TOXIC SUBSTANCE SAFETY STATUTE VIOLATIONS: SHOULD VERMONT ADOPT THE NEGLIGENCE PER SE WITH EXCUSE DOCTRINE?

INTRODUCTION

The increasing incidence of injury due to the proliferation of hazardous substances has generated serious concern in our political and legal systems. Congress has found that both citizens and the environment continue to be exposed to large amounts of chemical substances which present an unreasonable risk of injury.[1] State legislatures have made extensive and detailed studies and have enacted statutes that have set standards and eased the management of hazardous substances.[2] In Vermont, the legislature stated that the overall problem of hazardous waste management has become a statewide concern.[3] Further, it stated that inefficient and improper methods of managing solid waste cause air and water pollution and result in hazards to the public health.[4]

The avoidance of risks by regulation and legislation designed to prevent injuries is clearly distinct from the compensation for injuries after the fact, particularly through tort law.[5] The legal system theoretically provides adequate remedies for injuries to private parties; however, the legal theories available for claims of hazardous substance-related injuries present substantial practical barriers to recovery.[6] For instance, under negligence theory,[7] one of

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1. 15 U.S.C. § 2601(a)(1982).

2. *E.g.*, N.Y. ENVTL. CONSERV. LAW § 27-1313 (McKinney 1984); MD. NAT. RES. CODE ANN. § 8-1409 (1983) ("The person responsible for the oil spillage shall be liable to any other person for any damage to his real or personal property directly caused by the spillage."); N.C. GEN. STAT. § 14-284.2 (1981) (regulating dumping of toxic substances without a permit); OR. REV. STAT. § 468.790 (1983) (oil).

3. VT. STAT. ANN. tit. 10, § 6601(2) (Supp. 1983).

4. *Id.* at § 6601(1).

5. In re Agent Orange Products Liability Litigation, 597 F. Supp. 740, 780 (E.D.N.Y. 1984).

6. "Application of these theories to inactive or abandoned [hazardous waste] sites is largely hypothetical because of the limited amount of litigation." Note, *Inactive or Abandoned Hazardous Waste Disposal Sites: Coping With a Costly Past*, 53 S. CAL. L. REV. 1709, 1719 (1980). "Of over 50 damage suits noted, only one was even partly resolved by judgment; the others were settled." CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, SENATE COMM. ON THE ENVIRONMENT AND PUBLIC WORKS, SIX CASE STUDIES OF COMPENSATION FOR TOXIC SUBSTANCES POLLUTION: ALABAMA, CALIFORNIA, MICHIGAN, MISSOURI,

the private plaintiff's major barriers to recovery is proving damages because symptoms of an injury resulting from toxic waste exposure may not surface for many years.[8] Another barrier to recovery is proving the defendant's failure to exercise due care. The failure to exercise due care is difficult to prove because the plaintiff must educate the jury as to the appropriate standard by which to measure the defendant's behavior. An appropriate standard necessarily must encompass complex and technical fact-finding for which a jury is often ill-equipped.[9] Such a standard of conduct may be prescribed by legislative enactment.[10] One way in which a plaintiff may overcome this barrier to recovery is to show that the defendant has violated a safety statute regulating toxic substances.[11] Where a court determines that a safety statute is applicable, it may adopt the legislatively prescribed standard of care, thus removing determination of that issue from the jury.[12]

Safety statutes, however, only facilitate private recoveries to the extent that courts attach determinative weight to the violation of the statute. The determinative weight which a court attaches to the violation of a safety statute is a matter of proof and not a matter of substantive law.[13] For instance, at one extreme, a statutory violation to which the court gives conclusive weight, as in a negligence per se jurisdiction, may distort the truth-finding function of

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New Jersey and Texas XV (Comm. Print 1980) [hereinafter cited as Six Case Studies].

7. To establish negligence at common law, the plaintiff must prove the following elements: (1) the opposing party owed a duty to exercise due care to protect the plaintiff's interests; (2) the party breached that duty; and (3) the conduct constituting the breach of duty was a proximate cause of an injury or harm suffered by the plaintiff. W. Prosser & W. Keeton, The Law of Torts, § 30 (5th ed. 1984). Once the plaintiff has fulfilled this burden of proof and the defendant has rebutted, the responsibility for determining the existence or nonexistence of the elements establishing negligence is allocated between the judge and the jury. *Id.* at 537. The existence of a duty of care is usually a legal question, decided by the court, by weighing the various factors affecting whether a person should be required to exercise care to protect another's interests. *Id.* The standard of care at common law is an objective one: the reasonable person standard. The issue of the breach of this duty is normally determined by the jury. *Id.*

8. Pierce v. Johns-Manville Sales Corp., 296 Md. 656, 464 A.2d 1020 (1983).

9. Keller, *Toxic Tort Litigation: The Management Challenge*, 19 Trial 50, 53 (April 1983).

10. W. Prosser & W. Keeton, *supra* note 7, at § 36.

11. *Id.*

12. Satterlee v. Orange Glenn School Dist. of San Diego County, 29 Cal. 2d 581, ___, 177 P.2d 279, 283 (1947).

13. Duncan v. Wescott, 142 Vt. 471, 474, 457 A.2d 277, 280 (1983); *see also* Potapoff v. Mattes, 130 Cal. App. 421, ___, 19 P.2d 1016, 1017 (1933).

the jury if the defendant acted reasonably.[14] At the other extreme, a statutory violation which the court treats as mere evidence of negligence does not aid the plaintiff's burden of production as does the negligence per se doctrine.[15]

The Vermont rule on the determinative weight of safety statute violations, recently reiterated in *Duncan v. Wescott*,[16] falls between the two extremes: negligence per se and mere evidence of negligence. In *Duncan*, the Vermont Supreme Court held once again that violation of a safety statute in Vermont establishes a prima facie case of negligence which creates a rebuttable presumption and shifts the burden of production of evidence to the defendant to show non-negligence.

This note examines the determinative weight which courts may give to safety statute violations to prove the failure to exercise due care in the context of a toxic substance-related personal injury. First, it examines the scope of the problem of toxic substance-related injuries. Second, it analyzes the two basic ways to handle the problem: regulatory control of toxic substances to reduce the risk of injury and adequate compensation, through negligence actions, to parties who are injured by toxic substances. Third, it analyzes the element of failure to exercise due care under both common law negligence and statutory negligence theories. Finally, it suggests that when faced with a safety statute violation, Vermont courts should apply the negligence per se with excuse doctrine.

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14. *See* Wakefield v. Connecticut and Passumpsic Rivers R.R. Co., 37 Vt. 330, 86 A. 711 (1864) (violation of a safety statute in Vermont creates a prima facie case of negligence).

15. *See* 2 F. Harper & F. James, The Law of Torts § 17.6 (1956). The burden of proof of the defendant's negligence is generally upon the plaintiff. Such burden in fact consists of two prongs: the burden of production and the burden of persuasion. Although the courts use confusing language, the burden of persuasion generally remains upon the plaintiff because the plaintiff is the party initiating the suit and asking for relief. The burden of production of evidence in the typical common law negligence case shifts to the defendant after the plaintiff has introduced evidence to prove its case. In practice, such burden of proof is of relatively small importance in the majority of civil cases. In toxic waste cases, however, the plaintiff's burden of proving negligence may be sufficiently difficult that the shifting of the burden of production of evidence may become important to individual plaintiffs. *See* W. Prosser & W. Keeton, *supra* note 7, at § 38; G. Lilly, An Introduction to the Law of Evidence, § 15 (1978).

16. 142 Vt. 471, 457 A.2d 277 (1983).

