bottled or Canned Beverage*, 52 A.L.R.2d 117 (1957).

134. "We can imagine no reason why, with ordinary care, human toes could not be left out of chewing tobacco, and if toes are found in chewing tobacco, it seems to us that somebody has been very careless." *Pillars v. R.J. Reynolds Tobacco Co.*, 78 So. 365, 366 (Miss. 1918).

135. "Some circumstantial evidence is very strong, as when you find a trout in the milk." Journal Entry of Henry David Thoreau (Nov. 11, 1850), in 2 *THE JOURNAL OF HENRY DAVID THOREAU* 94 (Bradford Torrey & Frances H. Allen eds., 1984).

136. DOBBS, *supra* note 11, §§ 155–161, at 373–89; HARPER, *LAW OF TORTS*, *supra* note 9, § 19.5–19.12; CAL. EVID. CODE § 646 (West 2004); RESTATEMENT (SECOND) OF TORTS § 328D, at 156–57. See also MCCORMICK ON EVIDENCE, *supra* note 90, § 342; 9 JOHN HENRY WIGMORE, EVIDENCE § 2509 (3d ed. 1940).

137. South Carolina takes perverse pride in eschewing the doctrine by name while applying largely similar principles of circumstantial evidence. Compare *Legette v. Smith*, 220 S.E.2d 429, 430 (S.C. 1975) (rejecting doctrine), with *McQuillen v. Dobbs*, 204 S.E.2d 732, 735 (S.C. 1974) (applying similar circumstantial evidence principles).

138. See 1 *AMERICAN LAW OF PRODUCTS LIABILITY*, *supra* note 11, § 15:01–15.3; FRUMER & FRIEDMAN, *supra* note 11, § 10.04; MADDEN & OWEN, *supra* note 11, § 7:9; Jonathan M. Hoffman, *Res Ipsa Loquitur and Indeterminate Product Defects: If They Speak for Themselves, What Are They Saying?*, 36 S. TEX. L. REV. 353, 355 (1995). For a discussion of the "malfunction doctrine" (or, informally, "defect ipsa loquitur"), a parallel theory of proof in strict products liability, see OWEN, *supra* note 1, § 7.4.

139. 159 Eng. Rep. 299 (Ex. 1863). See also DOBBS, *supra* note 11, § 155, at 373–76; PROSSER & KEETON, *supra* note 11, § 39, at 242–57.

was walking, sought recovery from the defendant without introducing affirmative proof of why the barrel fell from the window.¹⁴⁰ To the defendant's argument that the plaintiff's case must be dismissed because he failed to prove specifically how the defendant was negligent in allowing the barrel to tumble from the window, Chief Baron Pollock remarked, "res ipsa loquitur," the thing speaks for itself, and allowed the plaintiff's verdict.¹⁴¹ This remark promptly evolved into a full-blown doctrine¹⁴² that a plaintiff may establish a defendant's breach of duty indirectly, in situations where an accident's specific cause is unknown but where the circumstances indicate that some negligence by the defendant probably was its cause. This doctrine has been warmly embraced by (and has introduced complication into)¹⁴³ the Anglo-American law of negligence.¹⁴⁴

Especially prior to the development of strict liability theories of products liability law in the 1960s, res ipsa served in certain cases as an important mechanism for unburdening plaintiffs from having to establish specifically how a manufacturer or other supplier had been negligent in the production or sale of a defective product. Particularly in manufacturing defect cases, where the product violently malfunctioned, res ipsa provided a bridge between the difficulties of proving negligence by direct evidence and modern products liability claims based on product defect that relieve a plaintiff, at least in theory, from having to prove a manufacturer's fault at all.

A prime example is *Escola v. Coca Cola Bottling Co.*,¹⁴⁵ a negligence case against the bottler by a waitress injured when a bottle of Coke exploded in her hand. Today, *Escola* is remembered for Justice Traynor's

140. *Byrne*, 159 Eng. Rep. at 299.

141. *Id.* at 299-300.

142. *But see* Jackson v. Millar, [1975] S.C.R. 225, 235-36 (Can. 1975); Ballard v. N. British Ry. Co., 1923 S.L.T. 219, 226 (Scot. 1923) (Lord Shaw) ("If that phrase had not been in Latin, nobody would have called it a principle.").

143. Res ipsa is "a thing of fearful and wonderful complexity and ramifications, and the problems of its application and effect have filled the courts of all our states with a multitude of decisions, baffling and perplexing alike to students, attorneys and judges." William L. Prosser, *Res Ipsa Loquitur in California*, 37 CAL. L. REV. 183, 183 (1949).

144. Two years after *Byrne v. Boadle*, the res ipsa doctrine was described by Chief Justice Erle:

[There must be] reasonable evidence of negligence; . . . but where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

Scott v. The London & St. Katherine Docks Co., 159 Eng. Rep. 665 (Ex. 1865).

