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Negligence Per Se and Excuse for a Statutory Violation in Texas.

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COMMENTS

NEGLIGENCE PER SE AND EXCUSE FOR A STATUTORY VIOLATION IN TEXAS

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A reading of Texas cases leads one to the inescapable conclusion that the courts of this state follow the majority of jurisdictions in recognizing the rule of negligence per se, or statutory negligence. In adopting a legislative standard, the courts have supplanted the common law concept of the "reasonable man" by which to judge the conduct of a party in civil litigation. As a result, the violation of the standard is unreasonable by definition. While this doctrine has been accorded wide theoretical acceptance, it has proved difficult to apply, in matters of both substance and procedure. Recent Texas Supreme Court decisions have attempted, with moderate success, to clarify this area of the law, particularly as it concerns Article 6701d of the Texas Revised Civil Statutes. The following discussion will re-examine the law of negligence per se and excused violation in light of these recent developments.

NEGLIGENCE PER SE: THE PRESENT CONCEPT

Negligence per se is recognized as "[t]he unexcused violation of a legislative enactment . . . which is adopted by the court as defining the standard of conduct of a reasonable man."[1] The decision to adopt the legislative standard is one for the court to make in the exercise of its discretion.[2] The court will initially look to the legislative enactment and determine if it may be interpreted both to protect a class of persons within which the injured party is included,[3] and to prevent the type of injury which has been suf-

1. RESTATEMENT (SECOND) OF TORTS § 288B (1965). The Texas Supreme Court, citing the *Restatements*, has approved this rule as a correct statement of the law. Southern Pac. Co. v. Castro, 493 S.W.2d 491, 497 (Tex. Sup. 1973).

For the historical development of statutory negligence, *see* Foust, *The Use of Criminal Law as a Standard of Civil Responsibility in Indiana*, 35 IND. L.J. 45, 46 (1959).

2. Phoenix Ref. Co. v. Powell, 251 S.W.2d 892, 896 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.); *accord*, Rudes v. Gottschalk, 159 Tex. 552, 556, 324 S.W.2d 201, 205 (1959); RESTATEMENT (SECOND) OF TORTS § 286, comment *d* (1965).

3. Bergeron v. City of Port Arthur, 264 S.W.2d 769, 774 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.); Leonard Bros v. Zachary, 94 S.W.2d 509, 512 (Tex. Civ. App. —Ft. Worth 1936, no writ). The injured party is the one entitled to claim the violation of the statute. Hammer v. Dallas Transit Co., 400 S.W.2d 885, 888-89 (Tex. Sup. 1966). *See generally* 65 C.J.S. *Negligence* § 19(5) (1966).

fered.[4] Enactments which commonly satisfy these requirements are safety measures,[5] and of these, the Texas Uniform Act Regulating Traffic on Highways, Article 6701d,[6] is most frequently involved in negligence per se litigation. When the court has decided that the statute was designed to protect the party asserting it from the type of injury which occurred, the question then remaining is the effect to be given that violation.

It has not been conclusively settled whether the violation of any one of the many provisions of the Act will constitute negligence per se. It is the generally accepted rule that violation of the statute is "not merely evidence of negligence, but is negligence per se."[7] Passage of article 6701d and the subsequent decisions thereunder have, however, quashed any expectations of a uniform application of this doctrine.

Various sections of the Act set out a standard of conduct prescribing a rule of minimum behavior, violations of which, without a legally acceptable excuse, have been uniformly held to establish negligence per se. The court accepts the statutory standard, rather than the "ordinary care" standard, as the more accurate one to determine negligence "because the Legislature, by reason of its organization and the investigating processes, is generally in a better position to establish such tests than are the judicial tribunals."[8] An example of this is section 52 of the Act, which prohibits driving on the left-hand side of the road.[9] Because there is no "looseness or lack of a definite

4. *E.g.*, East Texas Motor Freight Lines v. Loftis, 148 Tex. 242, 246, 223 S.W.2d 613, 615 (1949); Bazan v. Corpus Christi Trans. Co., 358 S.W.2d 235, 238 (Tex. Civ. App.—Eastland 1962, no writ); Franklin v. Houston Elec. Co., 286 S.W. 578, 580 (Tex. Civ. App.—Galveston 1926, no writ). The statute applies "once it is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation . . . ." PROSSER, HANDBOOK OF THE LAW OF TORTS § 36, at 200 (4th ed. 1971). *See also* Herrin v. Falcon, 198 S.W.2d 117, 120 (Tex. Civ. App.—Beaumont 1946, writ ref'd n.r.e.); RESTATEMENT (SECOND) OF TORTS § 288B (1965).

5. *See* Impson v. Structural Metals, Inc., 487 S.W.2d 694, 697 (Tex. Sup. 1972); Keeton, *Torts, Annual Survey of Texas Law*, 24 Sw. L.J. 3, 16 (1970).

6. TEX. REV. CIV. STAT. ANN. art. 6701d (1969), *as amended*, (Supp. 1973). This article largely superseded and supplemented TEX. PENAL CODE ANN. arts. 801, 827a (1961), and was a substantial adoption of the uniform act as drafted by the National Conference of Commissioners on Uniform State Laws. Comment, *The Effect of the Uniform Traffic Act Upon the Substantive Law of Torts in Texas*, 26 TEXAS L. REV. 500 (1926). Article 6701d will subsequently be referred to as "the Act" and particular sections of that article will often be identified by section number only.

7. Mundy v. Pirie-Slaughter Motor Co., 146 Tex. 314, 320, 206 S.W.2d 587, 590 (1947). In those jurisdictions where the violation of the statute is but evidence of negligence for the jury to consider, the doctrine of negligence per se has no application. *Compare* 57 AM. JUR. 2d *Negligence* § 239 (1971), *with* 57 AM. JUR. 2d *Negligence* § 246 (1971).

