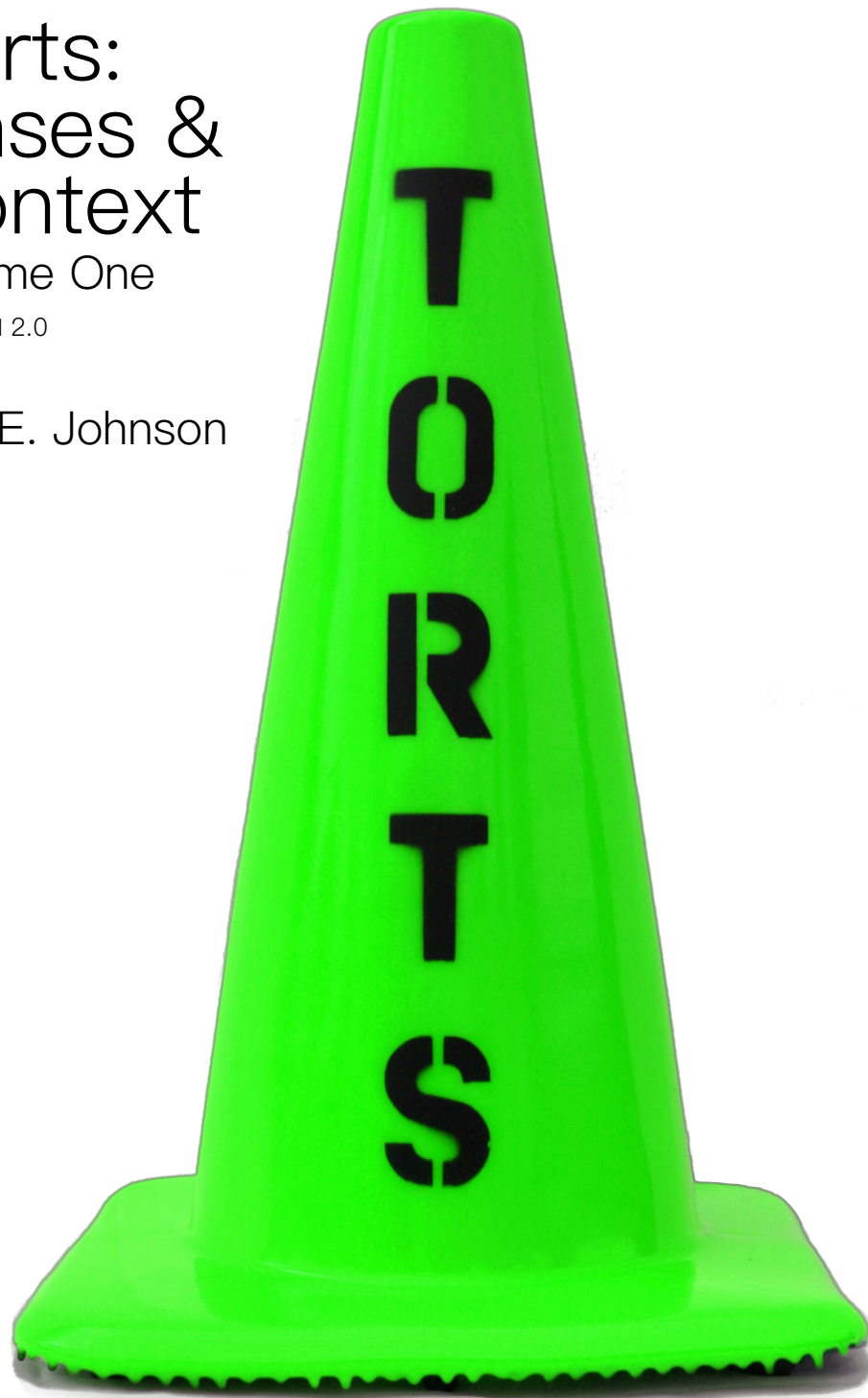


# Torts: Cases & Context

Volume One

VERSION 2.0

Eric E. Johnson



PYLON EDITION



Torts:  
Cases and Context  
Volume One  
VERSION 2.0

PYLON EDITION

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Torts: Cases and Context  
Volume One  
Pylon Edition, Version 2.0  
by Eric E. Johnson

ISBN-10: 0-9705825-1-X (print paperback)  
ISBN-13: 978-0-9705825-1-5 (print paperback)

Library of Congress Control Number:2019910138

Place of publication: Norman, Oklahoma

Year of publication: 2019

Publisher: Eric E. Johnson

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This book is set in 12-point Garamond.

Name: Johnson, Eric E., 1971– author  
Title: Torts : cases and context  
Description: Pylon Edition, Version 2.0. | Norman, Oklahoma :  
Eric E. Johnson 2019. | No index.  
Identifiers: LCCN 2019910138 | ISBN 9780970582515 (pbk.)  
Subjects: Torts ; Torts–Cases

10 9 8 7 6 5 4 3 2 1

For Joe and Zane

# Notices

This is the author-revised second edition of Volume One of *Torts: Cases and Context*, updated July 2019. Because this is an open-source book, anyone may make new editions. To distinguish this one, this edition is denominated “Pylon Edition, Version 2.0.” For information relevant to the version and revision history of this casebook and to obtain the first edition, see <http://elangdell.cali.org/>. Other revision information is at <http://ericejohnson.com/projects/tcc>.



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# About the Author

Eric E. Johnson is an Associate Professor of Law at the University of Oklahoma College of Law. From 2007 to 2018, he was on the faculty of the University of North Dakota School of Law. He has taught torts since 2007. In addition, he has taught courses in intellectual property, antitrust, sales, entertainment law, media law, sports law, and employment law, as well as writing courses. He has twice been selected by students as the keynote speaker for UND Law's graduation banquet, and in 2018 students selected him, along with Professor Kit Johnson, to deliver the commencement address at UND Law. His writing on legal pedagogy has appeared in the *Journal of Legal Education*.

Professor Johnson's research concerns the intersection of law, science, and risk, as well as intellectual property law. His publications include the *Northwestern University Law Review*, the *Boston University Law Review*, the *University of Illinois Law Review*, and *New Scientist* magazine. His work was selected for the Yale/Stanford/Harvard Junior Faculty Forum in 2013.

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Professor Johnson archives teaching materials on his website at [ericejohnson.com](http://ericejohnson.com). His online exam archive includes dozens of essay exams and banks of multiple-choice questions.