I. Scope of the Problem of Exposure to Toxic Substances

The number of personal injuries arising from exposure to toxic materials is growing at an alarming rate.[17] Many different substances cause these injuries.[18] For instance, the Vermont legislature defines hazardous waste as "any waste or combination of wastes, of a solid, liquid, contained gaseous, or semi-solid form which . . . may cause, or contribute to, an increase in mortality or an increase in serious irreversible or incapacitating reversible illness . . . ."[19]

The impact of a hazardous waste upon the public and the environment is potentially disastrous. The Love Canal[20] controversy and the DES,[21] asbestos,[22] and PBB[23] litigation are the products of mismanagement of hazardous substances. A recent example of hazardous substance mismanagement is the Williamstown controversy. In Williamstown, Vermont, the UniFirst Corporation, a drycleaning company, allegedly contaminated the groundwater with a toxic substance called tetrachloroethylene, or perchloroethylene.[24]

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17. *See, e.g.*, McGovern, *Toxic Substances Litigation in the Fourth Circuit*, 16 U. Rich. L. Rev. 247, 251 n.19 (1982):

> For example, in March, 1978, thirty-one suits, encompassing 123 plaintiffs, were pending in the Federal District Court for Eastern Virginia, alleging injuries due to exposure to asbestos at the Newport News shipyards. Memorandum and Order, Bailey v. Johns-Manville Corp., C.P. No. 77-1 (E.D. Va., filed Mar. 30, 1978). At one point in 1980, the Federal District Court for Eastern Texas was handling the claims of 2,445 plaintiffs against manufacturers of asbestos products. *Id.* at 251 n.19 (citations omitted).

18. The EPA defined the term hazardous waste as "[a]ny waste or combination of wastes which pose a substantial present or potential hazard to human health or living organisms because such wastes are lethal, nondegradable, or persistent in nature; may be biologically magnified; or may otherwise cause or tend to cause detrimental cumulative effects." U.S. Environmental Protection Agency, Report to Congress, Rep. No. SW-115, 3, Disposal of Hazardous Wastes (1974).

19. Vt. Stat. Ann. tit. 10, § 6602(4) (Supp. 1983).

20. *See generally* Ginsberg and Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 Hofstra L. Rev. 859 (1981); Note, *Inactive or Abandoned Hazardous Waste Disposal Sites: Coping With a Costly Past*, 53 S. Cal. L. Rev. 1709, 1712-14 (1980).

21. *See generally* Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 Harv. L. Rev. 668 (1981).

22. *See generally* Simon, *Insurers Recoil in Wake of Asbestos Claims*, 13 Bus. Ins. 3 (1979).

23. *See generally* Comment, *Catastrophic Chemical Contamination: A Response to the Michigan PBB Episode*, 1978 S. Ill. U.L.J. 223.

24. In re UniFirst Corp., Williamstown, Vermont, Statement of Claims and Defenses, No. S53-840EC (Orange County Superior Court, Chelsea, Vermont, April 26, 1984); and telephone interview with Merideth Wright, Assistant Attorney General of the State of Vermont (Feb. 8, 1985).

There were allegedly two roots to the contamination. First, the distilling process used by the dry-cleaning service produced sludge from the still bottoms which the company initially buried on the property before taking the waste to other disposal sites. Second, waste water from the dry-cleaning service leaked from the groundwater disposal systems which conveyed wash water to a waste sewage plant.[25] The effect which this contamination will have in the future on the central Vermont community is uncertain since such contamination is difficult to monitor and may linger in the environment indefinitely.

The petrochemical contamination of Dover Township, New Jersey, also graphically illustrates the hazards of uncontrolled chemical wastes.[26] In 1971, a trucker disposed of between 5,000 and 6,000 barrels of chemical wastes from a Union Carbide Corporation plant. The trucker dumped the wastes on a former chicken farm in Dover Township, and in the township landfill. In 1972, the chicken farm owner and the township obtained a court order for Union Carbide to remove the wastes. In 1974, residents of the township noticed that their well water was odorous; groundwater contamination was discovered upon investigation of their complaints. The wastes which were identified were aromatic hydrocarbons, alcohols, and phenolic resins.[27]

The Environmental Protection Agency estimated that direct damages from the groundwater contamination amounted to $417,350.[28] This estimate does not include the devaluation of the residents' property, their inconvenience, and costs due to the possible future spread of the contamination. It also does not include the residents' loss of their well water and the future medical costs

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25. *See supra* note 24.
26. SIX CASE STUDIES, *supra* note 6, at 336-401.
27. *Id.* at 336-356.
28. *Id.* at 357. The breakdown of the direct damages of $417,350.00 was as follows:

Item	Amount
Estimated cost of capping the condemned wells	$ 44,400
Removal of drums	25,750
Interim emergency water supply	4,900
Drilling of 20 new wells to deeper aquifer	46,000
Cost of sampling and analysis	38,900
Extension of public water supply	249,100
Construction of observation wells	8,300
	$417,350

U.S. ENVIRONMENTAL PROTECTION AGENCY, HAZARDOUS WASTE DISPOSAL DAMAGE REPORTS #3, EPA/530/SW-151.3 (June 1976), p.5, *cited in*, SIX CASE STUDIES, *supra* note 6, at 364, n.64.

of latent injuries which may develop later.[29] One hundred fifty-two people can no longer use their well water in Dover Township. Thus, although the waste has been removed, effects of the groundwater contamination may continue to surface for generations.

II. Regulation and Compensation

The actual damages and existing threats to thousands of citizens from situations such as the Williamstown and the Dover Township contaminations are generating serious concern for redress in our political and legal systems.[30] To protect public health and the environment, society must develop a comprehensive system of regulatory control over hazardous wastes—from their generation to their final disposal.[31] In addition to ensuring protection through regulation, society must provide a system of fair and adequate compensation to those who are injured by the mismanagement of hazardous substances. This distinction, between avoidance of risk and injury through regulation on the one hand and compensation for injuries after the fact on the other, is a fundamental one.[32]

A. *Legislative Protection*

State legislatures have recognized the serious threats to public safety from increasing industrialization and are enacting protective measures.[33] Legislatures typically aim their regulations at either

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29. Six Case Studies, *supra* note 6, at 357.

30. *See* McGovern, *supra* note 17, at 247-49.

31. Note, *The Regulation of Hazardous Waste Disposal: Cleaning Up the Augean Stables with a Flood of Regulations*, 33 Rutgers L. Rev. 906 (1981).

32. In re Agent Orange Product Liability Litigation, 597 F. Supp. 740 (E.D.N.Y. 1984). The court stated:

> In the former, risk assessments may lead to control of a toxic substance even though the probability of harm to any individual is small and the studies necessary to assess the risk are incomplete; society as a whole is willing to pay the price as a matter of policy. In the latter, a far higher probability (greater than 50%) is required since the law believes it unfair to require an individual to pay for another's tragedy unless it is shown that it is more likely than not that he caused it. *See e.g., Ayers v. Jackson Tp.*, 189 N.J. Super. 561, 461 A.2d 184, 187 (N.J. Super. Ct. Law Div. 1983) (increased risk of exposure to contaminated water not enough for tort liability because of "speculative" nature of proof); *Pierce v. Johns-Mansville Sales Corp.*, 296 Md. 656, 464 A.2d 1020, 1026 (C.A. Md. 1983) (applying 50% probability rule to asbestos exposure).

Id. at 781.