8. Rudes v. Gottschalk, 159 Tex. 552, 555, 324 S.W.2d 201, 204 (1959).

9. TEX. REV. CIV. STAT. ANN. art. 6701d, § 52 (Supp. 1973).

standard"[10] as to the conduct required of the motorist, the statute provides "an appropriate standard for measuring civil liability . . . ."[11]

In determining whether the standard of conduct has been breached, the courts may be required under other statutes to additionally apply the prudent man test to the limited extent of defining the conditions which invoke the statutory duty. The seminal case outlining this concept was *Missouri-Kansas-Texas Railroad v. McFerrin.*[12] This particular case involved a railroad-crossing collision wherein the railroad claimed that plaintiff's decedent was guilty of contributory negligence per se for failing to stop his vehicle within the prescribed distance from the track when an approaching train was "plainly visible" and in "hazardous proximity."[13] The court held that these statutory conditions are not established by the mere fact of collision, but are determined by the standard of a reasonably prudent person in the same situation as the motorist.[14] The prudent man test as applied does not "pertain directly to the act or omission in question,"[15] but rather is used to "call the statutory duty into existence."[16] At that point, the principles of negligence per se are applied.

There are also many statutory provisions which do not precisely define the standard of conduct required but rather evince a "standard of care" in that the duty of compliance is conditional, not absolute.[17] Consequently,

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10. Wilson v. Manley, 347 S.W.2d 778, 780 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.e.). The court in *Wilson* was construing section 68(b) of article 6701d, which requires a motorist to give a continuous signal for at least 100 feet before beginning a turn. This provision, like section 52, lends itself to neither "amplification nor construction" for the prescribed conduct is not optional; it is required. *Id.* at 780. Other statutes of this type are likewise characterized by an unmistakable duty. *See* section 59 (where a road is designated for one-way traffic, the motorist shall drive only in the designated direction); section 33(b) (motorist required to stop before entering an intersection when faced with a red light). Additionally, compliance is often expressed in numerical terms: e.g., section 126(a) (headlights capable of illumination for 350 feet).

11. Phoenix Ref. Co. v. Powell, 251 S.W.2d 892, 896 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.).

12. 156 Tex. 69, 291 S.W.2d 931 (Tex. Sup. 1956).

13. The statute in issue was TEX. REV. CIV. STAT. ANN. art. 6701(d), § 86(d) (1969) which reads in part:

> Whenever any person driving a vehicle approaches a railroad grade crossing, the driver of such vehicle shall stop within fifty (50) feet but not less than fifteen (15) feet from the nearest rail . . . when:
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> . . . .
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> (d) An approaching train is plainly visible and is in hazardous proximity to such crossing.

14. Missouri-K.-T. R.R. v. McFerrin, 156 Tex. 69, 76, 291 S.W.2d 931, 935-36 (1956).

15. 1 STATE BAR COMMITTEE, TEXAS PATTERN JURY CHARGES 16 (1969).

16. Misssouri-K.-T. R.R. v. McFerrin, 156 Tex. 69, 76, 291 S.W.2d 931, 936 (1956).

17. Renfroe v. Ramsey, 477 S.W.2d 648 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ) (section 71(c)); Perkins v. Fisher, 395 S.W.2d 657 (Tex. Civ. App.—Amarillo 1965, no writ) (section 68(c)); Williams v. Price, 308 S.W.2d 185 (Tex.

the violation of these statutes incorporates a finding that the party charged with the violation failed to exercise ordinary care in his actions. A provision of this type is section 68(a) of the Act which provides that no person shall turn his vehicle into a private road or driveway "unless and until such movement can be made with safety."[18] The phrase, "with safety," is interpreted as "safety in the judgment of a person using ordinary care."[19] Thus the statute provides, in effect, only that the driver must exercise ordinary care.[20] A finding that one could turn "with safety," or proceed "safely"[21] involves a broadly based inquiry that arguably reduces the statutory standard to mere evidence of negligence to be weighed by the common law standard. Of perhaps lesser scope, but similar effect, are those provisions the violation of which is predicated upon a finding that an oncoming vehicle was an "immediate hazard."[22] Several courts have implied that the violation of these various statutes does not constitute negligence per se, and thus the submission of a common law negligence issue is required.[23] While it may be contended that the common law standard is only invoked to define the conditions giving rise to the statutory duty,[24] it may equally be presumed that the jury is in fact

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Civ. App.—Ft. Worth 1957, writ ref'd n.r.e.); Booker v. Baker, 306 S.W.2d 767 (Tex. Civ. App.—Dallas 1957, writ ref'd n.r.e.) (sections 68(a), 72); *see* Schwab v. Stewart, 387 S.W.2d 939 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e., 390 S.W.2d 752 (Tex. Sup. 1965); Craker v. City Transp. Co., 316 S.W.2d 447 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.) (section 71).

Apart from judicial interpretation, the statute itself may prescribe a standard of care where it commands that non-compliance will not relieve a plaintiff from the burden of proving negligence. *See* Davis v. Gatlin, 462 S.W.2d 54, 56 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.) (commenting on section 171(b)).

18. TEX. REV. CIV. STAT. ANN. art. 6701d, § 68(a) (Supp. 1973).

19. 1 STATE BAR COMMITTEE, TEXAS PATTERN JURY CHARGES § 5.26, comment at 134 (1969). In regard to a similar statute (section 71(c)) which prohibits a driver from proceeding until he "may safely enter the intersection without interference or collision," this language has been construed to mean "until a reasonable man so situated would think he could safely enter the intersection." Renfroe v. Ramsey, 477 S.W.2d 648, 650 (Tex. Civ. App.— Houston [14th Dist.] 1972, no writ).

20. Impson v. Structural Metals, Inc., 487 S.W.2d 694, 695 n.1 (Tex. Sup. 1972); *accord*, Garcia v. Caletka, 486 S.W.2d 880, 883 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.). *See* Cunningham v. Suggs, 340 S.W.2d 369, 375 (Tex. Civ. App.—Eastland 1960, writ ref'd n.r.e.) (where it was not possible to turn with "absolute safety," the driver need only act with "reasonable prudence under the circumstances").

21. TEX. REV. CIV. STAT. ANN. art. 6701d, § 71(a) (Supp. 1973); *see* 1 STATE BAR COMMITTEE, TEXAS PATTERN JURY CHARGES § 6.01 (1969).

22. Day v. McFarland, 474 S.W.2d 946, 955 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.) (section 73); Booker v. Baker, 306 S.W.2d 767 (Tex. Civ. App.—Dallas 1957, writ ref'd n.r.e.) (section 72).

