NEGLIGENCE PER SE AND BROAD STATUTORY CONSTRUCTION IN ALASKA: THE ADOPTION OF AN APPLICABLE STATUTE AS AN APPROPRIATE STANDARD OF CARE

I. INTRODUCTION

The use of the doctrine of negligence per se in cases involving the violation of an applicable statute has been evolving in Alaska since the Alaska Supreme Court's 1971 decision in *Ferrell v. Baxter.*[1] In *Ferrell,* the court explicitly adopted the negligence per se rules set out in sections 286, 288A, and 288B of the *Restatement (Second) of Torts.*[2] The negligence per se concept itself is elaborated in section 288B of the *Restatement:*

> (1) The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.
> (2) The unexcused violation of an enactment or regulation which is not so adopted may be relevant evidence bearing on the issue of negligent conduct.[3]

Although the *Ferrell* court limited its holding to cases in which a traffic statute, regulation, or ordinance had been violated,[4] the decisions of the Alaska Supreme Court since *Ferrell* have demonstrated the court's willingness to apply negligence per se to cases involving a

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1. 484 P.2d 250 (Alaska 1971).

2. *Id.* at 263; *see infra* text accompanying notes 3 and 11 (language of sections 288B and 286 of the *Restatement (Second) of Torts).* Section 288A of the *Restatement (Second) of Torts* provides:

> (1) An excused violation of a legislative enactment or an administrative regulation is not negligence.
> (2) Unless the enactment or regulation is construed not to permit such excuse, its violation is excused when
> (a) the violation is reasonable because of the actor's incapacity;
> (b) he neither knows nor should know of the occasion for compliance;
> (c) he is unable after reasonable diligence or care to comply;
> (d) he is confronted by an emergency not due to his own misconduct;
> (e) compliance would involve a greater risk of harm to the actor or to others.

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

3. *Id.* at § 288B.

4. 484 P.2d at 263.

wide variety of statutes,[5] especially those which might be best characterized as "safety statutes."[6] This note will first examine the rules the Alaska Supreme Court developed and some of the cases it decided prior to 1983 regarding the adoption of applicable statutes providing appropriate standards of care in negligence per se actions. This note will then argue that the Alaska Supreme Court has recently begun approving the use of legislative and administrative enactments as the basis for negligence per se instructions in cases where the enactments would be more appropriately used as mere evidence of negligent conduct.[7]

The Alaska Supreme Court's liberal new approach is especially troubling because under this approach the court has submitted to juries as statements of the appropriate standard of care statutory standards that have not been clearly applicable to the facts of the cases before the court. Thus, the court has appeared all too willing to allow trial courts to usurp the jury's traditional role of determining the standard of conduct of the reasonable man in actions where a plaintiff has alleged negligence and the violation of a statutory standard. While the court likely has been motivated by a sincere desire to achieve the "right result," its extremely broad construction of statutes, combined with its ready approval of the use of negligence per se by the lower courts, has fostered an appearance of arbitrariness which is unnecessary, undesirable, and unjustified. All too often, defendants accused of negligence are found to have violated statutory standards that they simply had no reason to believe applied to their conduct.

Finally, this note will suggest that in certain limited circumstances, the Alaska courts should use an evidence of negligence approach that would avoid an appearance of arbitrariness, while allowing juries to maintain an active role in the resolution of negli-

5. "Statute" will be used in this note to include regulations and ordinances. It is generally accepted in Alaska and elsewhere that the rules and procedures applicable to statutes in negligence per se and evidence of negligence determinations also apply to regulations and ordinances. *See Ferrell,* 484 P.2d at 260. Wilson v. City of Kotzebue, 627 P.2d 623 (Alaska 1981), provides an illustration of the role non-enforceable guidelines recommended by a state agency can play in a negligence action. According to the *Wilson* court, the violation of "non-enforceable guidelines [provided by a state agency may] be considered as evidence of negligence." *Id.* at 629-30. Since the provisions found in a "Contract Jail Manual" involved in *Wilson* were neither legislative enactments nor administrative regulations, the court found the doctrine of negligence per se to be wholly inapplicable to the facts of the case. *Id.* at 629.

6. *See generally* Comment, *Ferrell v. Baxter: Negligence Per Se in Alaska,* 2 U.C.L.A.-ALASKA L. REV. 54, 67 (1972) (calling for extension of negligence per se to areas beyond traffic statutes, including safety codes).

7. *See supra* text accompanying note 3 (explaining that the *Restatement (Second) of Torts* § 288B(2) (1965) expressly authorizes the use of enactments as evidence of negligence).

gence actions grounded in whole or in part on the defendant's alleged violation of a statutory standard of care.

II. 1971-1983: ESTABLISHING THE RULES UNDER THE RESTATEMENT (SECOND) OF TORTS

Considered as a group, the Alaska Supreme Court's decisions between 1971 and 1983 involving negligence per se provide a fairly clear set of rules consistent with the policy considerations of "clarity, certainty, and justice" underlying the *Ferrell* decision.[8] Beginning with the general guidelines provided by the *Restatement (Second) of Torts,* the Alaska Supreme Court decided several significant cases in the twelve years following *Ferrell* that elaborated on the various considerations governing a court's adoption of an applicable statute as an appropriate standard of care in a negligence action. While not exhaustive in its treatment, the following section examines several of the most important cases decided by the court prior to 1983 in this area of law.

A. *Ferrell v. Baxter:* Violations of Traffic Statutes Lead to Alaska's Adoption of Negligence Per Se

As stated in the introduction to this note, in *Ferrell v. Baxter,*[9] the Alaska Supreme Court adopted the *Restatement's* formulation of negligence per se[10] for use in cases alleging that traffic statutes have been violated. Section 286 of the *Restatement (Second) of Torts* provides:

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
> (a) to protect a class of persons which includes the one whose interest is invaded, and
> (b) to protect the particular interest which is invaded, and
> (c) to protect that interest against the kind of harm which has resulted, and
> (d) to protect that interest against the particular hazard from which the harm results.[11]

As the *Ferrell* court noted, the rules found in section 286 of the

8. *See infra* text accompanying note 22.

9. 484 P.2d 250 (Alaska 1971). In the case, Ferrell, the driver of an automobile involved in a collision with a tractor-trailer, was sued by one of the passengers in her car for the injuries the passenger suffered in the crash. At the time of the accident, Ferrell apparently had been driving too fast and had inadvertently crossed over into the left-hand lane of oncoming traffic. *Id.* at 254. For an overview of the operation of negligence per se in Alaska and a good discussion of *Ferrell,* see Comment, *supra* note 6.

10. *See supra* text accompanying note 2.

11. RESTATEMENT (SECOND) OF TORTS § 286 (1965).

Restatement (Second) of Torts[12] require that the statute allegedly violated be *applicable* to the facts of the case. Furthermore, once the court determines that the statute applies to the defendant's alleged conduct, the court must decide whether the enactment, as articulated, provides a *fair and just standard of reasonable behavior.*[13] If the law adopted by the court provides such a standard and the defendant's violation of the statute is not excused, the violation will be held negligence per se.[14] Referring to one of its earlier decisions, *Meyst v. East Fifth Avenue Service, Inc.*,[15] the *Ferrell* court noted with approval that trial courts have a certain amount of discretion in determining whether an applicable traffic statute establishes a standard of reasonable behavior.[16] The court also noted that section 286 leaves a trial court free "to refuse to adopt . . . a law as" defining the standard.[17] By recognizing the trial court's discretion to reject a statute as defining the standard of reasonable care, the court was in essence recognizing that some legislative enactments are not appropriate bases for negligence per se instructions in certain instances because they do not provide standards of care which are just under the circumstances. The legislature's passage of a statute should not, in itself, mandate that a court use the statute as the basis for a negligence per se instruction.[18] Even though courts may generally presume that traffic statutes provide acceptable standards of behavior,[19] the *Ferrell* court itself realized that in exceptional circumstances different standards may apply:

> [I]t is conceivable that in highly unusual cases certain traffic laws may be so obscure, oblique or irrational that they could not be said as a matter of law to provide . . . a standard [of reasonable behavior]. In the event the courts of this state are faced with such arbitrary and unreasonable laws, they may provide that violations thereof merely indicate some evidence of negligence or no negli-

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12. *See supra* text accompanying note 11.