# Table of Contents

Notices.....	vi
About the Author .....	viii
Preface .....	17
Acknowledgements .....	23
Part I: Preliminaries .....	25
1. Basic Concepts.....	26
A. What is Torts?.....	26
B. How Torts Fits In .....	27
The Elemental Concepts of Private Law .....	29
C. Where Tort Law Comes From.....	30
D. The Structure of a Tort Case .....	34
The Parties .....	34
Causes of Action, Elements, Affirmative Defenses, and Burdens of Proof.....	34
2. An Overview of Tort Law .....	38
A. The Lineal Torts – Direct Harm to Persons or Physical Property.....	39
Causes of Action for Accidents.....	39
Strict Liability.....	41
Intentional Torts .....	43
B. The Oblique Torts – Economic or Dignitary Harm .....	47
C. The Whole Torts Landscape Considered Together.....	49
Part II: Negligence.....	50
3. Introduction to Negligence.....	51
A. Introduction .....	51
B. The Central Idea: Shifting the Burden of Loss.....	51
C. The Elements and Defenses for Negligence.....	52

4. An Example of a Negligence Case .....	58
Case: Georgetown v. Wheeler .....	58
Check-Your-Understanding Questions About <i>Georgetown v. Wheeler</i> .....	76
5. When and to Whom is a Duty of Care Owed .....	78
A. Introduction .....	78
B. The Essential Concept: Foreseeability .....	79
Case: Weirum v. RKO .....	79
Questions to Ponder About <i>Weirum v. RKO</i> .....	85
Some Historical Notes About <i>Weirum v. RKO</i> .....	86
Doctrinal Wiggle Room.....	86
Duty of Care in Entertainment Industry Cases .....	87
Problem: WZX Cash Patrol.....	88
A Quick Note About Respondeat Superior .....	88
Case: Kubert v. Colonna .....	89
C. The Duty of Care and Criminal Acts .....	102
Case: Boyd v. Racine Currency Exchange .....	102
Questions to Ponder About <i>Boyd</i> .....	107
The Use of <i>Boyd</i> to Decide Duty in <i>Orrico v. Beverly Bank</i> .....	108
D. Affirmative Duties .....	108
The General Rule: No Affirmative Duty to Help .....	109
Case: Theobald v. Dolcimascola .....	109
Questions to Ponder About <i>Theobald</i> .....	114
The Exception of Defendant-Created Peril .....	115
Case: South v. Amtrak .....	115
Questions to Ponder About <i>South v. Amtrak</i> .....	123
Weather and “Atmospherics”.....	124
Evidence Law and Procedural Posture .....	125
Note About the Interpretation of Statutes .....	125
“Good Samaritan” Laws.....	126
The Exception for Special Relationships .....	127

The Exception for Assumption of Duty .....	128
The <i>Tarasoff</i> Exception.....	129
Case: <i>Tarasoff v. UC Regents</i> .....	129
Questions to Ponder About <i>Tarasoff</i> .....	142
6. Breach of the Duty of Care .....	143
A. Determining Breach, in General.....	143
Terminology Note: Negligence vs. Negligence.....	143
The Essential Question: Was the Risk Unreasonable? ...	144
Distinguishing Breach from the Other Elements.....	145
Case: <i>Rogers v. Retrum</i> .....	145
Intentional Conduct as a Breach of Duty .....	154
B. The Reasonable Person Standard of Care .....	157
Basics .....	157
An Objective Standard.....	159
Case: <i>Vaughn v. Menlove</i> .....	159
C. Accounting for Differences Among People .....	163
Basics .....	163
Mental and Physical Capacity and Disability .....	164
Case: <i>Breunig v. American Family Insurance Co.</i> .....	164
Experience and Level of Skill .....	169
Children.....	170
Gender.....	173
Some Questions to Ponder About the Reasonable Person Standard.....	174
D. Negligence Per Se .....	174
Basics .....	174
What Makes a Statute or Regulation Amenable.....	175
Case: <i>Gorris v. Scott</i> .....	177
Negligence Per Se in the Context of Contributory Negligence or Comparative Negligence.....	180
Negligence Per Se and Causation.....	180

Case: Martin v. Herzog .....	181
Excuse for Complying with a Statute or Regulation .....	194
Complying with Statutes or Regulations as a Defense....	194
Some Problems on Negligence Per Se .....	195
E. The Role of Custom or Standard Practices.....	198
Case: The T.J. Hooper .....	199
F. The Negligence Calculus .....	203
Introduction.....	203
Case: U.S. v. Carroll Towing.....	204
The BPL Formula’s Place in Torts .....	210
How the BPL Formula Works .....	211
Some Simple Problems Using the Hand Formula.....	215
Some Not-So-Simple Problems Using the Hand Formula .....	215
G. Res Ipsa Loquitor .....	217
The Usual Necessity of Specific Evidence of Breach .....	217
The Place for Res Ipsa Loquitor .....	217
Case: Byrne v. Boadle.....	218
The Requirements for Res Ipsa Loquitor .....	221
The Effect of Res Ipsa Loquitor.....	221
Recurrent Situations for Res Ipsa Loquitor.....	222
Case: Fowler v. Seaton.....	223
Postscript on <i>Fowler v. Seaton</i> .....	227
The Similarity of Res Ipsa Loquitor to Strict Liability ....	228
H. Special Rules for Land Owners and Occupiers .....	229
Undiscovered/Unanticipated Trespassers .....	230
Discovered/Anticipated Trespassers.....	230
Discovered/Anticipated Child Trespassers.....	231
Licensees .....	233
Invitees .....	234
Case: Campbell v. Weathers.....	235

Questions to Ponder About <i>Campbell v. Weathers</i> .....	243
Some Problems About Duties of Land Owners/Occupiers .....	244
Case: Rowland v. Christian.....	245
Some Questions to Ponder About <i>Rowland v. Christian</i> ...	255
Statute: California Civil Code § 847 .....	256
Some Questions to Ponder About California Civil Code § 847 .....	259
7. Actual Causation.....	260
A. Introduction .....	260
B. The But-For Test.....	261
C. Actual Causation vs. Proximate Causation.....	262
D. How to Talk About Actual Causation.....	263
Actual Causation’s Other Labels: Causation-in-Fact, Factual Causation, and More .....	263
Think “A” Not “The” .....	265
E. The Need for Causal Linkage – From Breach to Injury .	267
F. Proof and Preponderance.....	268
Case: Beswick v. CareStat.....	268
Some Historical Notes on <i>Beswick</i> .....	279
Note on Loss of a Chance and Some Questions to Ponder .....	280
Note on “Substantial Factor” .....	281
G. Multiplicity Issues .....	282
Multiple Necessary Causes .....	283
Case: Jarvis v. J.I. Case Co.....	284
Multiple Sufficient Causes .....	287
Case: Kingston v. Chicago & Northwestern Railway .....	288
Twin-Fires Cases and the “Substantial Factor Test” in the Multiplicity Context.....	292
The <i>Summers v. Tice</i> Doctrine .....	292