23. Millers Cas. Ins. Co. v. Fowler, 472 S.W.2d 863, 864 (Tex. Civ. App.—Beaumont 1971, no writ); Perkins v. Fisher, 395 S.W.2d 657, 661 (Tex. Civ. App.—Amarillo 1965, no writ); Booker v. Baker, 306 S.W.2d 767, 774-75 (Tex. Civ. App.—Dallas 1957, writ ref'd n.r.e.); *see* Craker v. City Transp. Co., 316 S.W.2d 447, 450 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.). *See also* Sheppard v. Judkins, 476 S.W.2d 102, 113 (Tex. Civ. App.—Texarkana 1971, writ ref'd n.r.e.) (Ray, J., concurring).

24. *See* 1 STATE BAR COMMITTEE, TEXAS PATTERN JURY CHARGES 17 (1969).

determining whether a reasonable man would have violated the statute.

A more perplexing statute, section 74, involving "right-of-way," lacks no clear or definite standard by which to judge the conduct of a violator.[25] Several courts have, however, required a negligence submission under this kind of statute to determine whether the violator, having breached a standard of care, was negligent in so doing.[26] This line of cases suggests that a finding of ordinary care will relieve one from the consequences of his violation.[27] As a result, the application of negligence per se principles in this instance remains questionable.

Aside from a case-by-case analysis, there exist no clear distinctions that pierce the mixture of statutory and ordinary prudent man standards found in article 6701d. In the search for a guideline upon which to make proper application of negligence per se, one judge has concluded:

> [I]f the statute leaves a person to exercise his judgment such as, he may proceed when it is safe to do so, then the statute establishes a standard of care. However, if the statute provides that all persons shall stop in obedience to the red flashing light facing them at an intersection, it is one that leaves no discretion, nor does it leave an exercise of judgment on the part of the driver, and is therefore a standard of conduct statute.[28]

It may be fairly concluded, in any event, that where the courts determine that the statute, and not the common law, defines the standard of conduct of a reasonable man, the question of whether a prudent man would have violated the statute will never be reached. In these cases, the court will not find ordinary care conclusive, but will look only to the issue of excused violation.

EXCUSE FOR VIOLATION

The mere finding that a party has violated a statute that measures civil liability does not constitute negligence per se where the violator has raised an issue as to excuse.[29] This follows, of necessity, from the proposition that it is the *unexcused* violation of a penal statute that constitutes negligence per

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25. TEX. REV. CIV. STAT. ANN. art. 6701d, § 74 (Supp. 1973).

26. Warren Petroleum Co. v. Thomasson, 268 F.2d 5, 9 (5th Cir. 1959); Kelley v. Goodrum, 378 S.W.2d 935 (Tex. Civ. App.—Houston 1964, no writ); *accord*, Hemphill v. Meyers, 469 S.W.2d 327 (Tex. Civ. App.—Austin 1971, mand. overr.) (section 74).

27. Kelley v. Goodrum, 378 S.W.2d 935, 938 (Tex. Civ. App.—Houston 1964, no writ), *citing* Booker v. Baker, 306 S.W.2d 767 (Tex. Civ. App.—Dallas 1957, writ ref'd n.r.e.) where it was stated: "[T]he common-law standard of the reasonably prudent man must be used in determining as a matter of fact, not as a matter of law, whether the conduct of the motorist is negligent." *Id.* at 774.

28. Sheppard v. Judkins, 476 S.W.2d 102, 114 (Tex. Civ. App.—Texarkana 1971, writ ref'd n.r.e.) (Ray, J., concurring).

29. Impson v. Structural Metals, Inc., 487 S.W.2d 694 (Tex. Sup. 1972).

se.[30] The incorporation of excuse into the rule has raised this issue to "controlling importance."[31]

Establishing a Legally Acceptable Excuse

Before a party will be relieved from the consequences of his statutory violation, he must first assert a sufficient excuse.[32] An examination of the early cases reveals no uniform treatment of the excuse question. The concept of excuse, for lack of authoritative definition, has been subjected to various non-conforming classifications of excuses propounded by the authorities,[33] and confusing analogies drawn from the Texas special issue practice.[34]

An initial step toward clarification of the excuse doctrine was recently made by the Texas Supreme Court in *Impson v. Structural Metals, Inc.*[35] *Impson* involved a collision where the defendant truckdriver had attempted to pass an automobile by driving on the left side of the highway within 100 feet of an intersection in violation of article 6701d, section 57.[36] The accident occurred at night, and the intersection was obscured by trees and houses. The sign marking the intersection was small and there were no stripes marking the pavement to indicate no passing. The driver was, however, familiar with the road. Under these facts, the court held that the truckdriver had not established any legally acceptable excuse or justification for his violation of the statute.[37]

The court then addressed the problem of what constitutes a legally sufficient excuse. Five acceptable excuses were found by the court to satisfy the violation of a statute in Texas. The first of these arises when "the violation is reasonable because of the actor's incapacity."[38] This category includes cases where the violator does not have the mental or physical capacity to be

30. Southern Pac. Co. v. Castro, 493 S.W.2d 491, 497 (Tex. Sup. 1973); Parrott v. Garcia, 436 S.W.2d 897, 900 (Tex. Sup. 1969); Keeton, *Torts, Annual Survey of Texas Law*, 24 SW. L.J. 3, 16 (1970); 2 F. HARPER & F. JAMES, LAW OF TORTS § 17.6, at 1010 (1956).

31. Southern Pac. Co. v. Castro, 493 S.W.2d 491, 500 (Tex. Sup. 1973) (Walker, J., concurring).

32. Phoenix Ref. Co. v. Powell, 251 S.W.2d 892, 897 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.).

33. *See, e.g.*, 57 AM. JUR. 2d *Negligence* § 250 (1971); 1 BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 51.13, at 346 (3d ed. 1965); Ratliff, *Negligence Per Se in Texas: An Analysis of Statutory Excuse and Related Doctrines with Proposed Special Issues and Instructions*, 41 TEXAS L. REV. 104, 109-10 (1962).

34. *See, e.g.*, Christy v. Blades, 448 S.W.2d 107, 111 (Tex. Sup. 1969) (excuse of "impossibility" analogous to "sudden emergency"); Phoenix Ref. Co. v. Powell, 251 S.W.2d 892, 897 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.) (excuse established in an unavoidable accident issue).