13. *Ferrell,* 484 P.2d at 264.

14. *Id.*

15. 401 P.2d 430 (Alaska 1965) (jury given two instructions permitting, but not requiring, finding that violation of ordinance was evidence of negligence).

16. 484 P.2d at 260.

17. *Id.* at 264.

18. *See* RESTATEMENT (SECOND) OF TORTS § 286 (1965) (Courts *may* exercise their discretion to adopt a legislative enactment or administrative regulation as the standard of conduct of a reasonable man.).

19. According to the *Ferrell* court,

> In promulgating traffic laws and regulations the legislature, sometimes expressly, but more often by implication, indicates a policy that a certain class of individual be protected from a certain type of harm. . . . By enacting the regulation pursuant to statutory authority, the Department of Public Safety has implicitly indicated that no reasonable person would move from his lane before ascertaining it could be done safely.

484 P.2d at 261.

gence at all.[20]

In limiting the applicability of its decision to traffic law cases, the *Ferrell* court emphasized a special justification for using negligence per se in such cases — namely, the driving public's almost universal knowledge of traffic laws. Justice Connor, speaking for the *Ferrell* court, stressed the imperative need for clear rules in traffic cases:

> [P]eople must be able to govern their affairs according to known standards. They must be able to protect themselves in advance, currently by purchasing defensive insurance, perhaps in the future by some other means. They must also be able to take steps to make themselves whole once again after sustaining injuries and property damage.[21]

Seeking additional support for the court's adoption of negligence per se rules in traffic cases, Justice Connor also argued that

> [c]larity, certainty, and justice are the goals we seek. It is certainly fair to require all drivers, who must be tested on these traffic laws and regulations before they may obtain driver's licenses, to know and obey the rules of the road. In few areas is the ancient presumption of universal legal knowledge more fairly applied. It is both just and accurate to presume that all reasonable drivers know and obey the law, and to hold them civilly as well as criminally liable for any unexcused violations thereof.[22]

Justice Rabinowitz dissented from the *Ferrell* majority's adoption of negligence per se, preferring instead an "evidence of negligence" approach. According to Justice Rabinowitz:

> [A]n evidence of negligence rule is more easily grasped by jurors, [and] presents fewer difficulties from the vantage point of judicial administration . . . . In the end, I suppose the choice one makes is dependent upon an evaluation of the performance of juries in negligence actions. For my part, I would continue the common law's long tradition of placing the responsibility for determination of the standard of reasonable care with the jury.[23]

As the foregoing brief overview of *Ferrell* should suggest, the most important determinations in a civil action based on negligence per se are made by the trial judge. The judge must decide, first, whether the statute the defendant allegedly violated applies to the facts which the

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20. *Id.* at 260.

21. *Id.* at 262-63.

22. *Id.* at 263. In later decisions, the Alaska Supreme Court did not limit its selection of applicable statutory standards to those almost "universally known" as it had in *Ferrell.* With the supreme court's tacit approval, Alaska courts began to move farther and farther away from the laudable goals and well-considered justifications set forth by the *Ferrell* court for adopting negligence per se in traffic cases.

23. *Id.* at 271. Justice Rabinowitz also argued that negligence per se would have a "drastic impact upon the resolution of contributory negligence issues." *Id.* Such concerns are no longer present given Alaska's adoption of a pure comparative negligence scheme. *See* Kaatz v. State, 540 P.2d 1037 (Alaska 1975).

jury might find or which are not in dispute, and second, whether the law under consideration provides a fair and just standard of reasonable behavior.[24] The normal negligence considerations of causation, damages, and possible defenses typically are not affected by a jury's finding that a statutory violation constitutes negligence per se. Even if a plaintiff prevails on a negligence per se instruction, he must still prove that the defendant's negligence proximately caused his injury. Similarly, the plaintiff must prove the extent of the damages he has suffered. The negligent defendant, on the other hand, may present evidence of an affirmative defense which could exculpate him from liability. This note focuses on the trial judge's initial determinations in finding that a statute applies to the facts of a case and provides an appropriate standard of behavior. While the Alaska Supreme Court has not explicitly renounced the ground rules for utilizing negligence per se found in *Ferrell,* its most recent decisions in this area unfortunately imply that the Alaska courts will be able to bend, and perhaps break, these rules in actual application if an appropriate factual situation suggesting the "need" to do so comes before them.

B. *Breitkreutz v. Baker:* Recognizing the Need for a Precisely Defined Statutory Standard of Care

In *Breitkreutz v. Baker,*[25] decided two years after *Ferrell,* the Alaska Supreme Court provided additional guidelines concerning the type of statute that the lower courts could adopt as providing an appropriate standard of care. According to the *Breitkreutz* court, when a statute merely codifies the normal test of reasonable care and sets "no precise standards that modify the common law,"[26] a court should not apply the negligence per se rules found in *Ferrell.*[27] Negligence

24. Of course, in determining any negligence claim, the third determination that must be made, namely whether the facts of the case establish that the alleged tortfeasor actually violated the statute, and hence is negligent, is generally a question for the jury (assuming that such facts are in dispute). The fourth determination, whether an established violation may somehow be excused under the broad guidelines of section 288A of the *Restatement (Second) of Torts,* remains a question for both judge and jury. First, the judge must construe the statute as one permitting conduct to be excused. If the statute allows excuses, then in situations "where reasonable men may differ as to the sufficiency of the excuse," *Ferrell,* 484 P.2d at 265 n.26 and accompanying text, the jury, under proper instructions from the court, must determine whether a valid excuse exists for the defendant's behavior in the case. *Id.*

25. 514 P.2d 17 (Alaska 1973). In *Breitkreutz,* the plaintiff, Breitkreutz, was injured in an automobile accident with the defendant and another driver, and unsuccessfully argued that the defendant's violation of a speed regulation entitled him to a directed verdict on the issue of liability.

26. *Id.* at 20.

27. *Id.* at 20-21; *see also* Nazareno v. Urie, 638 P.2d 671, 675-76 (Alaska 1981); Bailey v. Lenord, 625 P.2d 849, 855-56 (Alaska 1981); Lynden Transport, Inc. v.

per se instructions based on common law "reasonable care" statutes provide the jury with no new standard of conduct to consider and might only tend to confuse them. If a jury is erroneously instructed on the basis of a reasonable care statute, its task is unchanged; it must still apply its usual test of reasonable care under the circumstances in order to determine whether the defendant's conduct was negligent. To avoid possibly confusing the jury, the *Breitkreutz* court required that the language of a statute adopted by a court articulate a specific standard of care before a violation would constitute negligence per se.[28]

Quoting an Ohio Supreme Court decision[29] with approval, the *Breitkreutz* court stated, "if a positive and definite standard of care has been established by legislative enactment whereby a jury may determine whether there has been a violation thereof by finding a single issue of fact, a violation is negligence per se."[30] According to the court, the standard of care embodied in a legislative enactment is "final and conclusive" unless "it is so vague or dependent upon a variety of facts and circumstances as to require definition by a court or jury before it may be applied to the facts of a particular case."[31] In other words, the standard of care must be patently clear from the language of the statute before the statute may serve as the basis for a negligence per se instruction. If the court must define and interpret a statutory standard before presenting it to the jury, it is in effect imposing its own standard on the jury in lieu of the legislature's standard. Similarly, if the jury is left to define a particular statutory standard, it will likely end up applying its *own* standard of care, which may be markedly different from either the reasonable care standard which it would have been required to formulate under traditional instructions from the court or the standard actually intended by the legislature. If the elements of a statutory standard have not been clearly defined by the legislature in the statute itself, then the principal reason for using the statute in the first place — that it contains an appropriate standard of care — simply disappears.