Case: Summers v. Tice .....	293
Market-Share Liability .....	297
Case: Sindell v. Abbott Labs .....	298
Problem: Nighttime Hit and Run.....	314
8. Proximate Causation .....	315
A. Introduction .....	315
B. The Place of Proximate Causation.....	316
C. The Label for Proximate Causation .....	317
D. The Relationship Between Proximate Causation and Duty of Care.....	319
Case: Palsgraf v. Long Island Railroad .....	322
Questions to Ponder About <i>Palsgraf</i> .....	336
A Different Version of the <i>Palsgraf</i> Case.....	337
More Questions to Ponder About <i>Palsgraf</i> .....	338
E. Various Tests for Proximate Causation.....	338
The Direct Test and Intervening Causes .....	339
Foreseeability and Harm-Within-the-Risk .....	341
Objects of Foreseeability .....	344
Unforeseeable Plaintiffs.....	345
Unforeseeable Type of Harm .....	345
Unforeseeable Manner of Harm .....	345
Unforeseeable Extent of Harm .....	346
Superseding Causes .....	347
Case: Ryan v. New York Central Railroad.....	349
Thoughts About <i>Ryan</i> in Historical Context.....	352
9. Existence of an Injury.....	353
A. In General.....	353
B. Loss-of-a-Chance Situations .....	355
Case: Herskovits v. Group Health .....	355
Questions to Ponder About <i>Herskovits</i> .....	361

The Thorny Question of Calibrating Damages in <i>Herskovits</i> and Some More Questions to Ponder.....	362
C. Pure Economic Loss.....	364
D. Mental Anguish and Emotional Distress .....	366
10. Affirmative Defenses to Negligence .....	370
A. In General.....	370
B. Plaintiff's Negligence .....	371
Contributory Negligence .....	372
Case: <i>Coleman v. Soccer Association</i> .....	373
Questions to Ponder About <i>Coleman v. Soccer Association</i>	383
Last Clear Chance Doctrine.....	384
Other Subversions of Contributory Negligence .....	385
Comparative Negligence.....	386
Statutes: Comparative Negligence.....	389
Some Problems for Applying Comparative Negligence Statutes .....	394
C. Assumption of the Risk.....	395
Implied vs. Express Assumption of the Risk.....	395
The Elements of Assumption of the Risk .....	395
Relationship with Contributory and Comparative Negligence.....	396
Case: <i>Murphy v. Steeplechase Amusement Co.</i> .....	397
Questions to Ponder About <i>Murphy v. Steeplechase</i> .....	401
Case: <i>Hulsey v. Elsinore Parachute Center</i> .....	401
Case: <i>Hiatt v. Lake Barcroft Community Association</i> ....	412
Questions to Ponder About <i>Hiatt v. LABARCA</i> .....	416
Public Policy Exceptions to Express Agreements to Assume Risk .....	416
Part III: Liability Relating to Healthcare.....	419
11. Common Law Liability in the Healthcare Context.....	420
A. In General.....	420

B. The Standard of Care for Healthcare Professionals in Negligence Actions .....	421
Basics .....	421
C. Medical Battery .....	427
Case: <i>Mohr v. Williams</i> .....	428
Check-Your-Understanding Questions About <i>Mohr</i> .....	433
Questions to Ponder About <i>Mohr</i> .....	433
D. Informed Consent .....	433
Case: <i>Largey v. Rothman</i> .....	436
Questions to Ponder About <i>Largey</i> .....	448
12. ERISA Preemption .....	449
Basics .....	449
Case: <i>Corcoran v. United Healthcare</i> .....	451
Questions to Ponder About <i>Corcoran</i> .....	470
Notes About Edits and Editions .....	471
Unmarked Edits Generally .....	471
Idiosyncratic Unmarked Edits in this Volume .....	472
Edition Changes .....	473



# Preface

*(For both volumes)*

## What Makes this Casebook Different

This book is different from other casebooks in at least three key ways.

**First**, this book departs from the traditional style of most casebooks. Rather than just presenting a series of readings, notes, and questions, **this book makes a deliberate and systematic effort to explain the law.** It's an implementation of an approach I argued for in an article, *A Populist Manifesto for Learning the Law*, 60 JOURNAL OF LEGAL EDUCATION 41 (2010). In keeping with that approach, this book aims to be **easy to read** and to make it **easy for students to learn difficult concepts.**

There's something to be said for challenging students to figure out things for themselves. But, in my view, traditional casebooks err too much on the side of providing students with opportunities to get befuddled. This casebook strives for a balance. There are many formidable primary sources in these pages, but they are presented within a treatise-like narrative that will, I hope, help students get more of a return from their investment in reading.

Key to the explanatory mission of this book is **an emphasis on context.** I want students to understand why they are learning what they are learning, and where it fits into the bigger picture of tort law and the legal system as a whole. You will find evidence of that commitment in the first sentence of the first chapter, and it carries through to the end. This book also aims for **real-world context**, putting doctrine in the context of litigation strategy and trial tactics.

**Second**, this casebook is **free.** It is free in both senses of the word.

In one sense, it is free in that it does not cost the reader any money. That is, **the price is zero.** You can get an electronic copy for free, or you can buy a printed copy for whatever the paper and ink costs. You can also print it out yourself.

The no-money sense of free is great, but this casebook is also free in a deeper sense: It is **unfettered by proprietary legal claims** so that **you have the freedom to abridge, expand, repurpose, or adapt it as you wish**. That is to say, this book is “open source.” Consistent with the terms of the Creative Commons license that this book is published under, generations of instructors and students will be able to rip and remix this book to suit their needs.

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The open-source nature of the book provides considerable advantages. For one, it means **instructors can create their own customized version of this book at no cost**. Cut out the parts you don’t want, and fill-in anything you think is missing.

The CC license also means **instructors will never be compelled to use newer editions**, since older versions will stay available, and anyone can always keep re-distributing any version.

It’s helpful for learners, too. The open-source licensing means **students can cut-and-paste from this book to create their own study materials**.

CALI’s eLangdell Press, by the way, has a whole fleet of casebooks with open-source/share-it-forward licensing arrangements.

**Third**, this casebook is offered not merely as a one-way communication. Instead, this book **constitutes an invitation to you**. If you are an instructor, please get in touch with me. I’d love to hear how your class is going, and I would be happy to provide you with notes, slides, advice, and anything else I can. If you are a student, I would love to hear your comments about how this casebook is working and how it could be improved. An advantage of in-person speaking over writing is that you can see from the reactions of students whether you are doing a good job explaining something.

Since, in writing this book, I can't see any faces, I am relying on you and other readers to not be shy about telling me what I am doing well and what I could be doing better. You can find me at [ericejohnson.com](http://ericejohnson.com).

### **Questions and Problems**

There are two types of questions in this book, and they are separately labeled as such. In addition, there are problems for you to work.

**Questions to Ponder:** These questions are intended to be interesting and helpful to think about after reading the preceding material. You should not, however, attempt to figure out “the answer” to these questions. They are not meant to have clearly correct answers. Instead, the idea is to prompt you to think more deeply about one or more facets of the case.