35. 487 S.W.2d 694 (Tex. Sup. 1972).

36. TEX. REV. CIV. STAT. ANN. art. 6701d, § 57 (Supp. 1973).

37. Impson v. Structural Metals, Inc., 487 S.W.2d 694, 697 (Tex. Sup. 1972).

38. *Id.* at 696. *Impson* adopted the excuses as set out in the RESTATEMENT (SECOND) OF TORTS § 288A (1965).

charged with negligence.[39] An example of this form is found in *Rudes v. Gottschalk*,[40] where the court determined that a child violating a statute would not be held to the same standard as an adult violator.[41]

Justification will also be found where the violator "neither knows nor should know of the occasion for compliance."[42] The excuse here might arise where the motorist is driving at night and his taillight goes out suddenly, without his knowledge.[43] Similarly, where the motorist enters an area of unmarked and improperly lit highway construction, his mistake of fact as to his presence on the left-hand roadway may be justifiable.[44]

Where the violator is "unable after reasonable diligence or care to comply," the court will also pardon his breach of a statute.[45] When the statutory conditions are satisfied by reasonable diligence, this excuse will justify conduct exhibiting such care, though it is impossible to comply. This element of "impossibility" is found in the railroad-crossing cases where the motorist claims that even though he used ordinary care to obey the statute, he was still unable to bring his vehicle to a stop within the statutorily-prescribed distance from the track.[46]

The violator may also be absolved when "he is confronted by an emergency not due to his own misconduct."[47] Situations of this type might be the unexpected blowout of a tire,[48] unavoidable skidding on a wet street,[49] or a sudden mechanical failure in the steering[50] or brakes.[51]

The fifth type of excuse concerns the violation where "compliance would involve a greater risk of harm to the actor or to others."[52] When the alter-

39. Impson v. Structural Metals, Inc., 487 S.W.2d 694, 697 (Tex. Sup. 1972).
40. 159 Tex. 552, 324 S.W.2d 201 (1959).
41. *Id.* at 556, 324 S.W.2d at 205.
42. Impson v. Structural Metals, Inc., 487 S.W.2d 694, 696 (Tex. Sup. 1972).
43. *See* RESTATEMENT (SECOND) OF TORTS § 288A, comment *f* at 35-36 (1965). *See also* Parrott v. Garcia, 436 S.W.2d 897, 900 n.1 (Tex. Sup. 1969).
44. *See* Rash v. Ross, 371 S.W.2d 109, 112 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.).
45. Impson v. Structural Metals, Inc., 487 S.W.2d 694, 696 (Tex. Sup. 1972).
46. *See, e.g.*, Southern Pac. R.R. v. Montalvo, 397 F.2d 50, 52 (5th Cir. 1968); Southern Pac. Co. v. Castro, 493 S.W.2d 491, 494 (Tex. Sup. 1973); Christy v. Blades, 448 S.W.2d 107, 110 (Tex. Sup. 1969). *Christy* was later overruled on other grounds by *Castro*.
47. Impson v. Structural Metals, Inc., 487 S.W.2d 694, 696 (Tex. Sup. 1972).
48. *See* Phoenix Ref. Co. v. Powell, 251 S.W.2d 892 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.). A "sudden deflation" will also be excusable. L.M.B. Corp. v. Gurecky, 17 Tex. Sup. Ct. J. 53 (Nov. 3, 1973).
49. *See* Hammer v. Dallas Transit Co., 400 S.W.2d 885 (Tex. Sup. 1966). *See also* Herman v. Sladofsky, 17 N.E.2d 879, 881 (Mass. 1938) (skidding excusable when occurring through no fault of the driver).
50. *Cf.* Collins v. Smith, 142 Tex. 36, 40, 175 S.W.2d 407, 410 (1943).
51. Antee v. Sims, 494 S.W.2d 215, 216 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.); *see* Spurlock v. Burnette, 365 S.W.2d 812 (Tex. Civ. App.—Austin 1963, no writ).
52. Impson v. Structural Metals, Inc., 487 S.W.2d 694, 696 (Tex. Sup. 1972).

native to compliance is apparently safer, the violator may then be justified, for example, in crossing over to the left side of the highway in order to avoid a collision with a car approaching on the wrong side of the road.[53]

The *Restatement of Torts* takes the position that there may yet be other excuses.[54] The supreme court, however, in the recent case of *Southern Pacific Co. v. Castro*,[55] noted that "any claimed excuse . . . must fall within the permissibly limited classes" discussed in *Impson*.[56] Thus, whether other types of excuses will be recognized is open to question.

As to the permissible excuses, the courts have yet to explore the parameters of *Impson* in order to better define what quality of excuse is required. Where, for example, a driver faces an emergency with his vehicle out of control, the court may elect to consult the principles of the "sudden emergency" theory. Thus, to fall within *Impson*, the court might require that the condition relied upon must arise suddenly, must call for action leaving no time for deliberation, and must not be brought about by the negligence of the party claiming emergency.[57] Furthermore, evidence of mere loss of control would be of doubtful sufficiency; the violator would need to show that the cause of his lack of control was excusable.[58] When the condition is brought about by the voluntary or deliberate action of the violator, his conduct, though prudent, may nevertheless fail to satisfy the requirements of the emergency excuse.[59] His deliberate conduct will not be held against him, however, where he is faced with an emergency, things are happening quickly, and there is no time for deliberate judgment.[60] Another excuse, that of impossibility or

53. *See* Killen v. Stanford, 170 S.W.2d 792 (Tex. Civ. App.—Dallas 1943, error ref'd w.o.m.); Hicks v. Morgan, 259 S.W. 263 (Tex. Civ. App.—Beaumont 1924, no writ).

54. RESTATEMENT (SECOND) OF TORTS § 288A, comment *a* at 33 (1965). *Impson* approved of the "general treatment" of excuse as set out in the *Restatement* and made reference to that particular comment. Impson v. Structural Metals, Inc., 487 S.W.2d 694, 696 (Tex. Sup. 1972).

55. 493 S.W.2d 491 (Tex. Sup. 1973).

56. *Id.* at 498. Justice Walker, however, in concurring, construed *Impson* thusly: "Under . . . *Impson*, an issue of excuse can be raised only by evidence of one of the excuses mentioned in the Restatement *or something similar thereto.*" *Id.* at 501 (emphasis added).