C. *Bachner v. Rich:* An Attempt to Clarify the Rules of *Ferrell* and *Breitkreutz*

The Alaska Supreme Court's decision in *Bachner v. Rich*[32] was

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Haragen, 623 P.2d 789, 796-97 (Alaska 1981); McLinn v. Kodiak Electric Ass'n, 546 P.2d 1305, 1313-14 (Alaska 1976); Clabaugh v. Bottcher, 545 P.2d 172, 175-76 (Alaska 1976).

28. 514 P.2d at 22-23.

29. Eisenhuth v. Moneyhon, 161 Ohio St. 367, 119 N.E.2d 440 (1954).

30. 514 P.2d at 23 (quoting *Eisenhuth,* 161 Ohio St. at 374-75, 119 N.E.2d at 444).

31. *Id.*

32. 554 P.2d 430 (Alaska 1976).

extremely important for several reasons. In *Bachner,* the court adopted a non-traffic statute as the applicable standard of care in a negligence action for the first time.[33] After reiterating that the trial judge is vested with discretion in determining, as a matter of law, whether to adopt a legislative enactment or administrative regulation as an appropriate standard of care,[34] the court concluded that it was just as reasonable to require a contractor to know and obey the minimum safety standards set by the state for his occupation as it had been in *Ferrell* to require a driver to adhere to the standards prescribed by the traffic laws.[35]

More importantly for the purposes of this note, the *Bachner* court stated that *Breitkreutz* had generated some confusion concerning the criteria a trial court should consider in deciding whether to adopt a particular statutory standard of care. The *Bachner* court reemphasized that only a violation of an enactment that expressly provides a *specific* course of conduct may constitute negligence per se; when a statute expresses a rule of conduct in general or abstract terms, it may not be the basis of a negligence per se instruction.[36] If one of the litigants has proposed a "reasonable man" statute,[37] rather than a statute articulating a specific standard of conduct, as an appropriate standard, the court may simply choose to ignore the statute and refuse to frame its jury instructions in terms of whether or not the statute was violated.[38] In such cases, the traditional jury instructions based on the

33. *Id.* at 440 (adopting a General Safety Code provision promulgated by the Alaska Department of Labor). The *Bachner* case involved an employee's action against a general contractor for personal injuries suffered when the employee fell from a scaffold while working for a subcontractor of the general contractor. Apparently, the scaffold had been improperly constructed in violation of various provisions of the General Safety Code. *Id.* at 439-41.

34. *Id.* at 440-41. The court in a footnote continued with an excellent summary of the role of judge and jury following the adoption of a statutory standard of care:

> Once the legislative enactment or administrative regulation is adopted as the applicable standard of care, the role of the trial court is to then determine whether there was sufficient evidence from which a jury could reasonably infer that the statute or regulation was violated and whether there was sufficient evidence of excuse to warrant submission of the latter issue to the jury. Similarly, if jury issues are determined to exist as to either, or both, of those issues, then it becomes the jury's task, under appropriate instructions, to resolve such factual issues.

Id. at 441 n.12.

35. *Id.* at 441.

36. *Id.* at 441-42.

37. A "reasonable man" statute is one where liability is "determined by the application of the test of due care as exercised by a reasonably prudent person under the circumstances of the case." *Id.* at 442 (quoting *Eisenhuth,* 161 Ohio St. at 374, 119 N.E.2d at 444 (1954)).

38. *Id.* at 442.

likely actions of the reasonably prudent person are sufficient.[39] If the statute is nevertheless deemed relevant to the facts of the case, the trial court may exercise its discretion to inform the jury that a violation of the statute is evidence of negligence.[40]

In a concurring opinion in *Bachner,* Justice Erwin referred to Justice Rabinowitz's dissent in *Ferrell.* Calling for a reexamination of the doctrine of negligence per se for statutory violations, Justice Erwin asserted that Justice Rabinowitz had been correct in suggesting that negligence per se deemphasized the traditional role of the jury in determining the standard of reasonable care[41] and that an "evidence of negligence" approach was preferable.[42] Furthermore, Justice Erwin observed that it was "becoming extremely difficult to undertake any business endeavor without violating some regulation."[43] Justice Erwin suggested that the use of negligence per se can become somewhat problematic under present-day circumstances where government safety regulations at the federal, state, and local levels "are proliferating at an incredible rate."[44]

Justice Erwin's concurrence highlights many of the potential problems arising from the application of negligence per se. This note neither suggests that the negligence per se doctrine should never be utilized, nor that it should be completely replaced by an evidence of negligence approach as Justice Erwin suggested in his concurring opinion in *Bachner.* Instead, the courts should re-adopt the original framework found in sections 286, 288A, and 288B of the *Restatement (Second) of Torts.* Used properly, these sections allow a court to use either the "negligence per se" approach or the "evidence of negligence" approach as any particular fact situation might require.

D. *McLinn v. Kodiak Electric Association:* Refusing to Apply Negligence Per Se Where the Terms of a Statute's Coverage Are Imprecise

In *McLinn v. Kodiak Electric Association,*[45] the Alaska Supreme

39. *Id.*

40. *Id.* (citing *Ferrell,* 484 P.2d at 265).

41. *Id.* at 449. "The focus of determining the standard of reasonable care shifts from the jury to the judge who must rule whether or not a statute or regulation has been violated and thus the party is guilty of negligence per se. The proper label removes the issue from jury consideration." *Id.*

42. *Id.*

43. *Id.*

44. *Id.; see also* Morris, *The Role of Criminal Statutes in Negligence Actions,* 49 COLUM. L. REV. 21, 21 (1949).

45. 546 P.2d 1305 (Alaska 1976). The plaintiff in *McLinn,* a three-year old, was injured when she stumbled into the wheel of a boat trailer pulled by a truck on a public street. McLinn, by her next friend, brought suit against the corporation which

Court drew upon its explicit recognition in *Ferrell* that circumstances might occasionally arise that would justify a court's refusal to adopt a statute as defining an appropriate standard of conduct in a negligence action.[46] Surprisingly, the supreme court refused to apply a precise statutory standard stated in a regulation[47] which expressly required the defendant, a utility, to take certain minimum precautionary measures when working on its installations "on, over or under highway rights of way."[48] Under the facts of the case, the utility had clearly failed to take such precautions.[49]

Two factors convinced the supreme court to accept the superior court's conclusion that a reasonably prudent person in the defendant's situation would not have been aware that the regulation in question applied to his conduct. First, under the facts presented by the parties, the status of the road where the defendant's employees had been working was ambiguous. Simply stated, if the road was a state highway, the regulation directly applied to the defendant's conduct; if the road was a city street, the regulation did not apply. For the supreme court to have decided the question either way would have been somewhat arbitrary.[50] Second, the precise coverage of the regulation itself was unclear.[51] Based on these two factors, the reviewing court concluded that a negligence per se instruction was not warranted, and that the superior court had not abused its discretion by failing to give such an instruction.[52]

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had blocked off the portion of the street in order to install a utility pole. *Id.* at 1306-07.