145. 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring).

celebrated concurring opinion in which he outlined the various reasons for favoring a rule of “absolute liability” for manufacturers of defective products,¹⁴⁶ reasons which provided the theoretical basis for his opinion for the court in *Greenman v. Yuba Power Products, Inc.*,¹⁴⁷ nearly two decades later.¹⁴⁸ Now largely forgotten is the fact that the *Escola* majority, on the basis of *res ipsa*, upheld a judgment for the waitress despite her inability to prove specifically how the defendant bottler may have been negligent.¹⁴⁹ With the advent of strict products liability in tort and warranty, and strict liability’s parallel “malfunction doctrine” in particular, *res ipsa* in most jurisdictions has lost considerable importance. Yet, it remains a valid doctrine that continues to be pled and on which plaintiffs continue to win products liability claims.

2. Limitations

It may be helpful to note some attributes of the *res ipsa* doctrine that limit its applicability. First, the doctrine applies only in situations where the circumstances surrounding the accident are mysterious and unknown. That is, there is neither need nor room for a doctrine of circumstantial evidence that is designed to allow plausible guesses as to how an accident occurred where direct evidence clearly identifies both the nature of the product’s defect and the defendant’s conduct that allowed the defect to occur and harm the plaintiff. So, while many courts allow a plaintiff to rely on *res ipsa* even when the plaintiff pleads and offers specific evidence on negligence and causation, on how and why a product accident occurred,¹⁵⁰ the doctrine assuredly must vanish, like a bat in the proverbial light, once the plaintiff’s evidence fully and specifically explains how the product failed and the reasonable steps the defendant could have taken to prevent the failure.¹⁵¹ Ordinarily, however, a plaintiff’s proof of how an accident occurred will not

146. *Id.* at 440–44.

147. 377 P.2d 897 (Cal. 1963).

148. See OWEN, *supra* note 1, § 5.2.

149. See *Escola*, 150 P.2d at 440.

150. See, e.g., *Weyerhaeuser Co. v. Thermogas Co.*, 620 N.W.2d 819, 831–32 (Iowa 2000); see FRUMER & FRIEDMAN, *supra* note 11, § 10.04[4].

151. See, e.g., *Stahlecker v. Ford Motor Co.*, 667 N.W.2d 244, 252 (Neb. 2003) (“[I]f specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of *res ipsa loquitur* is not applicable.”); *Dover Elevator Co. v. Swann*, 638 A.2d 762, 774 (Md. 1994) (holding *res ipsa* inapplicable where plaintiff’s expert fully explained why elevator misleveled). See generally PROSSER & KEETON, *supra* note 11, at 260; DOBBS, *supra* note 11, at 372, 387.

be so specific and complete, in which case the plaintiff should be entitled to rely upon *res ipsa* in addition to the more specific proof.¹⁵²

Second, it should be stressed that *res ipsa* normally is little more than an application of ordinary principles of circumstantial evidence to the accident law context, albeit in crystalized form tailored to the law of negligence.¹⁵³ The principal benefit the *res ipsa* doctrine provides the plaintiff is to supply an indirect means by which a jury may infer the defendant's breach of duty. So, while causation frequently is also established by the *res ipsa* inferences,¹⁵⁴ a plaintiff relying on *res ipsa* still has the burden of proving, in almost all states, *all* the elements of a negligence case—the defendant's duty, breach, cause in fact, proximate cause, and damage.¹⁵⁵ That is, the procedural effect of *res ipsa* in most jurisdictions is merely to provide some evidence of breach which a jury may accept or reject as it sees fit, such that the plaintiff retains the burden of proof on this and the other elements of the tort of negligence.

Third, one should also remember that *res ipsa* is a rule of *negligence*, not strict products liability, such that the inferences or presumptions must point to a probability that defendant was *negligent* in allowing a product to *become* defective, not merely that the product was defective. Thus, the doctrine establishes both defect and negligence, as where a product's specific defect is unknown, and its failure destroys evidence of its cause—as when a new car's engine compartment suddenly catches fire; or where the presence of the defect is crystal clear, but its precise origin is a matter of conjecture—as when a mouse shows up in a bottle of Coke. In either case, what must be inferred is the defendant's negligence in allowing the defect into the product and the product into the plaintiff's hands. And proof, no matter how strong, of the product's defectiveness alone—whether direct or circumstantial—simply will not suffice. For the latter, there is a closely similar, newer doctrine of circumstantial evidence, the “malfunction

152. See, e.g., *Weyerhaeuser*, 620 N.W.2d at 831 (explaining that specific negligence and *res ipsa* may be pled and submitted to jury in the alternative).

153. See, e.g., *Waering v. BASF Corp.*, 146 F. Supp. 2d 675, 687 (M.D. Pa. 2001); *Weyerhaeuser*, 620 N.W.2d at 831. See generally PROSSER & KEETON, *supra* note 11, § 39.