33. *See supra* note 2.

standard-setting or administrative regulation of toxic substances.[34] For example, in Vermont, house members recently proposed a bill similar to a superfund bill.[35] The proposed bill included provisions to tax hazardous waste generators, to establish a revolving fund to pay for toxic clean-ups and to strengthen Vermont's legal power to regulate dumpsites.[36] The proposed bill's tax provisions would apply to major generators that produce more than 220 lbs. of hazardous waste per month and would levy a heavier penalty for producers who dispose of waste at dumpsites and a smaller penalty for those who recycle waste.[37]

The New Jersey Spill Compensation and Control Act[38] would now govern the Dover Township incident. The Act prohibits the discharge of petroleum and other hazardous substances,[39] provides for the clean-up and removal of such discharge,[40] and establishes a spill compensation fund.[41] The statute has two prongs: compensation and liability. Administratively, the Act created the New Jersey Compensation Fund, which pays for all clean-up and removal costs and all damages, from any source, which are associated with the discharge of a hazardous waste into the state waters, including groundwater. The administrators of the fund condition payment of claims by the fund upon the surrender of all the claimant's private rights to recovery from the discharger of the hazardous substance.[42] The second part of the Act allows the fund to recover for hazardous substance-related damages from the discharger, without regard to fault. While the Act does not preclude private parties from invoking otherwise existing statutory or common law remedies, it makes clear that such an election of remedies prohibits additional compensation from the fund.[43]

The legislatures have compiled much information supporting legislative protective measures such as the New Jersey Spill Compensation and Control Act. Reports by experts and specialists and scientific data on the known propensities of various substances all

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34. *See, e.g.*, Keller, *supra* note 9, at 51.
35. Rutland Herald, Feb. 6, 1985, at 1, col. 1.
36. *Id.*
37. *Id.*
38. N.J. STAT. ANN. § 58:10-23.11 (1982 & Supp. 1984).
39. *Id.* at § 58:10-23.11c.
40. *Id.* at § 58:10-23.11f.
41. *Id.* at § 58:10-23.11i.
42. *Id.* at § 58:10-23.11q.
43. *Id.* at § 58:10-23.11v.

become a valuable source of information and discovery. One example is the 1980 OSHA Cancer Policy which set out, in a 2000 page legal and scientific report, the current knowledge of the risk from potential carcinogens and possible ramifications from workplace exposures to them.[44] Such legislative fact-finding is invaluable to courts in setting standards by which to measure behavior by private defendants.

B. *Compensation of Injured Parties*

The vexing problems of adequately compensating parties injured by toxic waste may be best dealt with by legislation.[45] However, the growing concern for redressing the harms caused by unregulated toxic substances matches the growing awareness that direct government regulation is not adequate to protect or compensate injured individuals.[46] Accordingly, courts must attempt to effectively and equitably resolve the personal injury cases arising from exposure to toxic materials, commonly called toxic torts, with "approaches that are consonant with present law and reasonable predictions about trends in the law."[47]

To be compensated for a hazardous waste injury, a private party must prove that a defendant engaged in liability-incurring behavior which caused damage or loss to the plaintiff.[48] The traditional common law basis of recovery for injured parties is negligence.[49] Negligence is conduct "which falls below the standard established by law for the protection of others against unreasonable risk of harm."[50] The theory of negligence is widely accepted because it both compensates individual plaintiffs and deters future misbehavior.[51]

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44. Keller, *supra* note 9, at 52, *citing* OSHA Cancer Policy, 45 Fed. Reg. 5001 (1980) (Proposed Jan. 22, 1980) (now current reg. is Identification, Classification, & Regulation of Potential Occupational Carcinogens—OSHA Cancer Policy, 29 C.F.R. 1990 (1984)).

45. In re Agent Orange Product Liability Litigation, 597 F. Supp. 740, 842 (E.D.N.Y. 1984).

46. *See generally* Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs*, 80 YALE L.J. 647, 667-68 (1971); SIX CASE STUDIES, *supra* note 6.

47. In re Agent Orange Product Liability Litigation, 597 F. Supp. at 842.

48. The typical causes of action in a toxic tort case are: nuisance, trespass, strict liability or negligence. In such cases, however, these actions often do not allow plaintiffs to recover adequately. Ginsberg & Weiss, *supra* note 20, at 928.

49. *See generally* Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

50. RESTATEMENT (SECOND) OF TORTS § 282, at 9 (1965).

51. *E.g.*, Englard, *The System Builders: A Critical Appraisal of Modern American*

The usual concept of negligence, as formulated by Judge Learned Hand, is that liability depends upon whether the burden of adequate precautions is less than the probability and gravity of injury.[52] This concept enables courts to implement efficient, as well as just, results.[53] The typical common law negligence case requires the plaintiff to carry the burden of proving the elements of his opponent's negligence, which the court and the jury determine as mixed questions of law and fact according to the reasonable person standard.[54]

As stated above, however, toxic tort litigation differs from the traditional negligence case. One major difference is the problem of proof.[55] All of the elements of negligence in a toxic tort require scientific and technical data which is costly and difficult to obtain.[56] A plaintiff must identify culpable industries,[57] establish the failure to exercise due care[58] and prove that a certain substance caused his injury.[59] In addition, a negligence action may be barred if the party does not detect latent injuries attributable to hazardous waste exposure before a state's statute of limitations has run.[60] To prove these elements, a plaintiff must gather and introduce evidence of the industry's custom, the industry's knowledge of the risk of harm, and the nature and capacities of the hazardous substance.[61]

A plaintiff alleging injury from the groundwater contamination in Dover Township, for example, must prove the existence of a duty on the part of the defendant, the breach of this duty, causation, and damages.[62] Several New Jersey court decisions aid a

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Tort Theory, 9 J. LEGAL STUD. 27, 27-28 (1980); W. PROSSER & W. KEETON, *supra* note 7, at § 31.

52. U.S. v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); Conway v. O'Brien, 111 F.2d 611, 612 (1940); W. PROSSER & W. KEETON, *supra* note 7, at § 31.

53. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

54. *See supra* note 7.

55. Ginsberg and Weiss, *supra* note 20; Page, *A Generic View of Toxic Chemicals and Similar Risks*, 7 ECOLOGY L.Q. 207 (1978); Note, *An Analysis of Common Law and Statutory Remedies for Hazardous Waste Injuries*, 12 RUTGERS L.J. 117 (1980); SIX CASE STUDIES, *supra* note 6, at 447-87.

56. *See supra* note 7.

57. McGovern, *supra* note 17, at 263-64.

58. Note, *supra* note 55, at 123.

59. *Id.* at 138-45.

60. *Id.* at 145; Ginsberg & Weiss, *supra* note 20, at 920-22.

61. McGovern, *supra* note 17, at 250-53; Ginsberg & Weiss, *supra* note 20; Note, *supra* note 55; SIX CASE STUDIES, *supra* note 6, at 447-87.

62. Rabowski v. Raybestos-Manhattan, Inc., 5 N.J. Super. 203, 68 A.2d 641 (1949).

plaintiff in showing such a duty and its breach because they have accepted the principle that the quality of the requisite duty depends upon the risk of the activity in which the defendant is engaged. In other words, the New Jersey courts require a higher degree of care in activities involving a dangerous instrumentality, such as toxic substances, than they require under less dangerous circumstances.[63]

One way to establish that Union Carbide breached its duty of care is for the plaintiff to show that it knew, or should have known, that its activities caused an unreasonable risk to others. Factual determinations would be relevant as to its "knowledge of the possibility of percolation or other hydrological transportation of these chemicals to the wells of the landowners in the area, and the obligation, if any, of Union Carbide to warn (the truckdriver) of the dangers characteristic of the wastes transported."[64]

Union Carbide's duty of care would, in this case, be quite high. In the chain of events leading to the groundwater contamination, Union Carbide was the sole actor with knowledge of the toxicity of the chemicals involved. In the case of Dover Township, Union Carbide could attempt to avoid liability by claiming that the truckdriver was an intervening cause. A court might, however, examine the high toxicity of the chemicals involved and impose a duty on the company to exercise a high degree of diligence in choosing a truckdriver and in monitoring his actual performance. The court could hold that improper disposal at a landfill site was the kind of risk that the company should have foreseen.[65]

Once the plaintiff shows duty and breach of duty, the plaintiff must prove that the defendant's breach of duty caused his injuries. The test for cause in New Jersey is one of showing that the defendant's action was a substantial factor in the plaintiff's harm.[66] The problem of proof in this case concerns the actual physical movement of the toxic chemicals and the difficulty of adducing scientific evidence to establish causation. If the plaintiff can prove that

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63. *Id.* at 747; Essex v. N.J. Bell Tel. Co., 166 N.J. Super. 124, 339 A.2d 300, 302 (1979); Goldberg v. Newark Housing Auth., 38 N.J. 578, 186 A.2d 291, 293 (1962); New Jersey v. Ventron Corp., 94 N.J. 473, 468 A.2d 150 (1983).