46. The *McLinn* court affirmed a superior court decision in which the jury had been instructed that an alleged violation of an administrative regulation (ALASKA ADMIN. CODE tit. 17, § 15.130 (repealed May 1982)) was not negligence per se, but rather merely evidence of negligence. *Id.* at 1313-14.

47. *See supra* note 46.

48. *McLinn,* 546 P.2d at 1307 n.4. Under the facts of *McLinn,* the minimum precautionary measure required would have been the posting of a flagman at the work site, as recommended by the Uniform Manual on Traffic Control Devices for Streets and Highways, Bureau of Public Roads, which was adopted by ALASKA ADMIN. CODE tit. 17, § 15.130 (repealed May 1982). *Id.*

49. *Id.* at 1306.

50. The *McLinn* court apparently chose not to remand the case to the lower court for further findings of fact concerning the road's true status. *See id.* at 1314.

51. *Id.*

52. The analysis employed and the result reached by the *McLinn* court are both quite consistent with the approach suggested by this note. *See infra* text accompanying notes 119-31. When a statute is imprecise in its coverage and of questionable applicability, it should not be construed to establish an appropriate standard of care for the application of negligence per se. Assuming that normal evidentiary requirements, especially relevancy, are satisfied, the statute should be submitted to the jury as evidence of negligence. *See infra* text accompanying notes 122-24; *see also* James, *Statutory Standards and Negligence in Accident Cases,* 11 LA. L. REV. 95, 114-16 (1950).

E. *Ferriss v. Texaco, Inc.:* Relative Obscurity of a Regulation's Applicability Precludes Finding of Error in Trial Court's Failure to Adopt it as Standard of Care

In *Ferriss v. Texaco, Inc.*,[53] the Alaska Supreme Court determined that the "relative obscurity" of the National Electrical Safety Code's applicability to the defendant Texaco's actions justified the trial court's refusal to instruct the jury that a violation of the Code was negligence per se.[54] Ferriss, an employee of the contractor engaged by Texaco to install metal canopies above some gasoline pumps, sued Texaco for electrical shock injuries he suffered while working on the canopies when a piece of angle iron he was holding touched a high-voltage power line.[55]

Citing *Ferrell,* the court argued that while all drivers could be presumed to be familiar with traffic laws, the same assumption could not be made concerning a landowner's knowledge of the National Electrical Safety Code.[56] In particular, the court determined that "the specific distances allowable from lines of varying voltages are not within general knowledge in the same manner as driving regulations."[57] Nevertheless, the court did find that the lower court had erred in refusing to allow evidence of the Code to be presented to the jury. The court specifically found that the provisions of the Code were applicable to Texaco because Texaco had erected a building within the prohibited distance of a high-voltage electrical line.[58] Texaco's violation of the regulation was thus relevant evidence of its negligent conduct.

The *Ferriss* decision is consistent with the court's earlier decision in *McLinn,*[59] and with the general approach suggested in this

53. 599 P.2d 161 (Alaska 1979).

54. *Id.* at 164. According to the court, there was "some basis for confusion as to the applicability of the National Electrical Safety Code to other than new electrical installations or alterations of existing installations." *Id.* The requirements of the National Electrical Safety Code, unlike the traffic laws, were simply not generally known.

55. *Id.* at 162.

56. *Id.* at 164.

57. *Id.*

58. *Id.* at 163-64. Although the court found that the lower court had erred in refusing to allow evidence of the Code to be presented to the jury, it held this error to be harmless since a safety inspector had testified concerning the minimum safe distance from the top of the structure at issue in the case to various power lines. Ferriss was therefore able indirectly to present the same evidence to the jury that the Code itself would have provided.

59. *See supra* text accompanying notes 45-52. Of course, in *McLinn,* the question was whether a statute of imprecise coverage and questionable applicability should be adopted by the court to provide a standard of care appropriate for use in a negligence per se instruction. In *Ferriss,* the statute in question clearly applied to the defendant's

note.[60] Under the supreme court's holding in *Ferriss,* the violation of a statute not likely, nor reasonably, within the defendant's general knowledge prior to the institution of a negligence action against him should not constitute negligence per se. Instead, such violations should be submitted to the jury as evidence of negligence if they are relevant to the negligence issues in the case. While not explicitly stated in the court's opinion, it would appear that the court's concern for justice and fairness, as well as its recognition that per se rules should not be applied mechanically, dictated its holding in *Ferriss.* By balancing the interests of both the plaintiff and the defendant, and following the *Restatement's* formulation of the negligence per se doctrine, the court was able to reach a compromise solution not unreasonably harsh for either party to the suit.

F. *Johnson v. State:* A Regulation's Inapplicability and Ambiguity Are Adequate Grounds for Its Rejection as a Standard of Care

The key determination made by the Alaska Supreme Court in *Johnson v. State*[61] was whether the statute and administrative regulation allegedly violated by the state applied to the facts of the case.[62] In *Johnson,* the plaintiff brought a negligence action against the state for injuries arising from a bicycle accident at a railroad crossing which the state allegedly had maintained improperly.[63] The statute and regulation in question prescribed a statutory standard of care for utility permit holders working on a facility across or along a highway. The permit holders were to take all measures necessary to provide for continued travel along the highways and specifically to erect warning signs near any hazards across or along any highway "during construction or maintenance of a facility authorized by a utility permit."[64]

Although the plaintiff argued that the statute's own definition of "maintenance"[65] made the statute and regulation applicable to the state's activities, the state convinced both the trial court and the

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conduct. The question then became whether the statute's *obscurity* should bar its use in a negligence per se instruction.

60. *See infra* text accompanying notes 119-31.

61. 636 P.2d 47 (Alaska 1981).

62. The defendant allegedly violated ALASKA STAT. § 19.25.010 (1981) and ALASKA ADMIN. CODE tit. 17, § 15.060(a) (repealed May 1982).

63. 636 P.2d at 50-51.

64. *Id.* at 59-60 (quoting ALASKA ADMIN. CODE tit. 17, § 15.060(a)).

65. According to the statute's definition, " 'maintenance' means the preservation of each type of highway, roadside structure and facility as nearly as possible in its original condition as constructed, or as subsequently improved, and the operation of highway facilities and services to provide satisfactory and safe highways." ALASKA STAT. § 19.05.130(9) (1971) (*quoted in Johnson,* 636 P.2d at 60).

supreme court that the regulatory obligation to erect adequate hazard signs only applied when city crews were performing *actual work*[66] at the site where the plaintiff had been injured. Because no actual maintenance work was being performed at the site when the plaintiff's accident occurred, the supreme court concluded, as had the trial court, that the regulatory standard did not apply to the case and, therefore, could be rejected as the basis for a negligence per se instruction.[67]

The *Johnson* court also held that the regulation was sufficiently ambiguous that a reasonably prudent person could not have determined whether it was applicable to other than active maintenance work. Given these factors, the supreme court concluded that the trial court had not abused its discretion in refusing to grant the plaintiff's request for a negligence per se instruction.[68] Since the regulation did not apply to the facts presented, the court refused to consider whether the arguably ambiguous regulatory standard could ever serve as the basis for a negligence per se instruction.[69]

The *Johnson* case clearly demonstrates the simple but sometimes forgotten requirement that a statute be applicable to the facts of the case before it can be used to support a negligence per se instruction to a jury or a negligence per se determination by a court. Courts seeking to reach the "right result" through the use of negligence per se by ignoring the narrow scope of the applicability requirement will often find it necessary to engage in a creative, but questionable, construction of a statute in order to find it applicable to a defendant's conduct.[70]

G. *Metcalf v. Wilbur, Inc.:* Applying a "Clearly Erroneous" Standard when Evaluating Trial Courts' Refusals of Negligence Per Se Instructions