154. See, e.g., *Knight v. Just Born, Inc.*, No. CV-99-606-ST, 2000 WL 924624, at *13–*14 (D. Or. Mar. 28, 2000) (allowing *res ipsa* for both negligence and causation); *Dover Elevator*, 638 A.2d at 765 (“*Res ipsa loquitur* is ‘merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a [court or] jury in inferring negligence as the cause of that accident.’” (citation omitted)). See generally PROSSER & KEETON, *supra* note 11, § 39, at 247–48.

155. See, e.g., *Dover Elevator*, 638 A.2d at 765.

doctrine,” specifically tailored to proof of defect for purposes of establishing strict products liability.¹⁵⁶

B. Elements

Although *res ipsa* is properly not a cause of action but merely a method of proof, it nevertheless has two or three definite elements. Most traditional formulations of *res ipsa* in America derive from the first edition of *Wigmore on Evidence*, which divided the doctrine into three elements:

(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.¹⁵⁷

In order, these elements raise inferences (1) that someone was negligent, (2) that the someone was the defendant, and (3) that the someone was not the plaintiff. In combination, these elements provide that a plaintiff may rely on *res ipsa* where the circumstances of an accident suggest that it probably resulted from the defendant's negligence and not from the actions of the plaintiff or another.

Recently, however, prompted by the widespread adoption of comparative fault, many courts have eliminated the third element, an element which seems to be based on the plaintiff's contributory fault. Thus, while many courts continue to define the doctrine in terms of the traditional three elements,¹⁵⁸ sounder formulations of *res ipsa* today limit the essential elements to the first two, in which case the doctrine applies when (1) the accident was of a type that ordinarily does not occur unless someone has been negligent, and (2) the defendant had exclusive control over the instrumentality at the relevant time.¹⁵⁹ In terms of inferences, these elements establish that the accident probably resulted from someone's negligence and

156. See OWEN, *supra* note 1, § 6.4; Owen, *Manufacturing Defects*, *supra* note 5, at 871–84.

157. PROSSER & KEETON, *supra* note 11, § 39, at 244 n.24 (citing 5 WIGMORE, EVIDENCE § 2509 (1st ed. 1905)). More currently, see 9 WIGMORE, *supra* note 136, § 2509, at 487–512; see also 2 MCCORMICK ON EVIDENCE, *supra* note 90, § 342, at 519.

158. See *infra* note 156.

159. See, e.g., McGuire v. Davidson Mfg. Corp., 258 F. Supp. 2d 945, 953 (N.D. Iowa 2003) (explaining that the Comparative Fault Act “abrogates the requirement that the plaintiff show his actions did not contribute to the injury”); Barretta v. Otis Elevator Co., 698 A.2d 810, 812 (Conn. 1997); Turbines, Inc. v. Dardis, 1 S.W.3d 726, 741 (Tex. App. 1999); see also *infra* note 157.

that the negligent person was probably the defendant.¹⁶⁰ Whether the elements of *res ipsa* are established in any given case, and whether it otherwise applies to the facts, are questions of law for the court.¹⁶¹

It is sometimes said that *res ipsa*, which provides an incentive for a defendant to come forward with evidence of how an accident occurred, cannot be applied unless the plaintiff shows that the evidence is more accessible to the defendant than to the plaintiff.¹⁶² It is true enough that providing such an incentive to defendants is one secondary function of the doctrine.¹⁶³ Yet few courts today explicitly convert this secondary purpose into a formal requirement, for to do so would confusingly erect a “cardboard defense” that does little more than parrot the second element’s requirement that the plaintiff show the defendant controlled the instrumentality that caused the harm.¹⁶⁴ It should be helpful to examine the individual elements in more detail.

1. Accident of a Type that Normally Results Only from Negligence

The purpose of the first *res ipsa* element, that the accident was of a type that ordinarily does not occur without someone’s negligence, is to determine if the accident was probably caused by a negligent act or omission. For example, it may be that the negligence of someone is the most likely cause of a mouse or bug in a Coke,¹⁶⁵ a toe in chewing tobacco,¹⁶⁶ a trout in the milk,¹⁶⁷ a candy that burned the plaintiff’s mouth, so that it felt on fire,¹⁶⁸ a

160. See, e.g., *Turbines, Inc.*, 1 S.W.3d at 741 (“The first factor is necessary to support the inference of negligence and the second to support the inference that the defendant was the negligent party.”). See generally DOBBS, *supra* note 11, § 154, at 370–73.

161. See, e.g., *Barretta*, 698 A.2d at 811.

162. See PROSSER & KEETON, *supra* note 11, § 39, at 254; DOBBS, *supra* note 11, § 160, at 385–87.

163. See, e.g., *Turbines, Inc.*, 1 S.W.3d at 740.

The purpose of *res ipsa loquitur* is to relieve the plaintiff of the burden of proving a specific act of negligence by the defendant when it is impossible for the plaintiff to determine the sequence of events, or when the defendant has superior knowledge or means of information to determine the cause of the accident.

Id.