64. Six Case Studies, *supra* note 6, at 370.

65. *Id.*

66. Meade v. Kings Supermarket-Orange, 145 N.J. Super. 14, 366 A.2d 992 (1975) *rev'd on other grounds*, 71 N.J. 539, 366 A.2d 978 (1976); New Jersey Dep't of Environmental Protection v. Jersey Cent. Power & Light Co., 69 N.J. 102, 351 A.2d 337 (1976).

Union Carbide manufactured chemicals which caused the groundwater contamination, such direct proof would probably be sufficient.

III. The Element of Failure to Exercise Due Care

As illustrated by the Dover Township situation, one of the plaintiff's main difficulties in recovering for a toxic tort is proving the industry's failure to exercise due care.[67] Breach of duty is typically a jury question based upon the plaintiff's presentation of facts at trial.[68] The element of breach in a toxic tort, however, encompasses a high degree of scientific complexity, with which the trier of fact, whether judge or jury, is often unfamiliar.[69] The breach of duty issue may be further complicated if the dischargers of hazardous substances are not aware of the potential risk of their activities.[70]

The plaintiff normally has the burden of showing that the cost of the defendant's behavior exceeded the benefit of engaging in that behavior.[71] However, in view of the problems of proving industrial negligence, it seems more reasonable to place the burden of proving non-negligence upon defendants. Such a shift in the burden relies upon a reversal of Judge Learned Hand's test. In this shifted focus, defendants who have engaged in liability-incurring behavior would have to pay for damages caused by their activities unless they could demonstrate that the risks they had caused had social worth.[72]

Despite its appeal, most jurisdictions do not currently apply this burden-shifting theory. Instead, as stated above, the burden of proving the defendant's failure to exercise due care in a toxic tort, with all of the accompanying complexities, remains with the plaintiff. It is the plaintiff's burden to educate the jury as to the appro-

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67. Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs*, 80 Yale L.J. 647, 679-80 (1971); Note, *supra* note 55, at 123.

68. W. Prosser & W. Keeton, *supra* note 7, at § 37.

69. Keller, *supra* note 9, at 53.

70. Six Case Studies, *supra* note 6, at 477.

71. Carroll Towing Co., 159 F.2d at 173.

72. Analogous arguments are presented in: McGovern, *supra* note 17, at 276-77 and Honabach, *Toxic Torts—Is Strict Liability Really the "Fair and Just" Way to Compensate the Victims?* 16 U. Rich. L. Rev. 305, 311 n.21 (1982). At least two courts have used this analysis in the area of products liability: Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979); Barker v. Lull Engineering Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

priate standard of care by which to measure a defendant's behavior.

Another way in which a plaintiff may shift the burden of proving the failure to exercise due care is by utilizing the legislative fact-finding embodied in the legislative records and statutes. The legislative process includes "opportunities to arrive at informed value judgments superior to the opportunities of judges and jurors."[73] Legislatures, as noted previously, formulate appropriate standards of care, using legislative hearings, expert research and scientific resources.[74] Legislative fact-finding saves private parties valuable time and difficulty in educating juries. In *Zeni v. Anderson*,[75] the court stated that "[p]articularly in the area of health and safety regulations, we find ourselves attempting to further the ultimate policy for the protection of individuals which we find underlying the statute."[76] As legislatures increasingly prescribe standards of care for industries which use hazardous substances, plaintiffs injured by these toxic substances may rely more frequently upon safety statutes to prove the failure to exercise due care.[77]

Other than the New Jersey Spill Compensation Act, no safety statute applied at the time of the Dover Township contamination. Had a safety statute existed, the plaintiff's burden would have been lightened appreciably. For example, the Florida District Court of Appeals in *Hines v. Reichhold Chemicals, Inc.*,[78] discussed both the plaintiff's heavy burden of proving the failure to exercise due care in a toxic tort and the opportunity to lighten the burden which an applicable statute provides. In *Hines*, the plaintiff sued for alleged personal injuries caused by defendant's discharge of poisonous chemicals into the atmosphere. The issue on appeal was whether the plaintiff's complaint was sufficient to sustain a cause of action and whether the complaint was subject to dismissal for failure to allege any specific duty which the defendant owed to the plaintiff.[79] In his complaint, the plaintiff alleged

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73. Zeni v. Anderson, 397 Mich. 117, 243 N.W.2d 270, 279 (1976).

74. *Id.*

75. *Id.*

76. *Id.*

77. *See, e.g.*, Gonzalez v. Virginia-Carolina Chem. Co., 239 F. Supp. 567 (E.D.S.C. 1965) (violation of labelling law for poisons). *But see* Williams v. Pendleton Mfg. Co., 244 S.C. 228, 136 S.E.2d 291 (1964) (prejudicial error to instruct jury on statute because it might suggest to jury that violator was absolutely liable).

78. 383 So.2d 948 (Fla. 1980).

79. *Id.* at 949.

all of the common law negligence elements. He also alleged that for at least four years the defendant corporation continued to discharge various toxic chemicals into the atmosphere, knowing that these substances were toxic and that they were causing physical injury and damage to the plaintiff and other persons in the area. The defendant argued that the plaintiff had failed to allege "ultimate facts showing the existence of a duty owned by appellee to appellant."[80] The trial court agreed with the defendant and dismissed the case.

The District Court of Appeals reversed.[81] It discussed at length the difficulty of proving the specific failure to meet the standard for the duty of care. Finally, the court suggested that the plaintiff could avoid some of the problems of proof by presenting evidence of the violation of an applicable statute. Florida's statute made it a misdemeanor to permit or cause the emission of gases which are harmful to human or animal life.[82] The court held that a plaintiff may sue for civil liability under an applicable criminal statute, the violation of which is negligence per se in Florida. The court ordered that on remand, the plaintiff must be given the opportunity to amend his complaint to include reference to the statute.[83] Thus, the court in *Hines* demonstrates that an existing safety statute can lighten a plaintiff's burden significantly.

IV. Statutory Negligence

There are two basic categories of safety statutes.[84] One explicitly imposes civil liability within the statutory language itself. If such a statute is sufficiently explicit in its terms, it is easily applied. The New Jersey Spill Compensation and Control Act is illustrative. It imposes civil liability on a discharger of hazardous substances without regard to fault. The Act requires the polluter to pay damages to a fund, from which plaintiffs may be reimbursed. Also, the Act provides that any person who knowingly gives false information as a part of any claim pursuant to the Act for cleanup costs, removal costs, direct damages or indirect damages resulting from a discharge shall be liable for a penalty of not more than

80. *Id.* at 950.
81. *Id.* at 952.
82. Fla. Stat. § 386.041(1)(a) (1977).
83. *Hines*, 383 So.2d at 952.
84. Restatement (Second) of Torts §§ 285-286 (1965).