In *Metcalf v. Wilbur, Inc.*,[71] a passenger and his wife brought an action against a pilot and aircraft owner for injuries they had sustained in a plane crash.[72] The Alaska Supreme Court held that the superior court had erred in refusing to give a negligence per se instruction because it had based its refusal on a fact determination that the supreme court found to be "clearly erroneous."[73] The lower court rejected a particular regulatory standard as a basis for the requested negligence

66. *Johnson,* 636 P.2d at 60.
67. *Id.*
68. *Id.* (citing *McLinn,* 546 P.2d at 1314).
69. *Id.* at 60-61.
70. *See, e.g., infra* notes 79-118 and accompanying text.
71. 645 P.2d 163 (Alaska 1982).
72. *Id.* at 165-66.
73. The fact in question was whether the airplane's take-off had been attempted under "visual flight rules" or under "instrument flight rules." The resolution of this issue would determine which Federal Aviation Rule, if any, was applicable.

per se instruction, not because the regulation lacked specificity in defining a standard of care, but rather because the court found that the statute did not apply to the facts of the case. Once the underlying operative facts had been "changed" by the supreme court's interpretation of the evidence, the statutory standard became applicable and could serve as the basis for a negligence per se instruction.

The *Metcalf* decision once again highlights the significance of the initial determination a court must make in deciding whether a negligence per se instruction is proper — namely, whether the standard itself applies (at least arguably) to the facts of the case. The *Metcalf* opinion's emphasis on this initial aspect of the negligence per se question is especially important in light of the supreme court's most recent decisions in this area of law. These decisions are discussed in section four of this note.

III. SUMMARIZING THE RULES FOUND IN THE PRE-1983 CASES: A DEGREE OF FLEXIBILITY CONSISTENT WITH A FAIR AND JUST APPLICATION OF THE NEGLIGENCE PER SE DOCTRINE

As the foregoing discussion of the pre-1983 case law should suggest, if a court wishes to utilize a statutory standard in a negligence per se instruction, it must first ascertain whether the statute itself is directly applicable to the facts of the case by considering the four criteria listed in section 286 of the *Restatement (Second) of Torts.*[74]

If a statute does not apply to the facts of the case, the court does not have to consider it any further. If the statute is applicable, however, the court should then exercise its discretion and determine whether the statute provides a fair and just standard of reasonable behavior which can, and should, be substituted for the usual common law standard of reasonable care. Indeed, section 286 of the *Restatement* explicitly provides that a court "may adopt," rather than "shall adopt," a statute for the purpose of defining an appropriate standard of conduct.[75] The Alaska Supreme Court has recognized several reasons for finding statutes inappropriate as standards of conduct: (1) obscurity, obliqueness, or irrationality; (2) arbitrariness; (3) imprecision or ambiguity; (4) arcane or unreasonable formulation (making compliance virtually impossible); (5) and harshness (imposing liability without fault).[76] Although a court may find a particular statute an inappropriate basis for a negligence per se instruction, it can always submit the alleged violation of an applicable, but inappropriate, statu-

74. *See supra* text accompanying note 11.

75. *See supra* text accompanying note 11.

76. *See, e.g.,* cases discussed *supra* text accompanying notes 8-73; *see also* Northern Lights Motel, Inc. v. Sweaney, 561 P.2d 1176, 1184-85 (Alaska 1977).

tory standard to the jury as possible evidence of the defendant's negligence.

Even if a court determines that a statute provides a fair and just standard of reasonable behavior, it should still adjudge the statute inappropriate for use in a negligence per se instruction if the statute merely codifies the common law reasonable man standard. In such cases, a court should not frame its instructions in terms of whether the defendant violated the statute, but rather should frame its instructions in terms of whether the defendant's actions satisfy the "reasonably prudent person" standard under the circumstances. Testimony suggesting that the defendant violated a statute codifying the common law, however, may still be submitted to the jury if the court deems the violation relevant evidence of negligence.

If a statute satisfies the "fair and just standard of reasonable behavior" test articulated in *Ferrell,* the court still has to find that the statute provides a positive and definite standard of care. In other words, the court must determine that a jury would be able to determine whether the statute had been violated by finding a single issue of fact. Once the statute is found to provide a positive and definite standard of care, and the plaintiff can show that the record contains sufficient evidence from which the jury could reasonably infer that the defendant violated the statutory standard,[77] the plaintiff then becomes entitled to an instruction based on negligence per se as long as no justifiable excuse for the violation had been proved by the defendant and accepted by the court.[78]

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77. The test used to determine whether a plaintiff has produced sufficient evidence to demonstrate a defendant's alleged statutory violation

> is whether the facts and resulting inferences are such that reasonable people, viewing the evidence in the light most favorable to the party seeking the instruction, could justifiably have different views on the question. If they could, then the question should be submitted to the jury under the appropriate instructions. If they could not, then submitting the issue to the jury would not be justified.

Godfrey v. Hemenway, 617 P.2d 3, 7-8 (Alaska 1980). Given this test, if it appears that the statute in question, for whatever reason, was clearly not violated, then a negligence per se instruction would certainly be inappropriate.

78. Although the Alaska courts have recognized various excuses for the violation of statutory standards in negligence per se cases, an examination of such excuses is beyond the scope of this note. For examples of the types of excuses that are explicitly authorized in the *Restatement (Second) of Torts* § 288A, see *supra* note 2.

IV. 1983: BIRTH OF THE "TWO-STEP" TEST — IN THEORY, LITTLE CHANGE; IN PRACTICE, SOME REAL PROBLEMS

A. *State Mechanical, Inc. v. Liquid Air, Inc.:* Streamlining the Finer Points of Negligence Per Se

In *State Mechanical, Inc. v. Liquid Air, Inc.,*[79] the supreme court suggested a two-step test for determining whether a particular statute contains an appropriate standard for creating a negligence per se instruction:

> First, [the trial court] must determine whether the conduct at issue lies within the ambit of the statute or regulation in question, by applying the four criteria set out in the Restatement (Second) of Torts § 286 (1965). Second, once the trial court has concluded that the statute or regulation applies to the allegedly negligent conduct, the court must further determine whether the rule of law is so obscure, unknown, outdated, or arbitrary as to make inequitable its adoption as a standard of reasonable care.[80]

In the court's words, the first portion of the test to be applied by the lower courts is "strictly a legal conclusion, and we [as a reviewing court] will exercise our independent judgment in deciding whether the trial court interpreted the scope of the statute or regulation correctly."[81] The standard of review of a lower court's determination of the statute's applicability is therefore "substitution of judgment."[82] The reviewing court is to accord greater deference to the trial court's decision to adopt or reject the statute or regulation as an *appropriate* basis for a negligence per se instruction. As the supreme court had noted in its earlier decisions,[83] the trial court's disposition of whether an enactment is too obscure, unknown, or arbitrary to be used as a standard of reasonable care will be reversed on appeal only if the decision constitutes an abuse of discretion.[84]

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79. 665 P.2d 15 (Alaska 1983).

80. *Id.* at 18-19 (citations omitted).

81. *State Mechanical,* 665 P.2d at 19.

82. *Id.*

83. *See, e.g.,* Northern Lights Motel, Inc. v. Sweaney, 561 P.2d 1176, 1184 (Alaska 1977) (abuse of discretion explicitly adopted by Alaska Supreme Court for first time as standard of review for lower court's decision to adopt statutory standard of care).