**Check-Your-Understanding Questions:** These questions are intended to help you see if you absorbed the preceding material. Unlike “Questions to Ponder,” the questions labeled as “Check-Your-Understanding Questions” do have clearly correct answers.

**Problems:** The problems in this casebook are much more involved than the questions. Rather than asking for you to ponder ideas or come up with simple answers, the problems call upon you to do *analysis*. That is, you are expected to apply what you have learned. With the problems, you mirror to some extent the task of the practicing lawyer. As you will learn by working through them, some of the problems in this book have well-defined solutions. Others are more open-ended and invite creativity. But all are meant to get you to utilize doctrine and concepts to generate fresh insights in view of new facts.

### **Editing of Cases**

In editing the cases for inclusion in this book, I have strived primarily for readability and brevity. Thus, I have been quite liberal in cutting down courts' text, and, in some cases, re-arranging it.

I have left a record of my editing either in the cases themselves, in the annotations below, or in the aftermatter at the end of the book. I realize most casebooks do not provide this level of detail about the

editing, but by thoroughly cataloging my edits, I hope to facilitate the revision and adaptation of this book by others.

### **Footnotes**

I have handled footnotes in a slightly unconventional manner. The reason why is that this book is being written to work in multiple formats, including print, the print-like PDF format, and various e-book formats with variable pagination. Achieving compatibility across formats presents a problem with regard to footnotes. Footnotes are no problem in print. But footnotes are often rendered awkwardly in e-book formats.

This is a particular problem for a casebook. Courts love footnotes. Gather together a collection of judicial opinions, and footnotes are everywhere. In truth, footnotes are a wonderful structural tool for writing, since they give the reader choices. Less essential matter is kept out of the text, allowing a time-pressed reader to forge ahead. But if a more probing reader wants to read the footnote material, the eyes do not have to go far to find it. Unfortunately, standards developers have not provided a way of dealing with digital footnotes that preserves all the functionality they exhibit on paper.

One way around the problem posed by continuous pagination in electronic formats would be to convert the footnotes to endnotes. Hyperlinking can then facilitate a reader's movement from the text to the endnotes and back again. But that does not work in this casebook for two reasons. First, even though clicking links back and forth is easier than finding your way through a document with a scroll wheel or slide knob, clicking links is still time consuming. And with a lot of footnotes, the clicking time adds up. Second, this book is intended also to work well in a print distribution, and you can't use hyperlinks to avoid page-turning in a physical book.

Because of these concerns, I have adopted a zero-footnote/zero-endnote policy for this book. Nevertheless, there is footnote material in many cases that deserves to be read. So, where I felt footnote material was important, I have incorporated it into the inline text.

I have adopted this convention for marking footnote material:

↖ The superscript right-pointing descending arrow indicates the beginning of footnote material.

↗ The superscript left-pointing descending arrow indicates the end of a passage of footnote material.

While this system works well, there is one wrinkle: Sometimes courts put footnote references in the middle of a sentence. Where this has happened, I have had to depart from the exact linear order of the text, usually by inserting the footnote material after the end of the sentence.

### **Editing Marks**

Because I think it is good for the reader to be able to get a sense of the relative fidelity of the edited version of a reading compared to the original, I have left editing marks in many places.

Editing a casebook presents a special challenge in indicating what edits you have made. Courts themselves, when writing opinions, include an enormous amount of quoted material. Thus, unedited court opinions are filled with ellipses to show where the quoted version differs from the original. If I used ellipses in editing the opinions themselves, how could the reader of this casebook tell my edits from the court's?

To avoid such ambiguity, I have used a special mark in lieu of an ellipse where the chopping was mine:

~ The superscript tilde denotes matter omitted.

The superscript tilde also has the advantage of being less obtrusive than an ellipse.

Sometimes insertions are expedient.:

[ ] Brackets indicate an insertion. The insertion may be mine or the court's. They are usually mine if they are not in a quote.

Also, some courts use brackets in and around citations as part of their adopted citation style. Those brackets, which do not indicate an insertion, are the court's, not mine.

Any other editing marks you see are the court's, not mine.

### **Unmarked Edits**

While I have sought to indicate significant edits in the text, as I've just described, I also have made unmarked changes. In such cases, I left them unmarked because marking them in some way would have been unduly distracting. In particular, throughout the cases, I have liberally omitted citation matter, including parallel cites, portions of cites, and whole cites. (Note that I didn't remove all citation; in many places I thought it was essential to what the court was trying to say or that it otherwise made a helpful contribution.) Other unmarked edits are cataloged in the aftermatter at the end of this book.

# Acknowledgements

*(For both volumes)*

First and foremost, I want to acknowledge and thank my students, particularly my torts students at the University of Oklahoma and the University of North Dakota. They helped me immeasurably to grow as a teacher, and they provided invaluable feedback for the early forms of material that evolved into this casebook. A particular note of thanks is due my 2014-2015 and 2015-2016 torts students. Many of them went above-and-beyond-the-call in helping me ferret out typos and rework unclear passages in the draft version of the manuscript. I won't list names, but I am truly indebted to them. I also owe thanks to my colleagues in the faculty, staff, and administration at both OU and UND for their considerable support.

Many other people lent me their time and advice to help with this book. In particular, I am grateful to Michael L. Corrado, Murray Tabb, Patti Alleva, Paul LeBel, Keith Richotte, James Grijalva, Adam Gutride, Jim Dedman, Brian Schmidt, Devin Rogers, Pete Boll, Susan Carlson, Karen Martin, Jan Stone, and, especially, my wife, Kit Johnson. I also want to thank the anonymous reviewers who, through the CALI editing process, provided excellent counsel. And a special thank you goes out to those who have written me to point out errors in the first-edition text; I am in your debt.

In addition, I want to thank many people who have helped me in indirect but important ways by having illuminating discussions with me about torts – discussions that ultimately helped me frame the explanations that appear in this book. Those people include Paul Gowder, Sanne Knudsen, Sandra Sperino, John L. Watts, Bruce L. Hay, Guido Calabresi, and, most especially, my own torts teacher, Jon Hanson.

I am also grateful to Justice Raymond D. Austin who suggested *Benally v. Navajo Nation* to me as a good teaching case, as well as Jennifer L. Schulz for making the same suggestion with regard to *Dobson v. Dobson*.

Finally, I want to warmly thank Deb Quentel and everyone at CALI for supporting me in this endeavor. I am grateful to them not only for their work with regard to this particular project, but also more broadly for their efforts to make legal education more efficient, effective, affordable, and accessible.



# Part I: Preliminaries

# 1. Basic Concepts

To start, it's helpful to get some context for what you will be studying: what torts is, where it comes from, and how it fits into the general scheme of law and the law-school curriculum.