$25,000.00 for each offense.[85]

The second category of safety statutes is silent about civil liability, as was the statute referred to in *Hines*.[86] Vermont's water pollution control statutes, for example, provide for criminal liability but do not provide for civil liability: "Any person who violates any provision of this subchapter or who fails, neglects or refuses to obey or comply with any order or the terms of any permit issued in accordance with this subchapter, shall be fined not more than $25,000.00 or be imprisoned not more than 6 months, or both . . . ."[87] Other statutes fail to mention either civil or criminal penalties.

When a statute fails to mention any civil remedy, the courts assume the power and duty to interpret its provisions.[88] A court's first step is to determine whether the purpose of the statute is to regulate safety or to ease administration.[89] A court's second step is to determine whether the statute is designed to protect a class of persons, in which the plaintiff is a member, against the risk of harm which has in fact occurred as a result of the statute's violation.[90]

When a court determines that a safety statute is applicable in a private negligence suit, the statute can facilitate private recovery only to the extent that the court gives the violation of the statute sufficiently persuasive weight to shift the burden of production to the defendant. The courts of various jurisdictions have fashioned differing responses to this issue. The main doctrines which the courts use in giving effect to statutory violations are: negligence per se, negligence per se with excuse, prima facie case of negligence, and mere evidence of negligence.

A. *Negligence Per Se*

Negligence per se is the violation of a legislative enactment

85. N.J. Stat. Ann. § 58:10-23.11u (1977).

86. Fla. Stat. § 386.041(1)(a) (1977).

87. Vt. Stat. Ann. tit. 10, § 1275(a) (1984).

88. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825); *see generally* Kennelly, *Safety Statutes and Ordinances*, 19 Trial Law. Guide 323 (1975).

89. *See generally* Kennelly, *Safety Statutes and Ordinances*, 19 Trial Law. Guide 323 (1975).

90. Restatement (Second) of Torts § 285 (1965).

which is adopted by the court as defining the standard of conduct of a reasonable person.[91] According to this rule, the violation of a safety statute is not merely evidence of negligence, but negligence itself.[92] In the absence of explicit legislative authority, courts rarely find that violation of a statute in itself creates civil liability. Liability without fault is strict liability, and courts should be hesitant to so extend liability in the absence of a clear legislative mandate.[93] Courts usually find that a violation constitutes the element of breach of duty, which is conclusive of negligence. This approach, although technically different, reaches the same result. The court, by adopting the legislatively prescribed standard of conduct, removes the standard from any determination by the jury. If the jury finds that the statute has been violated, the defendant is negligent as a matter of law.[94] Negligence per se, however, is not liability per se. A violation of a statute is conclusive evidence of negligence and the court must give a peremptory instruction on this issue. Other issues, however, such as causation and damages, remain to be determined.

Osborne v. McMasters[95] demonstrates the application of the negligence per se doctrine. In *Osborne*, a druggist sold poison without a statutorily prescribed label. The plaintiff's intestate died as a result of taking what he thought was medicine. The court found the defendant liable for negligence. It stated: "Negligence is the breach of legal duty . . . the statute fixes it, so that the violation of the statute constitutes conclusive evidence of negligence, or, in other words, negligence per se."[96]

Similarly, in *Peterson v. Standard Oil Co.*,[97] the court held that the measure of care set forth by statute was the requisite standard of care "irrespective of all questions of the exercise of prudence, diligence, care or skill."[98] The court reasoned that when

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91. W. PROSSER & W. KEETON, *supra* note 7, at § 31.

92. Osborne v. McMasters, 40 Minn. 103, 105, 41 N.W. 543, 544 (1889). *See generally* Comment, *Statutory Negligence in Oregon*, 7 WILLAMETTE L.J. 469 (1971); Note, *Negligence—Violation of Safety Regulation as Negligence Per Se: The Perishable Sanction*, 62 KY. L.J. 254 (1973); Note, *Negligence Per Se: Its Applicability to "Dog at Large" Violations in Oregon*, 8 WILLAMETTE L.J. 199 (1972).

93. *Zeni*, 397 Mich. 117, 243 N.W.2d 270, 279 (1976).

94. Satterlee v. Orange Glenn School District of San Diego, 29 Cal. 2d 581, 177 P.2d 279, 283 (1947).

95. 40 Minn. 103, 41 N.W. 543 (1889).

96. *Id.* at ___, 41 N.W. at 543-44.

97. 55 Or. 511, 106 P. 337 (1910).

98. *Id.* at _, 106 P. at 340.

the statute prescribed a precaution for the protection of the public, such requirements constituted a legislative declaration of the standard of care. Any lesser degree of care was negligence as a matter of law.[99] The court stated that the pleading and proof need only show that the breach was the proximate cause of the injury and the damages sustained as a result; in the absence of proof of contributory negligence, this was sufficient to allow recovery. As the court in *Peterson* stated, "every innocent party whose person is injured by the act which constitutes the violation of the statute is entitled to a civil remedy for such injury, notwithstanding any redress the public may also have."[100]

The strict application of the negligence per se doctrine in a suit against an industry which has violated a hazardous waste safety statute constitutes negligence with no allowance for reasonable care. In *Springer v. Joseph Schlitz Brewing Co.*,[101] the defendant discharged large quantities of its brewery waste into the municipal sewage treatment facility, which became overloaded, malfunctioned, and caused water pollution. The plaintiffs, owners of a farm downstream from the brewery, brought suit to recover damages, alleging that the defendants had violated a safety ordinance. This ordinance reads in part:

> (2) Except as hereinafter provided, it shall be unlawful for any person to discharge or cause to be discharged any of the following described materials, waters, liquids, or wastes into any public sanitary sewer:
> (g) Liquid wastes containing any toxic or poisonous substances in sufficient quantities to [i]nterfere with the biological processes used in a sewage treatment plant. . . .[102]

The court ruled that the plaintiffs would have to show that the brewery wastes had a toxic or poisonous effect on bacteria that were essential to the sewage treatment process,[103] and that when the wastes passed through the sewage plant and into the river, the wastes were harmful to the aquatic life in the stream.[104] Upon this proof by the plaintiffs, the court allowed the jury to determine

99. *Id.* at _, 106 P. at 341.
100. *Id.* at _, 106 P. at 340.
101. 510 F.2d 468 (4th Cir. 1975).
102. Winston-Salem Code of Ordinances § 23-2(2)(q), *cited in* Springer v. Joseph Schlitz Brewing Co., 510 F.2d 468 (4th Cir. 1975).
103. *Springer*, 510 F.2d at 473.
104. *Id.*

whether the discharge violated the ordinance, and if so, whether it proximately caused damage to the plaintiff's property.[105] If the jury found the violation to be the cause of the injury, then the court would hold the defendant liable as negligent per se. The court stated: "The statute or ordinance, serving as a legislative declaration of a standard of care, creates a private right not to be harmed by its violation."[106] The defendant argued that the ordinance should not be literally applied because if it was, it would "shut down just about every industry in Winston-Salem."[107] The court responded that "there is no conflict between the public interest in keeping a factory open and the private right to recover damages for pollution. The two may be reconciled by requiring the source of pollution to pay damages while allowing it to operate."[108]

As demonstrated in *Springer*, the application of the negligence per se doctrine greatly aids the plaintiff's problems of proof if he can show that the defendant has violated a safety statute regulating toxic substances. However, in jurisdictions which apply the negligence per se doctrine, industries face a rule akin to strict liability with the additional requirement of fault.[109] The industry may not mitigate its liability even by demonstrating a high degree of care in a low risk situation. This doctrine, which requires reasonable persons to blindly obey all regulatory statutes under all circumstances, may lead to unrealistic and mechanical results.[110]

B. Negligence Per Se with Excuse

Few jurisdictions strictly apply the negligence per se doctrine.

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105. *Id.*

106. *Id.* at 472.

107. *Id.* at 473.