84. *State Mechanical,* 665 P.2d at 19. Although the *State Mechanical* court recognized the trial court's discretion to refuse to give a negligence per se instruction, it limited this discretion to "highly unusual cases." *Id.* (citing *Ferrell,* 484 P.2d at 260). This limiting language is from *Ferrell,* but the court seems to have interpreted it much more broadly in *State Mechanical* than it originally suggested would be appropriate in *Ferrell.* The *Ferrell* limitation was restricted to traffic laws, which were recognized as seldom being too obscure to be used in negligence per se instructions. If the trial court's discretion to reject a statutory standard is limited to "highly unusual cases," notwithstanding the nature of the statute and the likelihood that it establishes a stan-

On its face, the *State Mechanical* court's two-step inquiry appears very similar to the pre-1983 approach developed in *Ferrell* and its progeny.[85] When examined closely, however, the *State Mechanical* decision contains a very troublesome development, namely, the supreme court's apparent willingness to stretch the coverage of statutes to conduct they clearly do not, and should not, reach. While serious in itself, the court's broad construction of statutes — particularly safety statutes — has made the doctrine of negligence per se a readily available, but extremely harsh, tool which has led to some very questionable results.

In *State Mechanical,* for example, the court found an admittedly ambiguous statute applicable to the defendant's conduct in the case,[86] and then permitted that broadly construed statutory standard to serve as the foundation for a negligence per se instruction. The standard at issue, a provision of the General Safety Code,[87] stated that pressurized "[c]ylinders shall not be kept in unventilated enclosures such as lockers and cupboards."[88] The wording of the subsection containing this particular provision, however, suggested that it might pertain solely to cylinders stored "inside of buildings."[89] The defendants in *State Mechanical* had placed an acetylene cylinder in an unventilated, enclosed container outdoors at a construction site. Gas leaking from the cylinder exploded and one of the defendant's employees was injured.[90]

The supreme court rejected State Mechanical's argument that the regulation applied only to cylinders stored inside of finished buildings. According to the court:

> The regulation makes no sense if it can be read to allow storage of cylinders in enclosed containers everywhere except inside finished

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dard of reasonable behavior, the supreme court would probably accept the argument that the trial court should presume that *any* applicable statute provides an appropriate standard for use in a negligence per se instruction. As this note has stressed, however, the mere fact that a statute is applicable to the facts of a case by itself does not, and should not, be the sole test of whether it is an appropriate basis for a negligence per se instruction.

85. Absent from the *State Mechanical* test is the requirement that the standard be examined to see whether it provides a positive and definite standard of care rather than a mere duplication of the common law duty to act reasonably under the circumstances. This oversight, however, was corrected in later decisions. *See, e.g.,* Osborne v. Russell, 669 P.2d 550, 554 (Alaska 1983); Harned v. Dura Corp., 665 P.2d 5, 12 (Alaska 1983).

86. 665 P.2d at 20.

87. GENERAL SAFETY CODE § 01.1002(a)(2)(B)(ii) (adopted in ALASKA ADMIN. CODE tit. 8, § 66.010 (repealed 1975)). The text of the section may be found in *State Mechanical,* 665 P.2d at 19).

88. *Id.*

89. *Id.* The first three words of the subsection read: "Inside of buildings . . . ." GENERAL SAFETY CODE § 01.1002(a)(2)(B)(ii).

90. *State Mechanical,* 665 P.2d at 17.

> buildings. While we do not agree with [the plaintiff] that the provision is unambiguous, this court has recognized in the past that the provisions of the [General Safety Code] . . . should be given a broad interpretation.[91]

The supreme court therefore concluded that the superior court had properly ruled that the regulation applied to State Mechanical's conduct in the case.[92]

The supreme court also rejected State Mechanical's argument that the regulation "should not be adopted as a negligence per se standard of care because of the lack of requisite notice of enforcement to the community."[93] Interpreting this argument as suggesting that the obscurity of the regulation should have precluded its adoption as an appropriate standard of care, the supreme court summarily rejected the argument by noting the trial court's broad discretion to adopt statutes which provide standards of reasonable care, even in the face of obscurity arguments.[94]

The supreme court's interpretation of State Mechanical's argument does not appear to be correct. Clearly, State Mechanical was not suggesting that the regulation itself was unknown or obscure, but rather was arguing that the regulation's applicability to State Mechanical's conduct was unknown until the trial court decided to construe the regulation broadly enough to make it applicable. The question the court should have examined was not whether the law under consideration *objectively* provided a standard of reasonable behavior, but instead whether applying the standard to the defendant's behavior was *fair and just* given the facts of the case. Under *Ferrell,* a statute provides an appropriate standard for negligence per se only if it supplies an objectively clear standard of behavior *and* also can be imposed fairly in a particular case.

A regulation prohibiting the storage of cylinders in unventilated, enclosed containers inside of buildings certainly *does* define a standard of reasonable behavior. However, construing this regulation to apply also to containers located outside of buildings on construction sites is neither fair nor just if the defendant, though aware of the regulation's existence, had no reason to believe that it applied to his course of conduct. As the supreme court itself pointed out in this case, the scope of the regulation under consideration was ambiguous.[95] Until the court interpreted the regulation's language,[96] the regulation's applicability to any type of cylinder storage beyond that expressly provided for on

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91. *Id.* at 20.
92. *Id.*
93. *Id.*
94. *Id.*
95. *See supra* text accompanying note 91.
96. Of course, another means of ascertaining the regulation's applicability would

its face remained highly speculative. Arguably, the regulation should *not* have been applicable to any situation it did not expressly mention, because its language was quite specific. Without a clear finding that State Mechanical was aware that the regulation likely applied to its behavior, the trial court's decision to submit a negligence per se instruction to the jury based on the regulation should have been held to constitute an abuse of its discretion.

Under the circumstances of *State Mechanical,* the supreme court perhaps should have availed itself of the opportunity to submit the violation of the regulatory standard to the jury as evidence of negligence rather than as part of a negligence per se instruction. Surely the legislature's clear dictate that cylinders not be stored in unventilated enclosures inside of buildings had some relevance to whether the defendant's identical act outside of a building on a construction site was negligent. By submitting the regulation to the jury as evidence of negligence, the court could have afforded significant weight to the legislature's probable intent of promoting safe workplaces without overburdening the defendant with an absolute standard of care that a reasonably prudent person could not have anticipated.

Before resolving the claim against State Mechanical, the supreme court should have reconsidered a statement by Justice Holmes which it had quoted in *Ferrell:* "It is not intended that the public force should fall upon an individual accidentally, or at the whim of any body of men. The [legal] standard, that is, must be fixed."[97] Until a statute's requirements and coverage are fixed, the standard of care contained in the statute should not be applied mechanistically. Often, as in *State Mechanical,* the mechanistic application of a statutory standard will turn out to be both unfair and unjust.

B. *Harned v. Dura Corporation:* Ignoring a Clear Statutory Exemption When Determining a Statute's Applicability

In *Harned v. Dura Corporation,*[98] the supreme court concluded that the trial court had erred in declining to instruct the jury that the defendant's failure to manufacture a compressed air tank in accordance with the provisions of a regulatory safety code[99] that had been incorporated by reference into Alaska law constituted negligence per

have been for the legislature or appropriate state agency to clarify the wording of the regulation.

97. O. HOLMES, THE COMMON LAW 110-11 (1881) (quoted in Ferrell v. Baxter, 484 P.2d 250, 263 (Alaska 1971)).

98. 665 P.2d 5 (Alaska 1983).

99. After statehood, the Alaska Department of Labor ratified the American Society of Mechanical Engineers' "Boiler Construction Code" pursuant to express statutory authority. *See* ALASKA STAT. §§ 18.60.180-.395 (1981); ALASKA ADMIN. CODE tit. 8, § 80.010(a) (July 1984).

se.[100] The trial court had submitted the statutory standard to the jury as evidence of negligence. The statute by its express terms did not apply to any tank less than five cubic feet in volume unless the tank was to be used in a place of public assembly. The volume of the tank the defendant had manufactured was indisputably less than five cubic feet, so the statutory standards the plaintiff proposed were only directly applicable to the resolution of its case if the site where the plaintiff had been injured was a place of public assembly.