57. *See* Goolsbee v. Texas & N.O.R.R., 150 Tex. 528, 243 S.W.2d 386 (1951); Dallas Ry. Terminal Co. v. Young, 155 S.W.2d 414 (Tex. Civ. App.—Eastland 1941, writ ref'd). *See also* RESTATEMENT (SECOND) OF TORTS § 196 (1965). As to what may be a sufficient excuse, "[w]here that line is to be drawn in a given case is a question of law with no absolute boundaries for an answer." Antee v. Sims, 494 S.W.2d 215, 219 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.).

58. Hammer v. Dallas Transit Co., 400 S.W.2d 885, 887 (Tex. Sup. 1966); Sears, Roebuck & Co. v. Stiles, 457 S.W.2d 580, 582 (Tex. Civ. App.—Waco 1970, writ ref'd n.r.e.).

59. Impson v. Structural Metals, Inc., 487 S.W.2d 694, 697 (Tex. Sup. 1972) (emergency due to the violator's "own deliberate conduct"). *Compare* RESTATEMENT (SECOND) OF TORTS § 288A, comment *f* (1965), *and* cases cited in RESTATEMENT (SECOND OF TORTS, Appendix § 288A (1965).

60. *See* L.M.B. Corp. v. Gurecky, 17 Tex. Sup. Ct. J. 53, 54 (Nov. 3, 1973).

inability to comply, will likewise call into question any lack of care causing that inability. Thus the speed at which the motorist travels may have a bearing on his ability to stop the vehicle within a certain distance or time.[61] Likewise, a claim that the motorist was "distracted" will not permit him to advance his lack of fault for not sooner stopping.[62] A survey of the other permissible categories similarly reveals that the absence of fault is a critical limitation.[63] However, while the violator should never be negligent, *Impson* made it clear that it shall never be an excuse that he acted prudently.[64] To have found otherwise would allow the statutory standard of conduct to be disregarded when the violator was acting with ordinary care, and thus, in effect, render the doctrine of negligence per se meaningless.[65]

Placing the Burden of Proof

For one asserting violation of a statutory standard of conduct to establish negligence per se, he must prove a violation of the penal standard, which is unexcused.[66] This finding must also be supported by an appropriate answer to the proximate cause issue.[67] It is well established that once that party introduces evidence of the violation, the opposing party then assumes the burden to "go forward with the evidence and show excuse or justifica-

61. *See* Calvert, *Special Issues Under Article 6701d, Section 86(d), of the Texas Civil Statutes*, 34 TEXAS L. REV. 971, 978-80 (1956).

62. Woodruff v. St. Louis S.W. Lines, 484 S.W.2d 437, 440 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.) (truck driver's attention was directed to a fellow employee trying to signal him); *cf.* Impson v. Structural Metals, Inc., 487 S.W.2d 694, 697 (Tex. Sup. 1972) (truckdriver was watching car to be passed, rather than the highway); Lewie Montgomery Trucking Co. v. Southern Pac. Co., 439 S.W.2d 691, 694 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.). *Compare* Reuter v. Gilbreath, 401 S.W.2d 658, 667 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.) where under a fact situation similar to *Impson*, the court noted the prudence of the driver in watching the car to be passed.

Where, however, the distraction is of a nature that poses a threat of imminent danger to the driver's safety, this condition may negate violation itself. *See* Texas & N.O.R.R. v. Day, 159 Tex. 101, 108-09, 316 S.W.2d 402, 407 (1958) (a train was thus not "plainly visible" to a prudent man).

63. *See* Reuter v. Gilbreath, 401 S.W.2d 658, 667 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.) (one who relies on excuse "must show that the violation was not the result of his own negligence"). *See also* 2 BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 101.38, at 107 (3d ed. 1965) (facts should show the violator was not guilty of negligence in doing or omitting the complained of act).

64. Impson v. Structural Metals, Inc., 487 S.W.2d 694, 696 (Tex. Sup. 1972), *citing* Keeton, *Torts, Annual Survey of Texas Law*, 24 Sw. L.J. 3, 18 (1970). In *Imson*, the court noted that all of the proffered excuses showed the existence of, or perhaps even the lack of, ordinary care. Impson v. Structural Metals, Inc., 487 S.W.2d 694, 697 (Tex. Sup. 1972).

65. *See* Keeton, *Torts, Annual Survey of Texas Law*, 24 Sw. L.J. 3, 16 (1970).

66. Missouri-K.-T. R.R. v. McFerrin, 156 Tex. 69, 81, 291 S.W.2d 931, 939 (1956). It is immaterial, of course, whether the party asserting the violation is a plaintiff or a defendant.

67. *E.g.*, Taber v. Smith, 26 S.W.2d 722 (Tex. Civ. App.—Amarillo 1930, no writ);

tion for the violation."[68] Upon the introduction of sufficient evidence to raise an excuse that falls within the permissible *Impson* classes, the violator then shifts the burden back on the other party.[69] It is then for the court to submit the issue of common law negligence.[70]

Prior to the recent decision in *Southern Pacific Co. v. Castro*,[71] however, there was a conflict in authority as to which party had the burden of requesting the issue and obtaining the jury finding on the claimed excuse. The landmark case of *Phoenix Refining Co. v. Powell*,[72] involving a violation of driving on the wrong side of the road, held that where the violator brought forward sufficient evidence to show an excuse, he then thrust upon the party asserting negligence the burden of proof on the issue of whether the violation was common law negligence.[73] This holding was approved in a later supreme court decision, *Hammer v. Dallas Transit Co.*[74] In 1969, however, in *Christy v. Blades*,[75] the same court held that plaintiffs who violated section 86(d), the railroad-crossing statute, were the parties that would benefit from the submission of the excuse issue, so that their failure to request an appropriate issue or instruction was fatal.[76] Furthermore, had they requested the issue, they would have been required to assume the burden of persuasion.[77] Although *Christy* was phrased in terms of the excuse of "impossibility," the result of the case was confusion to the bench and bar.[78]

The recognition by the supreme court that two methods of jury submission were causing untold difficulty led to the adoption of a uniform rule of

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Missouri Pac. R.R. v. Burns, 382 S.W.2d 761 (Tex. Civ. App.—Waco 1964, no writ).