## A. What is Torts?

Torts is traditionally one of the core, basic, required courses in law school. The subject of torts is civil lawsuits in which one person alleges that another person perpetrated some harm. Personal injury, medical malpractice, and defamation are all subjects of torts.

The subject matter of torts is broad and fundamental. If you wrote out a list of 10 things someone could sue over, most of them would probably be torts. Breach of contract is a matter for your contracts course. Questions of who owns what are questions for your property course. And many modern claims, such as copyright infringement or antitrust violation, are based in specific federal statutes. But otherwise, most of the traditional, frequently invoked claims that can serve as a basis for a lawsuit can be categorized as torts. Someone punches you? That's a tort – it's called *battery*. A careless driver loses control and drives over your lovingly hewn shrubbery? That's a tort – it's called *negligence*. An enraged neighbor intentionally drives over your shrubbery? That's the tort of *trespass to land*. The neighbor does it over and over? Well, depending on how lovingly hewn the shrubbery was and how your mental state has been affected, that could be the tort of *intentional infliction of emotional distress*. Yet other torts include *slander*, *invasion of privacy*, *products liability*, and *fraud*.

The word “tort” dates back to Middle English, where it meant *a wrong* or *an injury*. The word, with its meaning, came to Middle English, by way of Old French, from the medieval Latin “*tortum*.” That word was produced as the past participle of “*torquere*,” which means *to*

*twist*. Etymologically, the word “tort” is related to “torque,” “tortuous,” and “torture.”

## **B. How Torts Fits In**

Let’s take a look at law school as a whole and see where torts fits in. Typically, law schools have at least these six courses in the first year: Torts, Contracts, Property, Civil Procedure, Criminal Law, and a course in basic lawyering skills, which goes by different names at different schools.

Torts is a doctrinal course teaching substantive private law. Explaining what that means will help you see how Torts relates to and is distinguished from your other courses.

### **Doctrine vs. Skills**

Roughly speaking, there are two sets of subject matter taught in law school – skills and doctrine. Sometimes both are taught in the same course, but often a course tends to be either a skills course or a doctrinal course. Generally, 1Ls will have one introductory course to teach you how to do the things a lawyer does. This may be called “Legal Methods,” “Lawyering Skills,” “Legal Reasoning and Argument,” or something similar. You are taught how to do legal research, how to write a brief, and maybe how to present an oral argument in court. Advanced skills coursework may include trial techniques, negotiation techniques, drafting for business transactions, estate planning, and more. In contrast with skills courses, courses that teach the law itself are called doctrinal courses. Torts is a doctrinal course. Although a torts course might include some relevant skills training, the primary mission is to teach you what tort law is.

### **Substantive vs. Procedural**

Doctrinal subject matter can be divided into two camps: procedural and substantive. Procedural law is law that governs the function of legal institutions. Most first-year law students take a course called Civil Procedure in which they learn the law that governs civil lawsuits. This includes how to start a lawsuit by serving a summons and a copy of the complaint on the defendant, which court to file the lawsuit in, and other essentials. Other procedural courses include

Evidence, which largely concerns when you can say “Objection!” at trial, and Federal Courts, which covers some fascinating questions about the power of the federal courts in relation to Congress, the president, and the states. Substantive law, by contrast, directly governs what people can and cannot do, or to whom they will be liable if they do certain things. In many schools, a course called “Criminal Law” is about half procedural law (such as what constitutes probable cause) and half substantive law (such as the difference between murder and manslaughter). Torts is a body of substantive law. Contracts and Property are substantive courses as well.

### **Private Law vs. Public Law**

Law can also be divided into “private law” and “public law.”

“Public law” refers to direct regulation by the government of individual conduct. If you run afoul of public law, then you are in trouble with the government. Substantive criminal law fits within this category, as does constitutional law, immigration law, environmental regulation, zoning ordinances, and the motor vehicle code.

“Private law,” on the other hand, refers to substantive law that gives one private party a claim on which to sue another private party. Torts is this kind of law. If you commit a tort, you are not in trouble with the government, but you might get sued by some private person. Another way to refer to private law is “the law of obligations,” meaning that it is the law that recognizes obligations between private parties that are enforceable in court.

It is of course possible for the same action to create liability under both private and public law. Many actions that constitute a tort will also constitute a crime. If you intentionally kill someone, that’s actionable in tort as wrongful death, and it is prosecutable under criminal law as murder.

Technically speaking, the government could – if they really wanted to – sue you as a private party in tort. But that almost never happens. If the government comes after you, they have more potent means in the public law than they have under private law. If you break into a secret Air Force installation, for instance, the federal government is not

going to noodle around with a tort suit for trespass. The U.S. Attorney will go to a grand jury and come back with an indictment heavy with charges based on federal criminal statutes. Getting sued in tort would be delightful by comparison.

### **The Elemental Concepts of Private Law**

In most law schools there are three foundational first-year doctrinal courses that each revolve around an elemental concept in private law. Those courses are Torts, Contracts, and Property. Each of these represents an essential idea that can give one person a claim against another person in court. If one person injures another, that's actionable under **tort** law. If one person breaches a binding promise to another, that's actionable under **contract** law. If two people both claim to own the same thing, a court can resolve the dispute using **property** law.

These concepts are not just important as themes for first-year courses. They are fundamental ideas that that animate law as a whole, and thus the concepts from them will reappear over and over again throughout law school.

Take misappropriation of trade secrets, for instance. If an employee takes a secret recipe from a baker and sells it to a competitor, that is actionable under trade secret law. Trade secret law is usually thought of as a separate body of law, not as a species of torts, contracts, or property. But at a fundamental conceptual level, when we ask why we have trade secret law, we find ourselves using the basic theories of tort, contract, and property to explain it. For instance, you could say trade secret misappropriation should be actionable because it constitutes a harm suffered by the originator of the secret. That's a *tort* way of thinking about it. Or, you could say the misappropriation should be actionable because it represents a broken promise made by the misappropriator to safeguard the secret. That's a *contract* way of thinking about it. Or you could say that the misappropriation is wrong because the trade secret was owned by the originating party and thus the misappropriator had no right to transfer or dispose of it. That's a *property* way of thinking about it.

You can think of torts, contracts, and property as the great common-law triumvirate in the first-year curriculum.

There is a fourth elemental concept, although it does not get its own course in the core curriculum. That fourth concept can be called **unjust enrichment**. The same concept also goes by labels such as “quantum meruit,” and “restitution.” The idea here is that a court should transfer some wealth from one person to another because the other person deserves it more. This is a very broad idea, but it usually is only applied in rare situations where no other theory would reach a just result. For instance, when an unconscious person – incapable of assenting to a contract – receives emergency treatment in a hospital, a theory of unjust enrichment gives the hospital a legal right to get paid. You might cover this doctrine in your contracts course.