In ruling that the trial court should have instructed the jury that a violation of the safety code provision constituted negligence per se, the supreme court refused to decide whether the site of the accident was a "place of public assembly." The court's attempt to explain its refusal to find facts on this question suggests a willingness by the court to rewrite express legislative enactments if it believes this modification is necessary to protect the public. Surprisingly, the court first declared that manufacturers should not be allowed to rely on the express terms of the statutory exemption. According to the court, it was a mere "fortuity" that the defendant's tank arguably fell within the scope of the exemption, since manufacturers generally "have no control over where the tanks they produce will be utilized."[101] After refusing to extend the statutory exemption to manufacturers, the court went on to hold that such manufacturers nonetheless had a duty to manufacture "pressure vessels" in accordance with the regulatory standards found in the statute.[102]

While the court's analysis seems reasonable from a public policy viewpoint, it does not justify the court's refusal to determine whether the specific exemption contained in the statute truly applied to the facts of this case. For whatever reason, the legislature had determined that pressurized tanks of five cubic feet or less need satisfy certain statutory standards only when such tanks are used in public places. As the *Ferrell* court noted more than a decade ago, the law allegedly violated by a defendant must be applicable to the situation presented to the court[103] before it can be adopted as a fair and just standard of reasonable care for use in a negligence per se instruction. Under the *Ferrell* test, the court should not have determined that the statutory standard applied to the case without first deciding whether the accident site was a public place. If the court felt compelled to issue a negligence per se instruction, it should at least have made the jury aware of the exemption so that the jury then could have determined whether the defendant had indeed violated the statute.

100. 665 P.2d at 14.
101. *Id.*
102. *Id.*
103. *Ferrell,* 484 P.2d at 264.

As it had in *State Mechanical,* the supreme court in *Harned,* after making the broad conceptual leap necessary to render an arguably inapplicable statutory standard applicable to the defendant's conduct, invoked the doctrine of negligence per se with little hesitation.[104] In the process, the supreme court overturned the lower court's decision to submit the standard to the jury as evidence of negligence. If the supreme court had accepted the evidence of negligence approach, it would have avoided the seemingly arbitrary determination of the statute's applicability which it must have felt compelled to make in order to reach the "correct result."[105] Compared with the negligence per se doctrine's requirement that a statute be directly applicable to the facts of a case, the relevancy requirement of the evidence of negligence approach places a much less rigorous burden on the party seeking to use a statutory standard to bolster his position at trial. The facts of *State Mechanical* and *Harned* would easily have allowed the plaintiffs to introduce the statutory violations involved in those cases as evidence of negligence. These facts were not sufficient, however, to warrant the application of negligence per se in either of the cases.

C. *Osborne v. Russell:* Construing a Safety Statute Broadly in Order to Render It Applicable to a Defendant's Conduct

In its most recent decision involving negligence per se, *Osborne v. Russell,*[106] the Alaska Supreme Court continued the trend it began in *State Mechanical* of construing safety statutes broadly in order to find them applicable to a defendant's conduct. In *Osborne,* an exposed wire connected to a circuit breaker inadvertantly became energized and electrocuted plaintiff's decedent while he was working in a restaurant. The personal representative of the decedent's estate alleged that an electrician had been negligent in his electrical work in the restaurant and filed a wrongful death action against him.[107] The supreme court exercised its independent judgment to find that even though a provision of the 1978 National Electrical Code[108] was entitled "splices," its directive that "the free ends of conductors shall be covered with an insulation equivalent to that of the conductors or with an insulating device suitable for the purpose"[109] applied to all conductors, not merely to spliced and energized wires.[110] The court sought

104. 665 P.2d at 12-13.

105. The jury at the trial court level had found for the defendant under the evidence of negligence instruction. *Id.* at 6.

106. 669 P.2d 550 (Alaska 1983).

107. *Id.* at 552.

108. NATIONAL ELECTRICAL CODE § 110-14(b) (1978) (text of section may be found in *Osborne,* 669 P.2d at 554 n.2).

109. *Osborne,* 669 P.2d at 554 n.2.

110. *Id.* at 554-55.

additional support for its conclusion in a separate subsection of the Code[111] which specified that "[c]onductors shall be insulated."[112] The court construed the two provisions together and concluded that it would not be "sensible" to limit them solely to spliced and energized wires connected to closed circuits, since the sections were enacted "to protect persons from exactly the sort of accident which occurred in this case."[113]

After dispensing with the potential barrier of the statute's inapplicability, the supreme court concluded that the only other possible reason the superior court had failed to instruct the jury on negligence per se might have been its determination that the provisions "were 'too vague or arcane' to be used as a standard of care."[114] The supreme court rejected this rationale because the provisions containing the specific requirement that wires be insulated were directed expressly to professional electricians like the defendant Russell. According to the supreme court: "[U]nder these circumstances there was no area of discretion in which the [trial] court could act."[115] After considering all of these factors, the supreme court concluded that the superior court had erred in refusing to give the plaintiff's requested negligence per se instruction.[116] Furthermore, finding that reasonable persons could not have disagreed as to whether the defendant had complied with the terms of the statute *as the court had construed it,*[117] the supreme court concluded that Osborne's motion for a directed verdict as to negligence should also have been granted.[118]

As in *State Mechanical,* the court in *Osborne* never paused to consider whether use of the statutory standard of care was fair and just under the facts of the case. Once again, a strong argument can be made that the use of negligence per se in *Osborne* was inappropriate because the defendant could not have foreseen the broad construction given the statutory provisions in question. If the alleged violation of

111. *Id.* at 555 (referring to § 310-2 of the NATIONAL ELECTRIC CODE, the text of which may be found at 669 P.2d 554 n.2).

112. *Id.* at 554 n.2.

113. *Id.* at 555.

114. *Id.*

115. *Id.* Given the court's conclusion, one wonders what became of the trial court's discretion to adopt or reject a statutory standard of care, since the discretionary decision in *Osborne* should have been reversed by the reviewing court only if the trial court had abused its discretion. Apparently, in this case the supreme court's finding of applicability, combined with the specificity and content of the safety code provision, made the provision an appropriate basis for a negligence per se instruction. Implicitly, the supreme court must have found that the trial court had abused its discretion in not adopting the statutory standard.

116. *Id.*

117. *Id.* (emphasis added).

118. *Id.*

the statutory standard had been submitted as mere evidence of negligence, the jury, rather than the court, would have determined the issue of negligence in the case — an extremely important difference, given the court's recent predilection toward construing safety statutes quite broadly.

V. VIOLATIONS OF SAFETY STATUTES AS EVIDENCE OF NEGLIGENCE

As previously discussed,[119] when a court has found that a statute does not provide a standard of conduct appropriate for a negligence per se instruction, the court may still accept a violation of that statute as relevant evidence bearing upon the reasonableness of the defendant's conduct.[120] Indeed, comment d to section 288B of the *Restatement (Second) of Torts* advocates this approach:

> particularly where the provision in question prescribes standard precautions for a purpose other than the protection of the person who is injured, or for protection against a hazard other than that from which the harm has resulted. The fact that such precautions have been prescribed for another purpose may be a relevant fact for the consideration of the triers of fact, as indicating that a reasonable man would have taken the same precautions in the particular case.[121]

According to Professor James, if a statute, although breached, is found not to govern the exact fact situation before a court, the statute itself should not be considered as fixing an appropriate standard of conduct. Instead, if the statute satisfies normal relevancy requirements, it should then be considered merely as evidence of the appropriate standard.[122] Similarly, where a defendant technically has not violated a statute because it does not cover the precise fact situation before the court, the statute, if sufficiently relevant, should still be utilized as evidence of the appropriate standard of behavior in a "sufficiently analogous situation."[123] In James's words:

> [S]hould not safety rules made to govern private power companies

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119. *See supra* text accompanying notes 3, 42, and 52.