164. Professor Dan Dobbs must be credited with this apt metaphor. See DOBBS, *supra* note 11, § 160, at 386.

165. See, e.g., *Harris v. Coca-Cola Bottling Co.*, 183 N.E.2d 56, 58 (Ill. App. Ct. 1962) (mouse); *Okla. Coca-Cola Bottling Co. v. Newton*, 237 P.2d 627, 628 (Okla. 1951) (fly).

166. See *Pillars v. R.J. Reynolds Tobacco Co.*, 78 So. 365, 365 (Miss. 1918).

167. See THOREAU, *supra* note 135, at 94.

new motor home that in fact catches on fire,¹⁶⁹ a hand grenade with visible defects that explodes too quickly,¹⁷⁰ or the steering¹⁷¹ or brakes¹⁷² of an automobile that suddenly fail.

Looked at from the other direction, limiting the *res ipsa* doctrine's operation to situations in which someone probably was negligent properly excludes from coverage true accidents most likely caused by no one's fault. While many product misadventures are attributable to someone's failure to exercise reasonable care—the manufacturer, the user, or someone else—many others are an inevitable result of imperfect humans using imperfect machines in an uncertain world. Thus, it may be most likely that a product accident is attributable to one's negligence when injury results from a new motor home that catches fire,¹⁷³ a vehicle that suddenly loses its steering,¹⁷⁴ a blood transfusion that causes serum hepatitis,¹⁷⁵ an escalator that malfunctions,¹⁷⁶ an air bag that fails to deploy,¹⁷⁷ or an underground gas tank that springs a leak and explodes.¹⁷⁸ In each such case, because the product might well have failed for reasons other than someone's negligent act or omission, *res ipsa* did not apply.

2. Defendant's Exclusive Control

a. *In General*

No matter how clearly the plaintiff establishes the first element, that someone was negligent in making or handling the product, a *res ipsa* case will fail unless the plaintiff further shows that the defendant is the particular party who most probably was responsible for the negligence. Traditionally, and quite roughly, this inference is established by showing that the manufacturer or other defendant had exclusive control of the instrumentality

168. See *Knight v. Just Born, Inc.*, No. CV-99-606-ST, 2000 WL 924624, at *2 (D. Or. Mar. 28, 2000).

169. See *Hinckley v. La Mesa R.V. Ctr., Inc.*, 205 Cal. Rptr. 22, 23 (Ct. App. 1984).

170. See *McGonigal v. Gearhart Indus. Inc.*, 788 F.2d 321, 322–23 (5th Cir. 1986).

171. See *Gen. Motors Corp. v. Dillon*, 367 A.2d 1020, 1021 (Del. 1976).

172. See, e.g., *Holman v. Ford Motor Co.*, 239 So. 2d 40, 41 (Fla. Dist. Ct. App. 1970).

173. See *Rocky Mountain Fire & Cas. Co. v. Biddulph Oldsmobile*, 640 P.2d 851, 853 (Ariz. 1982).

174. See, e.g., *Beatty v. Ford Motor Co.*, 574 S.E.2d 803, 805–06 (W. Va. 2002); *Brothers v. Gen. Motors Corp.*, 658 P.2d 1108, 1109 (Mont. 1983).

175. See *Schmaltz v. St. Luke's Hosp.*, 521 P.2d 787, 788–89 (Colo. Ct. App. 1974).

176. See, e.g., *Ellis v. Sears Roebuck & Co.*, 388 S.E.2d 920, 920–22 (Ga. Ct. App. 1989).

177. See *Batiste v. Gen. Motors Corp.*, 802 So. 2d 686, 687 (La. Ct. App. 2001).

178. See *Mitchell v. Suburban Propane Gas Corp.*, 581 N.Y.S.2d 927, 934 (App. Div. 1992).

that caused the accidental harm—the product in question—at the relevant time. That is, the “exclusive control” requirement is simply another way of assuring that the injury is traceable “to a specific instrumentality or cause for which the defendant was responsible.”¹⁷⁹

It is of utmost importance in products liability cases whether the relevant *time* of exclusive control over the instrumentality is viewed as the time of the accident that caused the plaintiff’s injury or the time of the probable negligence.¹⁸⁰ Basing *res ipsa* on the defendant’s control at the time of the accident makes good sense in conventional types of tort cases where *res ipsa* has long been employed, such as a passenger’s claim against the driver where a car leaves the highway and goes into a ditch, a type of case where common sense suggests that the operator of the vehicle at the time of the accident was most likely responsible for the car’s misadventure. But ascertaining who had control of the instrumentality at the time of the accident makes no sense in some contexts, including those involving products liability claims. No matter how powerful the circumstantial evidence that a defective or malfunctioning product resulted from some negligence by the manufacturer, the manufacturer will have relinquished control of the product to a retail dealer or someone else long before a product accident occurs. Indeed, plaintiffs themselves often are in control of products at the time they are injured. So, if a car-in-a-ditch case is brought by the driver’s estate against the manufacturer of the car, and the plaintiff proves that the car was new, the weather was clear, the roadway was empty, and the driver was awake and sober, the relevant time of control in such a products liability case would seem to be the time when the product was designed and manufactured, not the time of the accident. To take another example, a person drinking a bottle of Coke who suddenly encounters a mouse or a bug surely has control of the product at the time of the misadventure. But the circumstantial evidence in such a case is very strong that the relevant negligence was that of the bottler—who surely had control of the product at the time of bottling, the time of the probable negligence, and who just as surely had not a wit of control at the extraneous time of consumption.