108. *Id.*

109. *Id.* at 472. Forms of action may be referred to by the kind or degree of the defendant's fault: for example, "intentional harm," "negligence" and "strict liability." Only a few instances remain in which liability is imposed without fault; in these cases, the requirement of negligence is replaced by the requirement of an "ultra-hazardous" or "abnormally dangerous" activity by the defendant. Pfenningstorf, *Environment, Damages, and Compensation*, A.B. FOUNDATION RESEARCH J. 347, 368 (1979). Several cases involving the escape of hazardous substances have provided successful recovery under the theory of negligence: *see, e.g.*, Knabe v. National Supply Div. of Armco Steel, 592 F.2d 841, 843 (5th Cir. 1979) (discharge of emulsified oil and water mixture into creek); DeFeo v. Peoples Gas Co., 6 N.J. Misc. 790, 791-92, 142 A. 756, 757 (Sup. Ct. 1928) (escape of gas into wells); Cities Service Gas Co. v. Eggers, 186 Okla. 466, 468, 98 P.2d 1114, 1117 (1940) (discharge of oil well wastes into creek polluted subterranean waters).

110. 2 F. HARPER & F. JAMES, *supra* note 15, at § 17.6.

Most apply a modified doctrine in which the defendant is conclusively presumed to be negligent unless the court excuses the conduct in question.[111] The negligence per se with excuse doctrine represents a shift away from the conclusiveness of the stricter negligence per se theory and permits the court to allow reasonable departures from the legislative standard.[112]

To establish a presumption of negligence under this doctrine, the plaintiff must prove a violation of a statute and show that the violation proximately caused the injury. Once the plaintiff has introduced this to the court, the burden shifts to the opposing party to show sufficient evidence to excuse or justify defeating the conclusive presumption.[113] This doctrine, then, embodies the reverse Learned Hand analysis of shifting the burden of proving non-negligence to the defendant.

A legally acceptable excuse for a statutory violation relieves the defendant of liability.[114] The court determines whether to accept an excuse. Although jurisdictions differ in their application of this doctrine, courts normally accept five excuses to release liability for a violation of a safety statute. These are: (1) the actor's incapacity; (2) impossibility of compliance; (3) lack of knowledge; (4) emergency; and (5) that compliance would involve a greater risk of harm than noncompliance.[115] Thus, evidence of "due care . . . does not furnish an excuse or justification for the negligence presumed to arise on proof of the violation" of the statute unless such evidence is supported by one of the legally acceptable excuses.[116]

The Supreme Court of Texas applied the doctrine of negligence per se with excuse in *Impson v. Structural Metals, Inc.*[117] In *Impson*, the defendant's truck, in attempting to pass within a prohibited distance of a highway intersection, collided with the plaintiff's automobile. The court held that the party violating the stat-

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111. RESTATEMENT (SECOND) OF TORTS § 288A (1965); *see also* Note, *Negligence Per Se—Texas*, 50 TEX. L. REV. 1046, 1047 n.3 (1972); Singleton v. Collins, 40 Colo. App. 340, 574 P.2d 882 (1978); Gordon v. William Sommerville and Son, Inc., 584 S.W.2d 274 (Tex. 1979).

112. *See generally* Murchinson, *Negligence Per Se and Excuse for a Statutory Violation in Texas*, 5 ST. MARY'S L.J. 552, 561 (1973).

113. RESTATEMENT (SECOND) OF TORTS § 288A (1965).

114. *Id.*

115. *Id.*

116. W. PROSSER & W. KEETON, *supra* note 7, at § 36.

117. 487 S.W.2d 694 (Tex. 1972).

ute must introduce "some legally substantial excuse or justification" which was more than ordinary care.[118] The court quoted Harper and James to explain its rationale for using this intermediate theory:

> There is some merit in the objections to both the negligence per se and the 'evidence of negligence' rule. The negligence per se rule is certainly capable of rigid Draconian administration. But the alternative rule, at the other extreme, may be administered so that juries are empowered to dispense with reasonable statutory requirements in every case no matter how flimsy the excuse.[119]

In a toxic tort action, the negligence per se with excuse doctrine greatly benefits the plaintiff. It shifts the burden of production to the defendant upon the plaintiff's showing of injury caused by a breach of the statute. The doctrine allows the defendant to avoid liability for the violation by proving that the risks of harm created by a violation are less than the risks created by compliance.[120] This reversal of Learned Hand's analysis greatly lessens the plaintiff's burden and "puts the burden of producing the relevant complex and technical evidence on the party who has the most access to and is the most familiar with such evidence."[121]

C. *Prima Facie Case of Negligence*

In jurisdictions not following the negligence per se, negligence per se with excuse, or mere evidence of negligence doctrines, proof of violation of a safety statute bears less influence on a determination of negligence. Rather than finding such a violation negligence per se or even a presumption of negligence which shifts the burden to the defendant to prove excuse, these jurisdictions employ what has come to be termed the prima facie case of negligence theory.[122] Under the prima facie negligence theory, evidence of a safety statute violation is sufficient to withstand a motion to dismiss.[123]

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118. *Id.* at 694-95.

119. *Id.* at 696, *quoting* 2 F. Harper & F. James, *supra* note 15, at § 17.6.

120. *Barker*, 143 Cal. Rptr. at 240, 573 P.2d at 458.

121. *Beck*, 593 P.2d at 886.

122. The jurisdictions which employ the prima facie case of negligence theory are: Maryland, Michigan, Utah and Illinois. Dean v. Redmiles, 280 Md. 137, 374 A.2d 329 (1977); Zeni v. Anderson, 397 Mich. 117, 243 N.W.2d 270 (1976); True & True Co. v. Woda, 201 Ill. 315, 317, 66 N.E. 369, 370 (1903); Hall v. Warren, 632 P.2d 848 (Utah 1981).

123. White v. Abrams, 495 F.2d 724, 729 (9th Cir. 1974).

Illinois courts follow this theory to determine the effect of a statutory violation.[124] In *Johnson v. Pendergast*,[125] the Supreme Court of Illinois stated that "[t]he existence of the prima facie case . . . does not change the burden of proof, but only the burden of introducing further evidence."[126] Thus, the doctrine in Illinois requires the defendant to present evidence to meet the prima facie case created by the plaintiff's proof of the violation of a statute. If the defendant offers no proof to the contrary, the plaintiff will prevail. The jury determines whether the plaintiff has proven its case by a preponderance of the evidence, considering the statutory violation and all other evidence.[127]

In *Johnson*, the defendant violated a safety statute requiring the use of turn signals when driving an automobile and struck the plaintiff who was riding on his motorcycle.[128] The court held that the lower court should have instructed the jury to consider the violation of this statute as well as other evidence[129] such as the condition of the street, the speed of the vehicles, and the testimony of witnesses in determining whether the plaintiff proved the defendant's negligence. Under the prima facie case of negligence doctrine, proof of a violation of a statute assures the plaintiff that the jury will consider his case. Of course, the court may find the evidence so compelling as to warrant a directed verdict for the plaintiff. Once the jury receives the case, however, the violation of the statute becomes merely one fact among many for the jury to consider.[130]

In a jurisdiction in which a statutory violation involving a toxic tort creates a prima facie case, the plaintiff's burden is eased; however, it is not eased as much as if the negligence per se with excuse doctrine were applied. The prima facie case ensures that the jury will hear the plaintiff's evidence; however, the defendant may still come forward with evidence, such as industry custom, which may outweigh the plaintiff's prima facie case in the jury's opinion.

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124. 64 Ill. 2d 380, 356 N.E.2d 93 (1976).
125. 308 Ill. 255, 139 N.E. 407 (1923).
126. *Id.* at 257, 139 N.E. at 409.
127. *Id.*
128. *Id.* at 255, 139 N.E. at 407.
129. *Id.* at 258, 139 N.E. at 410.
130. Klinkenberg v. Horton, 81 Ill. App. 2d 152, 224 N.E.2d 597 (1967).