120. RESTATEMENT (SECOND) OF TORTS § 288B comment d (1965); *see also* James, *supra* note 52, at 110-12; Lowndes, *Civil Liability Created by Criminal Legislation,* 16 MINN. L. REV. 361, 377 (1932); Note, *Hassan v. Stafford: Admission of Administrative Regulations as Evidence of Standard of Care in Negligence Cases,* 47 TEMP. L.Q. 739, 740-46 (1974).

121. RESTATEMENT (SECOND) OF TORTS § 288B comment d (1965); *see also* James, *supra* note 52, at 110 ("Virtually all courts seem to agree that [a legislative] enactment should be considered unless it is irrelevant in the sense that its subject matter has nothing to do with the case.").

122. James, *supra* note 52, at 114 n.65.

123. *Id.* at 115; *see also* Morrow, *The Use of OSHA in Negligence Suits Against Those Responsible for the Maintenance of Safe Work Sites,* 1978 TRIAL LAW. GUIDE

> deserve consideration in evaluating the conduct of municipally owned power systems? And may not precautions required of motorists having the right of way as they approach highway intersections be some guide to proper behavior in approaching the intersection with a private road?[124]

The value of a statute, or rather of a statutory violation, in a negligence action need not be linked solely to its use as a basis for finding negligence per se; indeed, a criminal statute can often serve a useful, though not conclusive, function in a negligence action. An evidence of negligence approach is one well-recognized means[125] of giving effect to a relevant statute — and to the legislature's expertise and considered opinion contained within the statute — that avoids many of the problems that arise when courts inappropriately attempt to force relevant statutes into inapplicable fact situations by construing their provisions liberally, and then using them as the basis for a negligence per se instruction to the jury.

Professor Morris, another commentator, has suggested that an instruction to a jury "that the breach of a criminal statute is evidence of negligence amounts to a warning to the jury that the legislature has a standard and that jurymen should be cautious about substituting one of their own."[126] Furthermore, Morris argues that the use of an evidence of negligence procedure is appropriate in cases

> in which the judge doubts the suitability of the legislature's criminal standard for the decision of the tort case before him, and yet is not sure enough of his doubts to instruct the jury that the legislative standard should be disregarded, and therefore is willing to allow the jury to decide the ethical as well as the factual sub-issue of fault on their own power, unembarrassed by advice.[127]

In a case where a court would have to construe a safety statute extremely broadly to justify an application of negligence per se,[128] Professor Morris's suggestion provides an attractive alternative to negligence per se, namely, an evidence of negligence approach. Furthermore, Morris's suggestion is completely consistent with pre-1983

167, 185-86 (providing examples of jury instructions where relevant safety regulations had been submitted as evidence of negligence).

124. James, *supra* note 52, at 115-16 (citations omitted); *see also* Morrow, *supra* note 123, at 167-72. "Once it is established that a duty of due care is owed to the plaintiff by the defendant, then applicable OSHA regulations may be admissible as evidence of what a reasonable man in defendant's position would have done under the circumstances." Morrow, *supra* note 123, at 169-70.

125. *See supra* text accompanying note 3 (explaining that section 228B(2) of the *Restatement (Second) of Torts* permits the evidence of negligence approach).

126. Morris, *The Relation of Criminal Statutes to Tort Liability,* 46 HARV. L. REV. 453, 461 (1933).

127. *Id.*; *see also* Comment, *Torts — Violation of Criminal Statutes as Negligence Per Se or Mere Evidence of Negligence,* 1950 WASH. U.L.Q. 280, 284-85.

128. *See, e.g., supra* text accompanying notes 79-118.

Alaska law. In the future, rather than engage in somewhat artificial negligence per se determinations, the Alaska courts should submit alleged statutory violations to juries as mere evidence of negligence when the statutes themselves are likely inapplicable to the defendant's conduct or simply fail to provide appropriate standards of care.

VI. CONCLUSION

Since 1983, the Alaska Supreme Court has embarked on a program of construing arguably inapplicable safety statutes broadly in order to allow it to apply the doctrine of negligence per se to defendants who may not actually have violated these statutes. Unfortunately, the Alaska courts apparently have failed to recognize the full implications of following this course of conduct. To a very real extent, using negligence per se as the courts have in recent years undermines the rationale for the supreme court's adoption of the doctrine in 1971. When the coverage of a legislative enactment has been left ambiguous, the standard of care expressed in the statute, although certain in itself, is uncertain in its application until construed by a court or clarified by the legislature.[129]

One of the principal justifications for the negligence per se doctrine is that a reasonable man knows and obeys criminal statutes.[130] If, however, an individual has no reason to know that a statutory standard of care governs his conduct, he may violate that standard while pursuing a course of otherwise reasonably prudent conduct.[131]

In arguing for an evidence of negligence approach in *Bachner,* Justice Erwin suggested that the negligence per se doctrine produced harsh results when the number of "applicable" regulatory standards was proliferating at a fantastic rate. A similar criticism can be raised when arguably inapplicable safety statutes are being drawn into cases through broad statutory construction and the liberal use of negligence per se. Indeed, it is extremely easy to violate a legislative enactment that sets a specific standard of care different from another standard that one might otherwise follow as a reasonable man under the circumstances. Despite the ancient presumption of universal legal

129. *See* Morris, *supra* note 44, at 29-32. "In many of the cases in which courts obdurately use the doctrine of negligence per se to hold a non-faulty violator guilty of negligence, a proper interpretation of the statute might produce a sounder result." *Id.* at 30.

130. *See* W. PROSSER, THE LAW OF TORTS § 36 (4th ed. 1971); Morris, *supra* note 126, at 454; Thayer, *Public Wrong and Private Action,* 27 HARV. L. REV. 317, 322-23 (1914).

131. *See* Morris, *supra* note 44, at 33. "One who ignores important regulations might well have been reasonably prudent before their enactment; but once a definite standard has been set by the criminal law the reasonably prudent man usually tries to comply." *Id.*

knowledge, when a statute is ambiguous on its face so that its applicability remains unclear, the issue of notice to the defendant becomes important in determining whether the use of negligence per se may be considered truly fair and just in a particular case.

An evidence of negligence approach for the violation of a statute, especially when the statute has been broadly construed to render it applicable to the defendant's conduct, avoids many of the harsh, seemingly arbitrary results occasionally produced under negligence per se. In close cases, under an evidence of negligence instruction, the jury is able to place the defendant's violation of an arguably ambiguous statutory standard in proper perspective by considering whether the court's extremely broad construction of the statute should forestall a finding of negligence. The great flexibility of the evidence of negligence approach makes it a truly attractive option for the court when a defendant was likely unaware that a particular statutory standard applied to his behavior.

Finally, the Alaska courts' more frequent use of an "evidence of negligence" approach in close cases would not represent a dramatic departure from the rules that the court followed prior to 1983. The framework which the Alaska Supreme Court adopted in 1971 in the *Ferrell* decision and which it developed over the next twelve years should be resurrected and given continuing vitality. Significantly, no new legal ground need be broken to accomplish the result argued for in this note; pre-1983 precedent and procedures simply must be reexamined and followed. The Alaska courts should remember that the *Ferrell* rules expressly authorized the use of "evidence of negligence" where the use of negligence per se would be inequitable. Reaching the "right result" is important, but if the right result is not reached in the "right" way, clarity, certainty, and justice will almost certainly be sacrificed in the process.

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