

In view of the evidence offered, the trial court correctly determined that there was no evidence offered of any legally acceptable excuse or justification. It was, in law, an unexcused violation. The finding, therefore, that the driver violated the statute intended as a safety measure and the finding of proximate cause entitled the plaintiffs to a judgment.

[On motion for rehearing the court remanded the case solely for consideration of certain issues about damages.]

### Notes

1. In a number of extreme cases courts that ordinarily recognize the per se rule have held that statutory violation was excused. This has been the holding, for example, where the statute required good brakes, but the brakes suddenly failed without the driver's fault.

2. If excuses are limited to those formulated by the Restatement, might the effect be a kind of strict liability? On the other hand, if excuses are not limited, is the negligence per se rule in effect scuttled? In *Alarid v. Vanier*, 50 Cal.2d 617, 327 P.2d 897 (1958) the court said: "In our opinion the correct test is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." What effect, if any, does such an approach give to the statute?

### RUDES v. GOTTSCHALK

Supreme Court of Texas, 1959.  
159 Tex. 552, 324 S.W.2d 201.

NORVELL, JUSTICE. . . .

[Gottschalk, an eight-year-old boy, was struck by a car as he attempted to cross a controlled access expressway. A statute provided that "every pedestrian" was required to yield the right of way except in a crosswalk. The jury found Gottschalk was not in a crosswalk. On this basis, the trial judge concluded he was negligent per se and denied all recovery.]

It is well settled that where common-law negligence as distinguished from negligence per se is involved, the minor is judged by the standard of a child and not that of an adult.

While defendant does not dispute the rule above set forth, he insists that a different rule applies to cases of negligence per se. Here the legislative regulation governing the crossing of highways in places other than crosswalks was obviously intended to guard against a general class of harm which included the unfortunate occurrence disclosed by the record before us and was undoubtedly designed for the protection of motorists using the expressway as well as those crossing the same.

Fundamentally, however, the application of proscriptions contained in criminal statutes as standards for determining tort liability stems

from the judicial action of civil courts. The statute here does not expressly provide for the fixing of civil liability in a negligence action. Actions expressly provided for by statute are to be distinguished from actions based upon the doctrine of negligence per se. In the latter type of action, the civil courts may and often do consider acts or omissions as negligent because of criminal regulations against them, although such acts or omissions would not be considered negligent under the ordinarily prudent man test. In the usual negligence per se case, however, we are concerned with alleged conduct which would be considered substandard even in the absence of statute. We adopt the statutory test rather than that of the ordinarily prudent man as the more accurate one to determine negligence because the legislature, by reason of its organization and investigating processes, is generally in a better position to establish such tests than are the judicial tribunals. But this does not mean that the criminal statute is always accepted as a test of negligence by the civil courts under all circumstances. We have applied tests and standards taken from criminal statutes, even though such provisions are too indefinite for criminal proscriptions, and even when the statute may be wholly invalid as a criminal regulation because of a failure to comply with a procedural condition precedent. *Clinkscales v. Carver*, 22 Cal. 2d 72, 136 P.2d 777.

As the power of adopting or rejecting standards rests with the civil courts, we may accept or reject the criminal statute or use such part thereof as may be deemed appropriate for our purpose. We have applied standards set forth in criminal statutes even to those persons who are expressly excepted from criminal responsibility thereunder. And even while accepting a statutory standard of negligence in lieu of that of the ordinarily prudent man, we still retain the test of foreseeability of harm before liability is imposed under the doctrine of negligence per se.

We agree with the Court of Civil Appeals in holding that the conduct of a child is not to be judged by the standard of an adult simply because statutory negligence (negligence per se) is involved rather than common-law negligence. This holding is undoubtedly in accord with the overwhelming weight of authority in the United States. . . . [S]ome courts apply the general rule concerning a child's standard of care while others inquire by interrogatory or instruction into the child's capacity to understand and comply with the statute. . . . The general rule of a child's standard of care is, however, more compatible with the Texas practice and would be less likely to confuse a jury in a case submitted upon special issues.