D. *Mere Evidence of Negligence*

A few jurisdictions attach even less significance to a safety statute violation. These jurisdictions follow the doctrine that safety statute violations are merely evidence of negligence and do not constitute conclusive negligence, or negligence per se.[131] As the Supreme Court of Arkansas stated in *Bussell v. Missouri Pacific Railroad Co.*,[132] violation of a safety statute, "although not necessarily negligence, is evidence of negligence to be considered by [the jury] along with all the other facts and circumstances in the case."[133] The mere evidence theory neither shifts the burden of proof to the defendant nor gives greater weight to evidence of a violation than to any other type of evidence. The jurisdictions which apply the mere evidence doctrine treat safety statutes as evidence because the statutes represent the "collective opinion or judgment of the community in the matter. . . ."[134]

The mere evidence doctrine does not significantly affect the plaintiff's burden of proving a failure to exercise due care in a toxic tort. In these jurisdictions, the plaintiff must present all other possible evidence in order to fulfill the burden of proof because the jury, in its discretion, may disregard the evidence of the safety statute.

V. Safety Statute Violations as Evidence of Negligence in Vermont

It is unclear which approach the Vermont Supreme Court employs to determine the effect of a safety statute violation. The court usually describes proof of a statutory violation as creating a prima facie case of negligence. In some cases, it applies the prima facie case in a similar manner as, for example, the Illinois courts apply it.[135] In some opinions, however, the court seems to treat the violation of a statute as mere evidence of negligence.[136] Yet, in other opinions, the court has held that proof of a violation creates

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131. Gill v. Whiteside-Hemby Drug Co., 122 S.W.2d 597, 601 (Ark. 1938); Franco v. Bunyard, 547 S.W.2d 91, 93 (Ark. 1977); Floridia v. Farlee, 201 Neb. 39, 266 N.W.2d 204, 206 (1978).

132. 237 Ark. 812, 376 S.W.2d 545 (1964).

133. *Id.* at _, 376 S.W.2d at 548.

134. 2 F. Harper & F. James, *supra* note 15, at § 17.6.

135. Smith v. Blow & Cote, Inc., 124 Vt. 64, 67, 196 A.2d 489, 492 (1963).

136. Gilbert v. Churchill & Cote, 127 Vt. 457, 461, 252 A.2d 528, 530 (1969).

a rebuttable presumption of negligence which shifts the burden of presenting evidence to the defendant.[137] This rebuttable presumption approach departs from the prima facie case approach in that if the defendant offers rebuttal evidence, the plaintiff's presumption disappears and the burden of proof shifts back to the plaintiff.[138]

The Vermont Supreme Court first enunciated an approach concerning the effect of a safety statute violation in *Wakefield v. Connecticut and Passumpsic Rivers Railroad Co.*[139] In *Wakefield*, the court looked to the plain language and purpose of the statute in question.[140] It found that the purpose of the statute, which required trains to ring a bell or blow a whistle eighty rods from every crossing, was to give warning to travelers and to secure as much safety as possible by giving notice of approaching trains.[141] The court believed that this requirement created a duty extending to all persons in the vicinity.[142] The court held that the statute was designed as a matter of legal duty in all cases and under all circumstances. But the court pointed out the possibility of circumstances arising in which compliance could cause a disaster which may have not occurred if the ringing had been omitted.[143] In the court's opinion, the issue of liability should be left to the jury. The jury should decide, upon all the evidence, whether the defendant exercised reasonable judgment and prudence.[144]

In discussing the theory's effect on the burden of proof, the *Wakefield* court reasoned that the safety statute was designed to operate more stringently than the common law.[145] If the plaintiff can prove a violation, the burden will shift to the alleged violator to show that the violation was reasonable and prudent in the sound judgment of the violator and in view of all of the circum-

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137. Duncan v. Wescott, 142 Vt. 471, 457 A.2d 277, 278 (1983); Landry v. Hubert, 101 Vt. 111, 113, 141 A. 593, 594 (1928); Larmay v. VanEtten, 129 Vt. 368, 371, 278 A.2d 736, 739 (1971); Campbell v. Beede, 124 Vt. 434, 436-37, 207 A.2d 236, 240 (1964). The Michigan Supreme Court applied a rule similar to Vermont's in Zeni v. Anderson, 397 Mich. 117, 243 N.W.2d 270 (1976).

138. *Larmay*, 129 Vt. at 371, 278 A.2d at 739.

139. 37 Vt. 330, 86 A. 211 (1864).

140. *Id.* at 334, 86 A. at 215.

141. *Id.* at 333-34, 86 A. at 215.

142. *Id.* at 334, 86 A. at 215.

143. *Id.* at 335-36, 86 A. at 216.

144. *Id.* at 336, 86 A. at 216.

145. *Id.* at 335, 86 A. at 216.

stances.[146] The court in *Landry v. Hubert*[147] called this theory a "rebuttable, rather than a conclusive presumption."[148] The defendant, in other words, may prove attendant circumstances which counterbalance or overcome the presumption arising from the violation.[149] On the other hand, if the defendant does not introduce rebuttal evidence, the plaintiff's prima facie case prevails.[150] The *Landry* court held that it was for the jury to determine, upon all the evidence, whether the defendant was negligent.[151] The burden which is shifted thus seems to be the burden of production because the burden of persuasion seems to remain upon the plaintiff.

In *Larmay v. VanEtten*,[152] an automobile injury case, the plaintiff claimed that the defendant violated several safety statutes.[153] These statutes provided that operators of vehicles shall exercise due care and shall each keep to the right of the center of the highway so as to pass without interference. Also, they prohibited drivers from passing unless the highway ahead is clear of approaching traffic and from passing on a hill or on a curve where the view ahead is obstructed.[154] The *Larmay* court stated:

> [t]he rules of the road are safety statutes and proof of their violation, on the part of one charged with negligence, makes out a prima facie case of negligence against the offending operator. But this presumption of negligence is, of course, open to rebuttal. The presumption points out to the party on whom it lies the duty of going forward with evidence on the fact presumed. And when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the office of the presumption is performed and disappears from the arena.[155]

Larmay suggests that if the presumption created by the statute's violation is adequately rebutted, the burden of production and persuasion as to all elements of negligence shifts back to the plaintiff.

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146. *Id.*
147. 101 Vt. 111, 141 A. 593 (1928).
148. *Id.* at 113, 141 A. at 595.
149. *Id.*
150. Larmay v. VanEtten, 129 Vt. at 371, 278 A.2d at 736, *citing* Hammonds, Inc. v. Flanders, 109 Vt. 78, 82, 191 A. 925, 927 (1937).
151. *Landry*, 101 Vt. at 113, 141 A. at 595.
152. 129 Vt. 368, 278 A.2d 736 (1971).
153. VT. STAT. ANN. tit. 23, §§ 1032, 1035, 1047 (1983).
154. *Id.*
155. *Larmay*, 129 Vt. at 371, 278 A.2d at 740 (citations omitted).

In *Shea v. Pillette*,[156] a municipal ordinance prohibited sledding on any street within the city unless the street was designated for sledding by the city council. One evening, the plaintiff and several companions were coasting down a hill on a street posted with signs prohibiting coasting. The defendant negligently struck the plaintiff with his truck as the plaintiff coasted down the street. The defendant argued, however, that the plaintiff's sledding in violation of the ordinance was negligence per se;[157] therefore, the plaintiff was barred from recovery by her contributory negligence.