68. Phoenix Ref. Co. v. Powell, 251 S.W.2d 892, 897 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.); *accord*, Hammer v. Dallas Transit Co., 400 S.W.2d 885, 887 (Tex. Sup. 1966); Jessee Produce Co. v. Ewing, 213 S.W.2d 750, 752 (Tex. Civ. App.—Galveston 1948, no writ); Younger Bros. v. Marino, 198 S.W.2d 109, 113 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.).

69. Southern Pac. Co. v. Castro, 493 S.W.2d 491, 498 (Tex. Sup. 1973).

70. *Id.* at 498; Cunningham v. Suggs, 340 S.W.2d 369, 374 (Tex. Civ. App.—Eastland 1960, writ ref'd n.r.e.); Phoenix Ref. Co. v. Powell, 251 S.W.2d 892, 896 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.); Fisher v. Leach, 221 S.W.2d 384, 390 (Tex. Civ. App.—San Antonio 1949, writ ref'd n.r.e.).

71. 493 S.W.2d 491 (Tex. Sup. 1973).

72. 251 S.W.2d 892 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.). The holding was not explicit, however, as to who had to *request* the issue. *See* Rash v. Ross, 371 S.W.2d 109, 113 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.).

73. Phoenix Ref. Co. v. Powell, 251 S.W.2d 892, 896 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.).

74. 400 S.W.2d 885 (Tex. Sup. 1966).

75. 448 S.W.2d 107 (Tex. Sup. 1969). *Christy* was overruled in Southern Pac. v. Castro, 493 S.W.2d 491 (Tex. Sup. 1973). *Castro* also disapproved certain inconsistent language in Rash v. Ross, 371 S.W.2d 109 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.) found on pages 113-14 concerning the "Guyer Judgment." This "contrary" language principally concerned the burden of requesting and obtaining "excuse" issues.

76. Christy v. Blades, 448 S.W.2d 107, 112 (Tex. Sup. 1969).

77. *Id.* at 111.

78. Southern Pac. Co. v. Castro, 493 S.W.2d 491, 496-97 (Tex. Sup. 1973).

submission for all cases in which an excuse is asserted. In *Southern Pacific Co. v. Castro*,[79] the court concluded that the *Hammer-Phoenix* rule should control so that the burden of persuasion on all issues rests on the party asserting the violation.[80] Where there is no evidence of excused violation, the burden of persuasion consists of findings that the statute was violated, and that such violation was the proximate cause of the accident.[81] Either one of these findings may, of course, be established as a matter of law.[82] In those cases where the proof of violation also includes some evidence that the violation was excused, or if the violator brings forward sufficient evidence of an acceptable excuse, then the party asserting the violation must also request and obtain a finding on an issue which inquires whether the violator was negligent as determined by the reasonably prudent man standard.[83] A party who fails to assume this burden may find that the court has entered judgment for the opposing party, and that he has been charged with a presumed finding on the omitted issue.[84]

Pleading and Introduction of Evidence

It is well established that evidence not confined to the issues presented by the pleadings is inadmissible.[85] Yet when a party to the litigation establishes a violation of a statute, it is not conclusively settled whether the violator, in order to go forward with his evidence of excuse, must have specifically plead that matter in his petition. There is language in a few cases indicating that excuse should be plead.[86] In *Rash v. Ross*,[87] where the

79. 493 S.W.2d 491 (Tex. Sup. 1973).

80. *Id.* at 497-98.

81. *See, e.g.*, Wilson v. Manley, 347 S.W.2d 778, 779 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.e.); Jessee Produce Co. v. Ewing, 213 S.W.2d 750, 752 (Tex. Civ. App.—Galveston 1948, no writ).

82. *E.g.*, Parrott v. Garcia, 436 S.W.2d 897, 900 (Tex. Sup. 1969).

83. Southern Pac. Co. v. Castro, 493 S.W.2d 491, 500 (Tex. Sup. 1973).

84. *See, e.g.*, Reuter v. Gilbreath, 401 S.W.2d 658, 667 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.). In *Reuter*, when plaintiff showed excuse for violation of section 57(a)(2), he thrust the burden upon defendant to submit and obtain a finding on common law negligence. Having failed in his burden, the defendant could not complain of the presumed finding by the court in favor of plaintiff on the omitted issue. *Id.* at 667. *See also* Craker v. City Transp. Co. of Dallas, 316 S.W.2d 447, 450 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.) (section 71); TEX. R. CIV. P. 279.

85. 46 TEX. JUR. 2d *Pleading* § 270 (1963).

86. Rash v. Ross, 371 S.W.2d 109, 113-14 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.). *See* L.M.B. Corp. v. Gurecky, 489 S.W.2d 647, 652 (Tex. Civ. App.—Corpus Christi 1972), *rev'd on other grounds*, 17 Tex. Sup. Ct. J. 53 (Nov. 3, 1973); Structural Metals, Inc. v. Impson, 469 S.W.2d 261, 272 (Tex. Civ. App.—Corpus Christi 1971), *rev'd on other grounds*, 487 S.W.2d 496 (Nye, J., dissenting); Texas & Pac. Ry. v. Davis, 374 S.W.2d 305, 312 (Tex. Civ. App.—El Paso 1963, writ ref'd n.r.e.).

87. 371 S.W.2d 109 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.). The *Castro* case, in disapproving certain language in *Rash*, did not address the problem of pleading, but rather refused to grant writ of error on that particular point (No. II).

plaintiff was charged with driving on the wrong side of the road, he steadfastly denied the violation and failed to plead or introduce evidence of an excuse. The court held that he was not entitled to the submission of an excuse theory without pleading the issue.[88] Likewise, under the holding of *Christy v. Blades,*[89] where the violator was required to both request and prove his excuse issue, it naturally followed that he had to plead his excuse.

It would seem that for purposes of submitting an issue, the *Castro* holding has, *sub silentio*, made pleading unnecessary. The party seeking to excuse his conduct no longer has to carry the issue, as the resulting common law negligence (or contributory negligence) issue is being relied upon by the adverse party. Therefore, pleading is not required.