So, that’s about it – four fundamental theories of the common law: tort, contract, property, and unjust enrichment. Most of the private law is built out of these four elements. So keep in mind that torts has a conceptual importance well beyond this single course. You can expect tort theories to come up in courses concerning constitutional law, intellectual property, civil rights, federal courts, securities regulation, and many others.

### **C. Where Tort Law Comes From**

#### **States vs. the Federal Government**

In the United States, for reasons having to do with federalism and the dictates of the U.S. Constitution, tort law is almost entirely a creature of state law. Contracts, property, and unjust enrichment are, similarly, matters of state law.

This has a very important implication for this course: You are going to learn a generalized conception of tort law, not the law of any particular state. There are many different versions of tort law in the United States – including each state, plus the District of Columbia and various territories. Happily, tort law is mostly the same everywhere. But, unfortunately, you never know for sure what a particular doctrine of tort law is in any given jurisdiction until you

check it out. And what may be a minor difference in the grand scheme of things could make all the difference in a particular lawsuit.

For you, as a law student, this is both annoying and liberating. It is annoying for obvious reasons: You could learn tort law extremely well, but yet not be able to answer any particularized question about it with certainty. It is liberating for the same reason – you are off the hook from knowing with certainty how the law will apply to any given situation. (This can make it a lot easier to dodge legal questions posed to you by members of your extended family when you are home for the holidays.)

By the way, when it is time for you to take the bar exam, you will find that most state bars require you to know the generalized conception of tort law, rather than your state’s particular law. When it comes to torts, you could even get a multiple-choice question on the bar exam marked wrong by answering it accurately based on your state’s idiosyncratic law.

Every once in a while, federal law has a say in a torts lawsuit, but such circumstances are rare. One example, covered in the part of this book on healthcare liability, is how the federal Employee Retirement Income Security Act – better known as “ERISA” – preempts tort lawsuits against health insurers. Two other examples, subjects for Volume Two, concern the Federal Tort Claims Act and constitutional due-process limitations on punitive damages.

### **Common Law vs. Civil Law**

In American elementary schools, maybe even in middle schools and high schools, it is common to teach that the three branches of government – the legislative, the executive, and the judicial – each have three separate, distinct jobs: The legislative branch makes the law; the executive branch enforces the law; and the judicial branch interprets the law. Unfortunately, this is wrong. It is not just slightly inaccurate. It is fundamentally wrong. Most of the private, substantive law that is on the books in the United States has been created by the courts, not legislatures. This kind of court-created law is called the “common law.”

For the most part, what you will study in Torts, Contracts, and Property are doctrines of common law. In creating, fine-tuning, and revising these doctrines, the courts are not being “judicially activist.” Under the common-law system, it is the job of the courts to do this. This is the way it has been for centuries.

The tort of battery, for instance, allows one person to sue another for a harmful or offensive touching. If someone kicks you, that’s a battery. Battery is actionable as a tort not because a legislature passed a statute, but because, long ago, a court said so. And later courts followed that court. If you want to find the “law of battery,” you will have to look in the reported opinions of the courts – not in the enactments of the legislature. This makes looking up the law complicated. And this is a large part of what people pay lawyers for: Reading through lots of cases to figure out what the law is on any given matter.

You could criticize the common-law method as abstruse, wasteful, arcane, and undemocratic. And these criticisms would not be groundless. Regardless, as a general matter, this is how the law works in the “common-law countries,” a group which includes the United States, the United Kingdom, Canada, Jamaica, Ireland, Tanzania, Australia, and New Zealand, among others. Looking at this list of common-law countries, you probably will not be surprised to learn that the common-law way of doing things derives ultimately from England.

There is another way of creating a system of private law that is much closer to the government/law model you may have learned in elementary school – that is, where the legislature makes the law and the courts interpret the law. In this other way of doing things, the legislature passes statutes that govern private legal causes of action. This method is sometimes called a “code system,” since the essential doctrines are arranged in the form of a written code, an organized set of laws. This system is also called a “civil-law system.” Countries that follow such a system are often referred to as “civil-law countries.” Examples include France, Mexico, Germany, Japan, Guatemala, Switzerland, Thailand, Brazil, and many others. The phrase “civil law” can be confusing, because in the United States, the word “civil”



is often used in contradistinction to “criminal.” For instance your “Civil Procedure” course will cover the procedural law of “civil” lawsuits – meaning litigation that is not criminal litigation. In this sense, a tort lawsuit is a civil lawsuit, even though torts is a common-law subject. But to say that a country is a civil-law jurisdiction is to say that it follows a code system, in which the legislature creates the law of private obligations.

France is an archetypal civil-law jurisdiction. In France, the law that allows one person to sue another comes from the Napoleonic Code. The French civil-law heritage actually gives rise to two important exceptions to the common-law nature of torts in the United States and Canada. One state and one province have a code-based “law of obligations” rather than a common-law of torts. Those two jurisdictions are, naturally, Louisiana and Quebec. Owing to their French colonial history, each has a legal system that is a descendant of the Napoleonic Code.

While the code system has advantages, many of which are immediately apparent – including organization and accessibility – you will find that the common law has a wealth of subtly attractive features. In fact, both the common-law and civil-law systems have much to admire, which is perhaps why many countries – including Botswana, South Korea, Cameroon, Kuwait, and Norway – have adopted a mix of the two.

### **The Place of Statutes**

Even in a common-law jurisdiction, the legislature has a role to play in shaping tort law. While, for the most part, legislatures do not create tort law, they can if they want to. And when a legislature passes a statute on a point of tort law, it trumps any contrary judge-made common law.

For instance, the courts decided long ago that killing another person is not actionable as a tort. If this sounds ridiculous to you, you are in good company. Legislatures have found it ridiculous too. That’s why state legislatures everywhere have passed statutes that create a “wrongful death” cause of action and allow “survivorship” claims.

So, some aspects of tort law are statutory in origin. Nonetheless, tort law is, overwhelmingly, a body of judge-made common law. This means that most of what you will study in a course on torts are cases in which judges have announced and sharpened common-law doctrines.

#### **D. The Structure of a Tort Case**

To proceed methodically through tort law, we will follow what you might call the internal structure of a tort. Understanding this structure requires separating out the roles of the plaintiff and defendant, and then distilling causes of action, elements, and affirmative defenses.

##### **The Parties**

A **plaintiff** is someone who sues. A **defendant** is a person whom the plaintiff sues. In the torts context, this typically means that the plaintiff got hurt and the defendant is the one who is alleged to be responsible.

##### **Causes of Action, Elements, Affirmative Defenses, and Burdens of Proof**

A **cause of action**, also called a “claim,” is a basis upon which a plaintiff can sue. Torts has several causes of action. Some examples are battery, negligence, false imprisonment, fraud, and assault. In order to have a meritorious lawsuit, a plaintiff will need to properly allege at least one cause of action. Plaintiffs can, and frequently do, sue on multiple causes of action in the same lawsuit.