179. See *Weyerhaeuser Co. v. Thermogas Co.*, 620 N.W.2d 819, 832 (Iowa 2000); PROSSER & KEETON, *supra* note 11, § 39, at 248. “Exclusive control is merely one fact which establishes the responsibility of the defendant; and if it can be established otherwise, exclusive control is not essential to a *res ipsa loquitur* case.” RESTATEMENT (SECOND) OF TORTS § 328D cmt. g, at 161.

180. See PROSSER & KEETON, *supra* note 11, § 39, at 250; DOBBS, *supra* note 11, § 157, at 378–81.

Thus, if a court were to insist on applying the exclusive control element in a products liability case mechanically to mean control-at-the-time-of-injury, *res ipsa* almost never would be available in this type of litigation.¹⁸¹ For many years, however, a trend has been afoot to interpret the exclusive control element more liberally in a way that promotes its purpose in identifying the person most likely responsible for the negligence already inferred by element number one.¹⁸² As early as *Escola v. Coca Cola Bottling Co.*,¹⁸³ discussed above, courts were construing the control test in this more logical manner. There, the court decisively held that exclusive control may properly be determined at the time of the probable negligence, rather than at the time of the accident.¹⁸⁴ For some time, many courts have similarly interpreted the time of control in this commonsense fashion.¹⁸⁵

The probability that a defect is attributable to the manufacturer or other supplier diminishes over time after a product is first manufactured and sold as it suffers ordinary wear and tear, deterioration from the elements, abuse by users and mechanics, repairs, accidents, and other misadventures.¹⁸⁶ By the same token, as such incidents mount over the life of a product, the likelihood increases that a defect causing a product malfunction is attributable to such an event rather than to an original defect present at the

181. A few courts still do apply the exclusive control test narrowly in this manner. *See, e.g.*, *Harris v. Gen. Motors Corp.*, 34 Fed. Appx. 487, 490 (7th Cir. 2002) (concerning late deployment of air bag on one-year-old car; *res ipsa* inapplicable because of absence of defendant's exclusive control); *McConchie v. Samsung Elecs. of Am., Inc.*, No. CIV. 99-40-JD, 2000 DNH 180, 2000 WL 1513777, at *4 (D. N.H. Aug. 11, 2000) (finding *res ipsa* inapplicable to six-month-old microwave that caught fire because it was installed in plaintiffs' kitchen and so was not under defendant's exclusive control).

182. *See, e.g.*, *Pavon v. Rudin*, 679 N.Y.S.2d 27, 30 (App. Div. 1998). *See generally* FRUMER AND FRIEDMAN, *supra* note 11, § 10.04[3][a]; RESTATEMENT (SECOND) OF TORTS § 328D cmt. g at 161.

183. 150 P.2d 436 (Cal. 1944).

184. *See id.* at 438.

Many authorities state that the happening of the accident does not speak for itself where it took place some time after defendant had relinquished control of the instrumentality causing the injury. Under the more logical view, however, the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident, *provided* plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession.

Id.

185. *See, e.g.*, *McGuire v. Davidson Mfg. Corp.*, 258 F. Supp. 2d 945, 953-55 (N.D. Iowa 2003); *Weyerhaeuser Co. v. Thermogas Co.*, 620 N.W.2d 819, 832 (Iowa 2000); *see also* *Turbines, Inc. v. Dardis*, 1 S.W.3d 726, 741-42 (Tex. App. 1999) (dictum). *See generally* PROSSER & KEETON, *supra* note 11, § 39, at 250 ("[T]here is now quite general agreement" to this effect.).

186. *See* OWEN, *supra* note 1, § 10.5.

time of sale. Thus, the longer a product is out and about in the hurly-burly world, the more likely it is that a product failure cannot be traced to the doorstep of the original product suppliers. In such cases, once it becomes more likely than not that causes other than the defendant's negligence were responsible for a product's misbehavior, the exclusive control element shields the defendant from the rigors of *res ipsa*. Hence, courts have refused to apply *res ipsa* to a high mileage vehicle that malfunctioned,¹⁸⁷ tires that blew out,¹⁸⁸ an old ladder that buckled,¹⁸⁹ a car¹⁹⁰ or tractor that caught fire,¹⁹¹ a folding chair that collapsed,¹⁹² and to many other cases where causes outside of the defendant's control best explain a product mishap.