For purposes of introducing evidence into a trial, there is some authority that even in the absence of special pleading, the party charged with the violation may go forward with his evidence under a general denial.[90] The introduction of such proof may be allowed upon the grounds that excusable or justifiable violation of a penal statute is an inferential rebuttal issue.[91] While the recent changes in the Texas Rules of Civil Procedure have abolished the inferential rebuttal,[92] the reason for the introduction of such evidence is still valid. When the breach of a standard of conduct has been raised, the violator must introduce some evidence to rebut the proof that he failed to satisfy the legislative standard. This rebutting evidence denies the allegation of statutory negligence, and so should come in under a general denial. In the absence of such pleading, however, the violator should not necessarily be relieved from giving notice that he is relying on excuse.[93]

Sufficient Evidence of Excuse

The party charged with the violation of a statute will not be entitled to the

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Brief for Appellant, Application for writ of Error, at 6, Southern Pac. Co. v. Castro, 493 S.W.2d 491, 498 (Tex. Sup. 1973).

88. Rash v. Ross, 371 S.W.2d 109, 114 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.).

89. 448 S.W.2d 107 (Tex. Sup. 1969).

90. 11 BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 424.3, at 409 (3d ed. 1968).

91. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS § 25 (1959); Rash v. Ross, 371 S.W.2d 109, 113 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.).

92. TEX. R. CIV. P. 277.

93. Inasmuch as the preliminary question of excuse is one for the court, Phoenix Ref. Co. v. Powell, 251 S.W.2d 892, 896 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.), the court should be aware of its duty to weigh the sufficiency of the excuse.

The lack of pleading may also deny fair warning to opposing counsel that the issue is being raised, particularly where such evidence is interrelated with other issues in the trial. Counsel relying on the violation may fail to request the negligence issue, and though successful on the partial submission, may yet be charged with a deemed finding, if it has been determined that there was "some evidence" of excuse before the court. Reuter v. Gilbreath, 401 S.W.2d 658, 667 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.). Prudent counsel will then, in most cases, request the common law issue.

common law issue of negligence unless he brings forward sufficient evidence of an excuse to raise the issue. What constitutes sufficient evidence is a preliminary matter for the court.[94] Such evidence must clearly be more than a scintilla.[95] The issue will be raised, according to the best authority, if there is "some evidence"[96] or sufficient evidence "tending to show"[97] an *Impson*-type excuse.

The Texas Supreme Court, in *L. M. B. Corporation v. Gurecky*,[98] was faced with the question of whether certain facts and testimony raised "some evidence" of a claimed excuse where the defendant, who was involved in an accident, had been driving on the wrong side of the road. The defendant testified that his tire had been punctured, that he had trouble controlling his pickup truck; and that things happened "rapidly." Although certain portions of this testimony were directly disputed, the court concluded that a jury could believe that there was an excuse presented by reason of the deflated tire, and thus "some evidence" of excuse was in the record.[99] Likewise, in a recent court of civil appeals decision,[100] the sufficiency of evidence requirement was met by undisputed evidence that the defendant's truck suddenly veered across the center of the road, combined with the driver's own testimony that his brakes pulled to one side when he attempted to stop.[101] The quantum of evidence thus required will apparently not be difficult to meet for a violator who can allege acceptable events or circumstances as the creating factor of his emergency or other excuse.

Submission of the Excuse Issue

Where there is no evidence of a legally acceptable excuse or justification for the violation of a statute setting out a standard of conduct, the court will

94. Phoenix Ref. Co. v. Powell, 251 S.W.2d 892, 896 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.).

95. Hunter v. Carter, 476 S.W.2d 41, 44 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.); Kelley v. Goodrum, 378 S.W.2d 935, 937 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.). *See* Southern Pac. Co. v. Castro, 493 S.W.2d 491, 501 (Tex. Sup. 1973) (Walker, J., concurring); 2 BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 101.18, at 68 n.76 (3d ed. 1965).

96. Southern Pac. Co. v. Castro, 493 S.W.2d 491, 498 (Tex. Sup. 1973).

97. Phoenix Ref. Co. v. Powell, 251 S.W.2d 892, 896 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.).

98. 17 Tex. Sup. Ct. J. 53 (Nov. 3, 1973).

99. *Id.* at 54.

100. Antee v. Sims, 494 S.W.2d 215 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.).

101. *Id.* at 218. The testimony in *Antee* further tended to show that the emergency was not caused by the violator's own misconduct.

The party asserting violation may avoid the submission of the common law issue of negligence by introducing proof that the violator's misconduct contributed to the claimed emergency. The court may then hold as a matter of law that the "emergency" excuse was not raised. *See* L.M.B. Corp. v. Gurecky, 17 Tex. Sup. Ct. J. 53, 54 (Nov. 3, 1973). If such proof is insufficient, however, to block the submission of the

submit the issues of violation and proximate cause.[102] An affirmative finding to these issues will certainly constitute negligence per se. Wrongfully submitting the common law negligence issue in this situation may present circumstances for reversal if the trial court does not disregard the resulting jury finding in favor of the violator.[103] This issue may appear in the case, however, if the requesting party is also relying on a simple negligence theory.[104]

Where there is, in the mind of the judge, some evidence of an *Impson*-type excuse, the common law negligence (or contributory negligence) issue will become an essential element of the submission.[105] In this regard, the supreme court in *Castro* has attempted, in keeping with its policy of simplifying the special issue practice,[106] to set out the form that the negligence (or contributory negligence) issue should take:

> [U]pon proper request, [the party asserting violation] will be entitled to a definition or instruction which informs the jury the Legislature has established a uniform standard of safe conduct for those [who engage in the type of conduct the statute seeks to protect]. The court may state the provisions of Section [XX], Article 6701d. The court may further instruct the jury that [the violator], as well as the whole public, was charged in law with knowledge of those safety provisions. The court may also give an appropriate definition or instruction concerning any excuse which is supported by some evidence and qualifies under the *Impson* rule.[107]

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common law negligence issue, then at least there will be some evidence of the violator's negligence for the jury to consider when answering the common law issue.

102. *E.g.*, Rash v. Ross, 371 S.W.2d 109, 112 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.); Wilson v. Manley, 347 S.W.2d 778, 779 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.e.); Jessee Produce Co. v. Ewing, 213 S.W.2d 750, 752 (Tex. Civ. App.—Galveston 1948, no writ). *See generally* 1 STATE BAR COMMITTEE, TEXAS PATTERN JURY CHARGES (1969).