Contributory negligence on the part of a child, like that of an adult, may appear as a matter of law. . . . It may be further said that at either end of the age bracket of childhood there exists a zone where under the particular facts of a case, it could well be said that reasonable minds could not differ but that the particular child, as a matter of law, must be held incapable of contributory negligence, or, on the other hand, held to the adult standard of the ordinarily prudent man. The age of the child in this case lies within the classic common-law brackets of seven and

fourteen. The record does not compel the adoption of the adult standard on the theory that reasonable minds cannot differ as to the child's intelligence and discretion. The issue was for the jury and the Court of Civil Appeals correctly so held.

[Remanded for new trial.]

### Notes

1. *Bases for ignoring the statutory standard.* The broader point in *Rudes* continues the theme begun with *Tedla v. Ellman* and *Impson v. Structural Metals*. Can you now state three distinct grounds for avoiding the negligence per se doctrine?

2. *Rejecting excuses.* If courts can adopt or reject the statutory standard when the statute does not address tort liability, could they also hold that all excuses would be rejected? Would that be strict liability? See DOBBS ON TORTS § 141 (2000).

3. *Child's standard in negligence per se cases.* A narrower point in *Rudes* addresses the minor's duties under statutes. Is the court saying that the child standard of care always prevails over the statutory standard? In *Bauman v. Crawford*, 104 Wash. 2d 241, 704 P.2d 1181 (1985), the court said: "We hold that a minor's violation of a statute does not constitute proof of negligence per se, but may, in proper cases, be introduced as evidence of a minor's negligence." In *Rudes* the child was on foot; in *Bauman* he was riding a bicycle at night without a light. These are not exotic activities for children. Why would holding children to the statutory standard be such a bad idea?

4. *Common law negligence.* Be sure to notice that the plaintiff can claim negligence on ordinary common law principles even if the statute has no effect. That is, the standard of care "defaults" back to the reasonable and prudent person standard where the statute is held not to supplant it.

5. If the court is free to use some statutory standards and reject others, should there be some principles governing this choice or should the court be free to ignore the statutory standard when it feels like it?

6. "[T]he defendant in most negligence per se cases already owes the plaintiff a pre-existing common law duty to act as a reasonably prudent person, so that the statute's role is merely to define more precisely what conduct breaches that duty." *Perry v. S.N.*, 973 S.W.2d 301 (Tex.1998). When the statute creates a wholly new obligation and does not in itself purport to create a new cause of action, courts tend to give the statute no tort law effect at all. That was the case in *Perry*, where the statute required people to report known cases of child abuse. Since no common law obligation of this sort existed, and the statute did not purport to create a new cause of action, the court denied recovery to children whose abuse might have been avoided if a timely report had been made.

7. *Invalid statutes.* What if a statute setting a standard of care is invalid because of a purely formal defect in its passage? Is this a good ground for refusing to use its standard in a tort case?

8. *Obscure or irrational statutes.* Alaska has said that the trial judge could refuse the negligence per se instruction in "highly unusual cases," because of "obscure, oblique or irrational" statutory provisions, and also where the statutory standard merely duplicates the common law standard. *Osborne v. Russell*, 669 P.2d 550 (Alaska 1983). Is this a good ground for refusing to use its standard in a tort case?

9. *Licensing statutes.* Should courts adopt licensing statutes as standards of care? In *Talley v. Danek Medical, Inc.*, 179 F.3d 154 (4th Cir.1999) the defendant manufactured a medical device without obtaining required approval of the Food and Drug Administration. A surgeon used the device on the plaintiff's spine, allegedly to her injury. The court held that the defendant's failure to obtain required approval before marketing a medical device would not be negligence per se. Perhaps the most famous case on this topic is *Brown v. Shyne*, 242 N.Y. 176, 151 N.E. 197, 44 A.L.R. 1407 (1926). The plaintiff alleged that the defendant held himself out to practice medicine, that his treatments paralyzed her, and that he had no license to practice medicine. The New York Court of Appeals held that the plaintiff could not get to the jury on this allegation but would instead be required to allege and prove negligence by ordinary means. A few cases apply the negligence per se rule to particular licensing statutes, or find limited exceptions. Do you think *Talley* and *Brown* were rightly decided?