b. Multiple Defendants

The exclusive control element is problematic for plaintiffs in cases with multiple defendants.¹⁹³ If more than one defendant handles a product in a

187. See, e.g., *Mosesian v. Ford Motor Co.*, No. A096967, 2002 WL 31009208, at *4 (Cal. Ct. App. Sept. 9, 2002).

No less than seven years elapsed between the time Ford relinquished possession of the car and occurrence of the fire. During this time, the car underwent a series of repairs, both major and minor, some of which involved the electrical system. Three days before the fire, the car was in fact taken to a repair shop for an apparent electrical malfunction. There was no evidence linking the fire to the original condition of the car or rebutting the possibility that the problem arose from a modification of the motor or electrical system or from a faulty repair by a third party. . . . [T]he requirement of exclusive control would be rendered meaningless if it could be applied to the present case.

Id.; *Beatty v. Ford Motor Co.*, 574 S.E.2d 803, 808 (W. Va. 2002) (discussing an alleged steering failure on van driven 110,000 miles).

[O]ther responsible causes, including the conduct of the appellant and third persons, [were] not sufficiently eliminated by the evidence. The record shows it was not clear how the van had been operated or maintained over the many miles that the van had accumulated, suggesting that the conduct of unknown third persons could have caused the accident.

Id.

188. *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 358 So. 2d 1339, 1342 (Fla. 1978).

189. See *Crawford v. Sears Roebuck & Co.*, 295 F.3d 884, 885–86 (8th Cir. 2002) (commenting that the ladder was twenty to twenty-eight years old).

190. See *Parsons v. Ford Motor Co.*, 85 S.W.3d 323, 333 (Tex. App. 2002) (noting that the ignition switch had been replaced before fire).

191. See *U.S. Fid. & Guar. Co. v. J.I. Case Co.*, 432 S.E.2d 654, 658 (Ga. Ct. App. 1993) (explaining that the drivers used the tractor for 300 hours without reading instruction manual on cooling engine down).

192. See *Rivera-Emerling v. M. Fortunoff of Westbury Corp.*, 721 N.Y.S.2d 653, 654–55 (App. Div. 2001) (chair had been on sales floor to which innumerable shoppers had access).

193. See FRUMER & FRIEDMAN, *supra* note 11, § 10.04[3][c]; PROSSER & KEETON, *supra* note 11, § 39, at 251–53.

way that could cause the injury, no one defendant will have had exclusive control over the product and a *res ipsa* case ordinarily should fail.¹⁹⁴ To make out a *res ipsa* case against any one defendant in such a successive control situation, a plaintiff usually will have to show that the probable negligence was attributable to a particular defendant and not the others—by evidence that implicates the particular defendant, exonerates the other parties, or some combination of the two.¹⁹⁵ But a number of courts, in varying situations, have allowed plaintiffs to rely on *res ipsa* against multiple defendants who separately or jointly controlled the product before it caused the injury.¹⁹⁶

3. Plaintiff's Noninvolvement

The third traditional *res ipsa* element is that the plaintiff did not participate in causing the accident. Like the exclusive-control element, if this element were applied literally, a plaintiff using a product at the time it malfunctions could never recover under the *res ipsa* doctrine. Such a result would sap *res ipsa* of much of its proper power. While some courts and commentators have viewed the third element as a surrogate for contributory negligence, albeit as part of the plaintiff's case in chief, the third conventional element may more logically be viewed as a subset of and

194. See, e.g., *Waering v. BASF Corp.*, 146 F. Supp. 2d 675, 687 (M.D. Pa. 2001).

The employment of *res ipsa loquitur* is problematic where, as here, there are several defendants who had successive control over the harm-causing instrumentality and there is no reason to believe that more than one defendant is responsible for the harm. In such cases, the other defendants are 'other responsible causes' that must be sufficiently eliminated in order for it to be more likely than not that the remaining defendant is responsible for the harm.

Id.

195. See *id.* at 688 (holding that evidence of prior negligent packaging by manufacturer of hazardous chemicals, with no evidence of prior negligent shipping by distributors, sufficed to implicate manufacturer and exonerate distributors).

196. See, e.g., *Knight, Inc. v. Just Born, Inc.*, No. CV-99-606-ST, 2000 WL 924624, at *14 (D. Or. March 28, 2000) (defective candy manufacturer and seller); *Ruiz v. Otis Elevator*, 703 P.2d 1247, 1248–50 (Ariz. Ct. App. 1985) (elevator that squashed plaintiff-owner and party who manufactured, installed, and maintained it); *Stalter v. Coca-Cola Bottling Co. of Ark.*, 669 S.W.2d 460, 464 (Ark. 1984) (soft drink bottle that fell through bottom of carton bottler and retailer, who shared control of display); *Samansky v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 567 N.E.2d 386, 393 (Ill. 1991) (catheter line that broke and remained in plaintiff's body during bypass surgery—manufacturer, hospital, and doctors all had "consecutive" control); *Nat'l Union Fire Ins. Co. v. Harrington*, 854 So. 2d 880, 891–92 (La. Ct. App. 2003) (*res ipsa* appropriate against only possible tortfeasors, operator of vehicle and manufacturer, where former controlled vehicle at time it caught fire in plaintiff's carport and latter controlled vehicle when it was manufactured); *Holliday v. Peden*, 359 So. 2d 640, 642–43 (La. Ct. App. 1978) (surgical needle that broke in plaintiff's throat during tonsillectomy—manufacturer, hospital, and surgeon).