Each cause of action can be broken down into a number of **elements**. For instance, the cause of action for battery can be divided into the following four elements: (1) an action, that is (2) intentional, and which results in a (3) harmful or offensive (4) touching of the plaintiff. It is the plaintiff’s **burden of proof** to establish each of these elements. The plaintiff must establish all of the elements of the cause of action in order to win. It is not enough for the plaintiff to establish one or even most of the elements. The plaintiff must establish every single one in order to win.

If the plaintiff establishes each of these elements, then the plaintiff is said to have made out a **prima facie case**. “Prima facie” is Latin for “first face.” If a plaintiff has established a prima facie case, then the plaintiff has presumptively won.

You can understand the requirement that a plaintiff establish every single element just by thinking about it. Suppose you tap a stranger on the shoulder and ask her what time it is – after which she promptly sues you for battery. She can prove you undertook an (1) action, which was (2) intentional, and which resulted in (4) a touching. But the lawsuit must fail because there is nothing *harmful or offensive* about tapping someone on the shoulder. Because that element has not been established, the prima facie case for battery has not been made out. If you change the facts to replace the tap on the shoulder with a shove, then you have something harmful or offensive. And in that case there would then be a prima facie case for battery.

What does the defendant need to do to win a tort lawsuit? Absolutely nothing. At trial, the defendant can just sit back and see how things go, and if the plaintiff comes up short, failing to establish every element, then the defendant will win.

Now, even if the plaintiff establishes all the elements, and therefore has a prima facie case, the defendant still has two more ways to win. First, the defendant can undermine the plaintiff’s prima facie case by putting on additional evidence to refute the proof offered by the plaintiff on at least one of the elements of the cause of action. This is called a **rebuttal defense**. If the defendant can disprove just one element, the defendant wins on that cause of action.

There is a second way for the defendant to win as well: an **affirmative defense**. If the defendant can establish an affirmative defense, then the defendant can actually stipulate to the plaintiff’s entire case and yet still win. An affirmative defense defeats the entirety of the plaintiff’s successful prima facie case.

Different tort causes of action have different defenses. For the tort of battery, two principle defenses are consent and self-defense. Let’s say you punch someone in the face. That’s a battery. But suppose you

punch the person in the face in the context of a boxing match. In that case, you can establish the affirmative defense of consent. Consent is a complete defense to battery. Alternatively, if the punch in the face was in the context of defending yourself against someone physically attacking you, then you can establish the affirmative defense of self-defense.

It's a little strange how this works: If you punch someone in the context of a boxing match, you have committed a battery. That means that a prima facie case can be established against you. It does not mean the plaintiff will win when all is said and done, but it does mean the burden is on you, as the defendant, to establish that the punch was consented to in order to avoid liability. That's not to say that this will be difficult: Just provide credible testimony that the plaintiff stepped into a boxing ring and took a fighting stance while wearing boxing gloves – that will suffice to show implied consent.

The general standard of proof in a torts lawsuit is **preponderance of the evidence**. This means that it counts as “proof” to show that something is more likely than not. If a jury, after hearing conflicting evidence, determines it was 50.00000000000001% likely that a defendant acted with consent when punching someone, then that counts as proof. The preponderance standard works for whomever has the burden of proof in a torts case on a given issue. That is, the preponderance standard is the standard by which plaintiff must prove every element of a cause of action, and it is the standard applied to defendants seeking to establish an affirmative defense.

One way of thinking about the burden of proof and the preponderance standard together is that it constitutes a tie-breaker. If the question is whether a prima facie case has been established for a given cause of action, then the burden is on the plaintiff – that means that any tie will go to the defendant. If the issue is whether an affirmative defense is established, the burden is the defendant's – so a tie on that issue will go the plaintiff. (Just remember, a defendant is not required to prove an affirmative defense to win. If the plaintiff fails to prove any element of a given cause of action, then the defendant wins without doing anything.)

The preponderance standard can be compared to the well-known standard for criminal prosecutions: proof beyond a reasonable doubt. The reasonable-doubt standard in criminal law is a high bar. By comparison, the preponderance of the evidence standard in a tort suit is easy to meet. Suppose, after a trial, a jury collectively thought, “We aren’t very sure about it, but we think it’s slightly more likely than not that the defendant intentionally killed the victim.” That’s enough for a wrongful-death verdict, but it would lead to an acquittal for a murder charge.

One more note about causes of actions and affirmative defenses: Remember that it is possible for a plaintiff to allege more than one cause of action in a lawsuit. In fact, it’s typical. Similarly, a defendant may raise multiple affirmative defenses. A single altercation between two people could give rise to claims for battery, negligence, false imprisonment, fraud, defamation, and more. Each of those claims could give rise to multiple affirmative defenses, and all would ordinarily be dealt with in the same lawsuit.

Why allege more than one cause of action? Well, some causes of action entitle a plaintiff to more in monetary damages than others. Some are easier to prove than others. Bottom line, however, to get some relief, a plaintiff needs only to prevail with one cause of action. Similarly, for any given cause of action, a defendant can raise multiple affirmative defenses. But the defendant needs only to prove one affirmative defense to prevail with regard to any given cause of action.

## 2. An Overview of Tort Law

Now that you understand the fundamentals of causes of action, elements, and affirmative defenses, we can start to sketch an overview of the subject of tort law.

Before delving into the details of particular tort causes of action, it is extremely helpful to take the time to learn the broad outlines of the entire subject matter. Why? Having a framework of any subject makes it easier for you understand and absorb details. Moreover, when it comes to torts, you will find that there are many points of connection among disparate aspects of the subject matter. For instance, an aspect of negligence doctrine – called *res ipsa loquitur* – is similar in important ways to the cause of action for strict liability. If you take the time at the outset to study the overview, you will be able to understand these linkages much more readily when they come up later on.

As a common-law subject, torts has no official organization scheme. It exists as a disconnected mass of judicial opinions spanning a multitude of jurisdictions. The opinions are put into reporter volumes in chronological order – not grouped by topic. In fact, you would have a hard time grouping cases by topic if you tried, because any given case often deals with multiple topics.

Yet to tackle the subject of torts methodically, it is necessary to adopt some organizational scheme. There is some unavoidable artificiality in doing this, but imposing some form of order is needed to make the subject comprehensible to the uninitiated.

The most straightforward way to organize the study of torts seems to be to group together causes of action, and then explore one cause of action at a time, running through the elements and relevant defenses for each. That is how this book is organized. Unfortunately, some topics do not fit into this structure, since they are relevant to all or many tort causes of action. Such topics include immunities, remedies, special issues regarding who can sue, and generically applicable

affirmative defenses. Such topics will be treated separately (and they will appear in Volume Two).

To take a first cut at dividing up all the tort causes of action for study, we'll separate them into two large piles, to which we will give the labels "lineal" and "oblique."