103. Southern Pac. Co. v. Alex, 411 S.W.2d 413, 416 (Tex. Civ. App.—Corpus Christi 1967, no writ); Jessee Produce Co. v. Ewing, 213 S.W.2d 750, 752 (Tex. Civ. App.—Galveston 1948, no writ); *see* Sears Roebuck & Co. v. Stiles, 457 S.W.2d 580, 582 (Tex. Civ. App.—Waco 1970, writ ref'd n.r.e.). In this instance, whether the violator is or is not found negligent, is immaterial. If he is found negligent, then that finding is surplusage. If there is a failure to find negligence, then a judgment for the violator based thereon is error, for the issue should not have been submitted.

104. *See, e.g.*, Bailey v. Walker, 163 S.W.2d 864, 867 (Tex. Civ. App.—Galveston 1942, ref'd w.o.m.) (where plaintiff relied on both common law and statutory theories of negligence).

105. Southern Pac. Co. v. Castro, 493 S.W.2d 491, 498 (Tex. Sup. 1973); Phoenix Ref. Co. v. Powell, 251 S.W.2d 892, 897 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.); *see* HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS § 25, at 68 (1959). Where there is doubt as to the sufficiency of the evidence supporting the excuse, the proximate cause issue should be conditioned on the factual issue of violation (if submitted), rather than the negligence issue that incorporates the claimed excuse. 1 STATE BAR COMMITTEE, TEXAS PATTERN JURY CHARGES 14 (1969).

106. *See, e.g.*, Adam Dante Corp. v. Sharpe, 483 S.W.2d 452 (Tex. Sup. 1972); Yarborough v. Berner, 467 S.W.2d 188 (Tex. Sup. 1971).

107. Southern Pac. Co. v. Castro, 493 S.W.2d 491, 498 (Tex. Sup. 1973) (citations omitted).

A notable consequence of this form of submission is that *issues* in terms of the claimed excuse are not to be submitted.[108] This latter form was followed in the railroad-crossing collision cases and was formulated to satisfy the particular difficulties encountered in submitting violation of a technical statute.[109] The logic behind such issues was that the jury could not properly pass upon the issue of negligence until it had made a finding of fact as to excuse; otherwise, it could find the motorist not negligent "if it concluded *for any reason* that a person of ordinary prudence similarly situated" would have violated the statute.[110] It has been forcefully argued that an instruction as per *Castro* will not diffuse this possibility as effectively as a separate issue on excuse.[111] Nevertheless, the supreme court reasoned that the benefit of a uniform rule outweighed other considerations.[112] Moreover, in the *Phoenix-Hammer* line of cases where issues were never submitted in terms of excuse, the instruction will emphasize the importance that the excuse bears toward negligence. The result will also favor the policy of placing rebuttal matters into an instruction.[113]

While commendably explicit in setting forth an appropriate instruction, the supreme court was less than clear as to which statutes the instruction might apply. Though the general purpose was to establish a uniform rule for all cases, the court was faced with a "standard of conduct" statute. Whether the instruction would apply to a statute setting forth nothing more than a "standard of care" remains to be seen. It may be noted, however, that in this type of statute, such as the "right of way" provision, the "issue of negligence or standard of ordinary care instruction must be submitted."[114] Inasmuch as the submission of that issue or instruction does not hinge on the finding of an *Impson*-type excuse, it may be suggested that the *Castro* instruction will not necessarily apply. If this type of provision is a negligence per se statute, however, then excuse for violation remains in issue and *Castro* will apply.

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108. *Id.* at 498.

109. For an analysis of problems created by the railroad-crossing statute (section 86), *see* Calvert, *Special Issues Under Article 6701d, Section 86(d), of the Texas Civil Statutes*, 34 TEXAS L. REV. 971 (1956).

110. *See* Christy v. Blades, 448 S.W.2d 107, 111 (Tex. Sup. 1969) (court's emphasis).

111. *See* Southern Pac. Co. v. Castro, 493 S.W.2d 491 (Tex. Sup. 1973) (Walker, J., concurring). Judge Walker's principal objections to the instruction were that it would complicate and lengthen the charge, confuse the jury, and deprive the parties of a fair submission of a controlling and ultimate issue. *Id.* at 502.

112. Southern Pac. Co. v. Castro, 493 S.W.2d 491, 497 (Tex. Sup. 1973).

113. *See* Yarborough v. Berner, 467 S.W.2d 188, 192 (Tex. Sup. 1971). The change in procedure from special issues to explanatory instructions will, however, make it more difficult for the court to pass upon the question of reversible error. Deviney v. McLendon, 496 S.W.2d 161, 166 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.).

114. Garcia v. Caletka, 486 S.W.2d 880, 883 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.), *citing* Kelley v. Goodrum, 378 S.W.2d 935 (Tex. Civ. App. Houston 1964, writ ref'd n.r.e.). *See also* Booker v. Baker, 306 S.W.2d 767 (Tex. Civ. App.—Dallas 1957, writ ref'd n.r.e.).

CONCLUSION

The *Impson* and *Castro* decisions have clarified much of the law of negligence per se in Texas, particularly as it pertains to excuse for violation. They describe the circumstances in which a statutory violation may be negligence per se, the procedural consequences where the violator has gone forward with his evidence of excuse, and the correct form that the subsequent special issue should reflect. Many of the problems raised in *Christy v. Blades*[115] have been resolved by changes in Rule 277.[116] Other problems, however, are inherent in the substantive law of negligence per se and have not been approached. Of these, the effect and weight that the violation of a statute should receive is an old and stubborn problem that deserves immediate attention. It is hoped that the supreme court will continue to further define this beclouded area of the law.

115. 448 S.W. 107 (Tex. Sup. 1969).

116. Prior to *Castro* and the recent changes in the Texas Rules of Civil Procedure, an instruction of this nature would probably have been viewed as a general charge on the law, unnecessary and repugnant to the special issue practice. Pittsburg Coca-Cola Bottling Works v. Ponder, 443 S.W.2d 546 (Tex. Sup. 1969). *Ponder* has apparently been overruled. Greater latitude is now allowed in explanatory instructions, whether they might tend to constitute a general charge, a comment on the weight of the evidence, or advise the jury of the effect of their answers. TEX. R. CIV. P. 277.