check on the second. That is, if the defendant at the relevant time had *exclusive* control of the product, then the plaintiff must have had none—and so could not have participated in causing the accident.¹⁹⁷ From either perspective, the third element (as is true with the second) bears a distinctly antiquarian appearance of a search for an accident's sole responsible cause.¹⁹⁸ Yet modern principles of joint causation and comparative fault have decisively discarded the notion that a plaintiff's case against a negligent defendant is demolished if the plaintiff in some minor way contributed to the accident's causation.¹⁹⁹

Today, while many courts continue to include the absence of voluntary action by the plaintiff as part of the litany of the conventional three-element *res ipsa* rule,²⁰⁰ many other courts have dropped the third Wigmorean element and reduce *res ipsa* to its two principal elements: (1) the accident being of a type that normally results only from negligence and (2) the defendant's exclusive control of whatever caused the accident.²⁰¹ Perhaps in recognition that the plaintiff-noninvolvement element is logically subsumed by the exclusive-control element, some courts rely upon the latter element in

197. See DOBBS, *supra* note 11, § 159, at 384–85.

198. See PROSSER & KEETON, *supra* note 11, § 39, at 254.

199. See, e.g., *Montgomery Elevator Co. v. Gordon*, 619 P.2d 66, 70 (Colo. 1980) (remarking that the no-plaintiff-contribution element is “in direct contravention to the concept of comparative negligence” because “[a] plaintiff . . . who had to rely on *res ipsa* and who was only slightly negligent would be barred from recovery since his contributory negligence would deny him the application of the *res ipsa loquitur* doctrine”). See generally DOBBS, *supra* note 11, § 159; OWEN, *supra* note 1, chs. 11, 12, and 13.

200. See, e.g., *Mosesian v. Ford Motor Co.*, No. A096967, 2002 WL 31009208, at *3 (Cal. Ct. App. Sept. 9, 2002); *Williams v. Am. Med. Sys.*, 548 S.E.2d 371, 374 (Ga. Ct. App. 2001); *Nat'l Union Fire Ins. Co. of La. v. Harrington*, 854 So.2d 880, 891 (La. Ct. App. 2003); *Darms v. Bunce Rental, Inc.*, No. 24380-6-II, 2000 WL 1174548, at *6 (Wash. Ct. App. Aug. 18, 2000); see also *Searle v. Suburban Propane Div. of Quantum Chem. Corp.*, 700 N.Y.S.2d 588, 592 (App. Div. 2000) (including a fourth element: “evidence as to the true explanation of the event must be more readily accessible to the defendant than the plaintiff”); *Beatty v. Ford Motor Co.*, 574 S.E.2d 803, 808 (W. Va. 2002) (blending conduct of plaintiff or third persons into single element and including duty as a separate element).

201. See, e.g., *McGuire v. Davidson Mfg. Corp.*, 258 F. Supp. 2d 945, 951 (N.D. Iowa 2003) (“Two elements must be present for the doctrine to apply: ‘(1) the injury is caused by an instrumentality under the exclusive control of the defendant, and (2) the occurrence is such as in the ordinary course of things would not happen if reasonable care had been used.’”); *Weyerhaeuser Co. v. Thermogas Co.*, 620 N.W.2d 819, 831 (Iowa 2000); *Parsons v. Ford Motor Co.*, 85 S.W.3d 323, 332 (Tex. App. 2002) (“(1) the character of the injury is such that it would not have occurred in the absence of negligence; and (2) the instrumentality which caused the injury is shown to have been under the sole management and control of the defendant”). Some courts add a duty element. See, e.g., *Waering v. BASF Corp.*, 146 F. Supp. 2d 675, 686–87 (D. Pa. 2001) (indicating that negligence in question must be within defendant's scope of duty to plaintiff); *Beatty*, 574 S.E.2d at 808.

barring *res ipsa* claims where the plaintiff is using the product at the time of injury.²⁰²