The *Shea* court found that the city council's ordinance was designed to prevent precisely the type of accident which that case presented. In deciding to apply the ordinance to the plaintiff as determinative of contributory negligence, the court reasoned that it was not a mere rule of convenience, but was an absolute prohibition against using that street for coasting.[158] The act itself was illegal, not merely the manner of acting.[159] The court stated:

> Under these circumstances it cannot be said that the presumption of negligence afforded by the breach of the ordinance was rebutted, or that it was not determinative of the issue. The plaintiff's act was deliberate, with full knowledge of the . . . authoritative prohibition of the use of the street for coasting for the purpose of avoiding such danger.[160]

Shea suggests that even in circumstances in which the negligence per se doctrine would most directly apply, the Vermont Supreme Court still applies the rebuttable presumption analysis. If the plaintiff had been able to introduce any evidence that under the circumstances her violation was reasonable, for instance, that she was sledding down the hill to help an injured friend, the court's dicta suggests that the jury might not have found her negligent. In *Shea*, the plaintiff offered no rebuttal evidence. Thus, the violation was determinative of negligence as a matter of law.[161]

The Vermont Supreme Court recently reiterated its doctrine in *Duncan v. Wescott*.[162] In *Duncan*, the plaintiff was sitting on the floor console between the two bucket seats of the car at the

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156. 108 Vt. 446, 189 A. 154 (1937).
157. *Id.* at 449, 189 A. at 157.
158. *Id.*
159. *Id.* at 452, 189 A. at 160.
160. *Id.*
161. *Id.* at 452, 189 A. at 161.
162. 142 Vt. 471, 457 A.2d 277 (1983).

time the driver, the defendant, lost control of the car.[163] Plaintiff sued for injuries under the theory of negligence. The court held that the defendant was driving so as to jeopardize the safety of others, whether passengers or on-lookers, in violation of the safety statute. The statute provides that "[n]o person shall operate a motor vehicle on a public highway in a careless or negligent manner, . . . or in any manner to endanger or jeopardize the safety, life, or property of a person."[164] The court held once again that violation of a safety statute in Vermont establishes a prima facie case of negligence[165] which creates a rebuttable presumption and shifts the burden of proof to the defendant to show non-negligence.[166] *Duncan* demonstrates that Vermont's rule is a matter of proof and not of substantive law.

Although the Vermont Supreme Court does not apply the prima facie case doctrine in the traditional manner, the reasoning in its choice of doctrines is clear. It has rejected the negligence per se doctrine, which can be harsh and undesirable in application. The Vermont Supreme Court believes that the strict negligence per se doctrine can impose liability upon defendants in situations in which the defendants took all reasonable precautions.[167] It also believes that the jury, rather than the court, should have the opportunity to determine the reasonableness of the parties' actions.

The prima facie case of negligence which arises upon a violation of a safety statute in Vermont is more flexible than the negligence per se doctrine. However, it cannot be as clearly applied as the negligence per se with excuse doctrine. According to *Wakefield*, the defendant may have violated a legislatively prescribed standard of care, yet the jury must still apply the reasonable and prudent person standard to the statutory violation.[168] In *Duncan*, the court seemed to depart from the reasonable person standard by delineating specific evidence required to rebut the presumption of negligence raised by the statutory violation. The *Duncan* court stated that the defendant failed to rebut the presumption because she "failed to demonstrate either that she did not violate the safety statute, or that if she did, that such violation was not a

163. *Id.* at 474, 457 A.2d at 278.
164. VT. STAT. ANN. tit. 23, § 1090(a) (1978).
165. *Duncan*, 142 Vt. at 476, 457 A.2d at 279.
166. *Id.*
167. *Id.*
168. *Wakefield*, 37 Vt. 330, 86 A. 211 (1864).

proximate cause of the accident and plaintiff's injuries."[169] But this kind of evidence is the evidence required to rebut the negligence per se standard. Because of this apparent mixing of standards and the evidence required to rebut the presumption of negligence, it is not clear what approach would be required for a plaintiff to prove his toxic tort case in Vermont.

In addition, Vermont's approach allows the plaintiff to shift the burden of production. It establishes a presumption which is rebuttable by evidence tending to negate it. Shifting the burden of production aids the plaintiff in establishing the element of breach of duty. Despite this benefit, in many cases, such as complex toxic tort cases, the doctrine may bar a plaintiff from compensation when a defendant has a reasonable defense such as compliance with industry custom. Thus, the approach does not aid the plaintiff as strongly as does a doctrine which shifts the entire burden more conclusively, such as the negligence per se with excuse doctrine.

VI. Suggested Role of Safety Statutes in Vermont

The Vermont prima facie case doctrine, which creates a rebuttable presumption of negligence, is helpful to private parties seeking compensation for hazardous substance-related injuries. It allows the plaintiff to shift the burden of production to the defendant upon showing the violation of a safety statute, causation, and damages. But, the presumption is rebuttable. The plaintiff continues to carry the burden of persuasion if the defendant produces rebuttal evidence.[170]

The prima facie case doctrine is one way of accommodating Vermont's policy of rejecting the conclusive doctrine of strict negligence per se. The Vermont Supreme Court, however, has not clearly stated the weight of evidence necessary for the defendant to rebut the presumption of negligence created by the statutory violation.[171]

In a complex area such as toxic tort, a clear, judicially applied doctrine of statutory negligence, the negligence per se with excuse doctrine, seems to be necessary to ease the plaintiff's burden of

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169. *Id.* at 334, 86 A. at 214; Smith v. Blow & Cote, Inc., 124 Vt. at 70, 196 A.2d at 489.
170. *Duncan*, 142 Vt. at 474, 457 A.2d at 278.
171. *See supra* notes 135-38 and accompanying text.

proof. The negligence per se with excuse doctrine, applied to such a legislatively prescribed standard, may greatly enhance the plaintiff's potential for recovery. The doctrine is consistent with Vermont's policy of rejecting the conclusiveness of the strict negligence per se doctrine by allowing for a legally acceptable excuse.

The doctrine of negligence per se with excuse shifts both the burden of production and the burden of persuasion to the defendant when the plaintiff shows injury caused by an activity which violates a statute. The doctrine, embodying the reverse Learned Hand concept, allows the defendant to avoid liability for the prohibited activity by proving by a preponderance of the evidence that, on balance, the benefits of the activity outweigh the risk of harm.[172] The judge determines a legally acceptable excuse instead of the jury applying the reasonable person standard. In hazardous substance litigation with its attendant problems of proof, the plaintiff need not amass complex and technical facts with which to educate the jury.

If adopted in Vermont, the negligence per se with excuse doctrine would reduce the uncertainty inherent in the Vermont Supreme Court's approach to safety statute violations as evidence of negligence. Although the negligence per se with excuse doctrine normally requires the judge to make the determination of negligence, the Vermont Supreme Court could choose to apply a variation of the doctrine which allows the jury, rather than the judge, to determine the legally acceptable excuse. This variation would be consistent with Vermont's policy of allowing the jury to determine liability. The doctrine's five basic types of excuse[173] could be more clearly applied than the court's current approach, regardless of whether the judge or the jury decides the issue. In either case, the negligence per se with excuse doctrine, if adopted in Vermont, would overcome a major barrier to the plaintiff's recovery.

Conclusion

Complex litigation, such as that arising out of hazardous waste damage, is expensive and uncertain. The negligence per se with excuse doctrine, if adopted in Vermont, would reduce the complexities of proof required under Vermont's current rule. The increasing

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172. *See supra* note 72 and accompanying text.
173. *See supra* note 115 and accompanying text.

likelihood that large numbers of citizens will suffer serious injury due to toxic waste justifies Vermont's adoption of the negligence per se with excuse doctrine. Especially in the area of toxic torts, with all of the attendant barriers to recovery, adoption of the judicially applied rule of negligence per se with excuse would lighten the individual plaintiff's burden of proof and increase the potential for just compensation.

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