C. Procedural Effect

The importance of *res ipsa* lies in its procedural effect. Like any other type of circumstantial evidence, a large majority of courts hold that *res ipsa* provides nothing more than an inference that the defendant was negligent, an inference the jury is free to accept or reject.²⁰³ Yet an inference of this type may be exceedingly important to a plaintiff deprived by circumstances of direct proof of negligence and causation, saving him from summary judgment or a directed verdict for the defendant.²⁰⁴ In these mere-inference states, a defendant confronted with *res ipsa* may choose to introduce no evidence at all, and simply argue that the plaintiff's circumstantial evidence is insufficient to make a case. In a few states, however, *res ipsa* provides the plaintiff with a "presumption" of negligence, or makes out a *prima facie* case, that shifts the burden of going forward with the evidence (or the "burden of proof") to the defendant who thereupon must produce some evidence that it was not negligent or lose the case.²⁰⁵ Few terms are more slippery than "presumption" and "burden of proof,"²⁰⁶ and a lawyer must

202. See, e.g., *Darms v. Bunce Rental, Inc.*, No. 24380-6-II, 2000 WL 1174548, at *6 (Wash. Ct. App. Aug. 18, 2000). Cf. *Beatty*, 574 S.E.2d at 808:

[T]here is a substantial possibility that the rain-soaked highway and/or the appellant's carelessness in operating the van may have been, at the very least, a contributing factor to the accident. Accordingly, the appellant has not shown that the accident was of a kind that ordinarily would not have occurred in the absence of the [defendant's] negligence.

Id.

203. See, e.g., *Barretta v. Otis Elevator Co.*, 698 A.2d 810, 812 (Conn. 1997) ("The doctrine permits, but does not compel, such an inference. The doctrine has no evidential force, does not shift the burden of proof and does not give rise to a presumption. It is but a specific application of the general principle that negligence can be proved by circumstantial evidence." (citations omitted)).

204. See, e.g., *Williams v. Emerson Elec. Co.*, 909 F. Supp. 395, 399 (M.D. La. 1995) (denying summary judgment); *Knight v. Just Born, Inc.*, No. CV-99-606-ST, 2000 WL 924624, at *11 (D. Or. Mar. 28, 2000) (same); *Jurls v. Ford Motor Co.*, 752 So. 2d 260, 266 (La. Ct. App. 2000) (reversing directed verdict).

205. See, e.g., *Stalter v. Coca-Cola Bottling Co. of Ark.*, 669 S.W.2d 460, 462 (Ark. 1984) ("[T]he burden shifts to the defendant to go forward with evidence to offset the inference of negligence.").

206. When courts say that *res ipsa* shifts the "burden of proof," they usually mean only that the doctrine shifts to the defendant the burden of producing evidence, not the ultimate burden of persuasion. See MCCORMICK, *supra* note 90, § 342, at 433.

look closely and skeptically at *res ipsa* opinions using those words to be certain precisely what procedural effect the court has in mind.²⁰⁷

IV. CONCLUSION

Negligence may not be the most glamorous products liability claim, but it is regaining prominence as an essential, perhaps the primary, theory of recovery for injuries resulting from product accidents. This article has addressed three principal types of proof of negligence in modern products liability litigation—violation of governmental safety statutes and regulations (negligence *per se*), violation of industry codes and customs, and *res ipsa*. A defendant's violation of a relevant safety standard set by a legislature or governmental agency, or by the defendant's industry by custom or formal code, ordinarily will go far in proving a plaintiff's negligence claim. Similarly, a defendant's proof of compliance with such safety codes and standards provides some (if less compelling) evidence that the defendant's actions and omissions in making and selling the accident product were consistent with all due care. In cases where a product is destroyed or the plaintiff is otherwise unable to prove precisely why it failed and caused an accident, the doctrine of *res ipsa* may be available to provide the plaintiff with a method for establishing the defendant's negligence by circumstantial evidence.²⁰⁸ All three types of proof—violation of government or industry safety standards and product malfunctions that point to a defendant's negligence—are powerful indicia that a manufacturer or other supplier of a product involved in an accident may be subject to liability in negligence for the resulting harm.

207. See, e.g., *Nat'l Union Fire Ins. Co. of La. v. Harrington*, 854 So. 2d 880, 891–892 (La. Ct. App. 2003) (describing *res ipsa* as allowing fact-finder to “infer negligence,” as creating a “presumption of negligence,” and as requiring defendant to “rebut an inference of negligence”); *McGuire v. Davidson Mfg. Corp.*, 258 F. Supp. 2d 945, 952 (N.D. Iowa 2003) (stating *res ipsa* doctrine permits “inference of negligence,” yet defendant can present “rebutting evidence”); *Opelika Coca-Cola Bottling Co. v. Johnson*, 241 So. 2d 327, 328–29 (Ala. Civ. App. 1970) (explaining how Alabama courts, in addressing the procedural effect of *res ipsa*, variously state that the doctrine creates an *inference* of negligence; that it makes out a *prima facie* case of negligence, shifting the burden of going forward to the defendant; and that it creates a *presumption* of negligence). See 2 MCCORMICK, *supra* note 90, § 342, at 519.

208. A parallel principle of proof, often referred to as the “malfunction doctrine,” applies in most states to proof of defect in strict liability in tort. See OWEN, *supra* note 1, § 7.4; Owen, *Proof of Product Defect*, *supra* note 4.