### **A. The Lineal Torts – Direct Harm to Persons or Physical Property**

What we are calling the lineal torts are the ones that involve some kind of direct injury to a person's body or physical property. (And rarely, the harm can be to a person's mental well-being.) In this category of lineal torts, the harm to person or property is a direct one. Bar brawls, car crashes, and exploding soda-pop bottles are all examples.

Lineal-tort causes of action can be divided into two categories: those that will accrue from accidents, and those that only apply to intentional actions.

#### **Causes of Action for Accidents**

##### **Negligence**

The most general cause of action that is available for accidents is negligence. Motor-vehicle accidents, slip-and-falls, and most kinds of medical malpractice are negligence cases. There are five elements to the cause of action for negligence.

##### **(In plain English:)**

A plaintiff can win a negligence case by showing that (1) the defendant had an obligation to be careful, (2) the defendant wasn't careful, and that carelessness was (3) an actual cause and (4) a not-too-indirect and not-too-far-fetched cause of (5) a bodily injury or damage to physical property.

Those are the elements of negligence. But those are not the words courts actually use to talk about negligence. We will have to translate

our plain English into legal terms of art – “legalese,” if you want to call it that.

**(Restated in legal terms of art:)**

A plaintiff can establish a **prima facie case for negligence** by showing: (1) the defendant owed the plaintiff a duty of due care, (2) the defendant breached that duty, and that breach was (3) an actual cause and (4) a proximate cause of (5) an injury to the plaintiff’s person or physical property.

The **duty of care** concept simply means that, under the circumstances, the defendant had an obligation to be careful. A defendant is said to owe a duty of care (i.e., have an obligation to be careful) with regard to all “foreseeable” plaintiffs. This means that if you should have known you could hurt someone by being careless, then you had an obligation to be careful.

The **breach** element is established if the defendant was not, in fact, being careful.

The element of **actual causation** means that there is a logical cause-and-effect relationship between the defendant’s carelessness and the plaintiff’s injury. That is to say, if the defendant had actually been careful, then the plaintiff never would have gotten hurt. Generally speaking, if the plaintiff would have gotten hurt anyway, then the element of actual causation is not met.

The element of **proximate causation** means that the cause-and-effect relationship between the defendant’s conduct and the plaintiff’s injury cannot be too bizarre. If newlyweds driving back from their wedding reception are paying more attention to one another than the road, and because of this, their car rear-ends yours, you can sue the driver, and maybe the distracting passenger, but you cannot sue the matchmaker who got the two lovebirds together. Why not? A court would say that the matchmaker’s actions were not a “proximate cause” of the collision.

The **injury** element requires that the plaintiff actually got hurt. You cannot sue someone in negligence just because you are mad at them



for *almost* getting you killed. If you come away without a scratch, then there is no negligence case.

There are three affirmative defenses that are particularly relevant to negligence. The first two are **comparative negligence** and **contributory negligence**. These are really two different versions of the same idea – relieving the defendant from liability when the plaintiff's own negligence contributed to the plaintiff's injury. This kind of defense may either be complete, absolving the defendant of all liability, or partial, allowing the defendant to pay no more than some percentage of the total damages. (Be aware that comparative negligence also goes by the name "comparative fault.") An additional affirmative defense is **assumption of the risk**, based on the idea that where the plaintiff knowingly and voluntarily assumed the risk of something bad happening, the defendant should not be liable.

### **Strict Liability**

The cause of action for strict liability, like negligence, is also available for a plaintiff who has suffered a bodily injury or property damage because of an accident. But while negligence is available broadly for just about any kind of accident, strict liability is available only in a few limited circumstances in which the law imposes an **absolute responsibility for safety**. Those circumstances are:

- wild animals
- trespassing livestock
- domestic animals with known vicious propensities
- defective products
- ultrahazardous activities

The elements for strict liability are the same as those for negligence with one powerful exception: The duty-of-care and breach-of-duty elements are removed. This means that if the cause of an injury falls into one of the five categories for strict liability, then it doesn't matter how careful a defendant was being.

A plaintiff can establish a **prima facie case for strict liability** by showing: (1) the defendant's conduct falls into one of the categories for which there is an absolute responsibility for safety, and the defendant's conduct was the (2) actual cause and (3) proximate cause of (4) an injury to the plaintiff's person or physical property.

The key question in strict liability is when it may be invoked; that is: How do we define the categories giving rise to absolute responsibility for safety?

Ultrahazardous activities trigger the absolute responsibility for safety. That much is clear. But there is considerable room for argument as to what qualifies as ultrahazardous. Some examples of activities the courts have said qualify as ultrahazardous are fireworks, blasting, crop dusting, fumigation, oil drilling, and just about anything nuclear. On the other hand, jurisdictions are split on whether transporting gasoline by tanker truck qualifies.

With regard to defective products liability, the key question is what counts as a defect. The law recognizes three kinds of defects: a **manufacturing defect**, whereby some product failed to be made to specification; a **design defect**, where the product was designed in such a way that it was unreasonably dangerous; and a **warning defect**, in which the lack of a clear warning causes an otherwise safe product to be dangerous. An interesting aspect of strict products liability is that anyone in the distribution chain can be held liable, from the retailer, to the distributor, to the manufacturer.

We will save elaborations, complications, and exceptions for later, but for now it may give some readers peace of mind to know that selling items at a garage sale does not make you a retailer for purposes of strict products liability.

A key affirmative defense for strict liability is comparative negligence, which, as we noted, is also known as comparative fault. In fact, it is the applicability of this defense to the non-negligence context of strict liability that arguably makes "comparative fault" a better name.

(In this book, the phrases “comparative negligence” and “comparative fault” will be used interchangeably – all the better to get you used to the varying terminology.)

### **Intentional Torts**

The next broad category is that of intentional torts. You will see that where the defendant acted with intent in harming the plaintiff, the law allows many more options for recovery.

There are seven traditional intentional torts. Four are personal, three are property-related. The intentional personal torts are battery, assault, false imprisonment, and outrage (also known as intentional infliction of emotional distress, or “IIED”). The intentional property torts are trespass to land, trespass to chattels, and conversion. For these torts, we will sum up each in a sentence, saving a formal breakdown into elements for later.

#### **Battery**

The tort of battery requires an intentional infliction of a harmful or offensive touching of a person.

The touching does not need to be direct. Touching someone’s clothing, or even an object the person is holding, can qualify. Setting in motion some process that eventually results in a touching qualifies as well. Setting up a bucket of water to pour on someone’s head when they walk into a room weeks later will count as a touching. The touching also does not need to be on the outside of the body. Giving someone a beverage adulterated with a disgusting substance or a narcotic would count as a touching.

The intent requirement is more relaxed than you might think, as well. Knowing with substantial certainty that a person would be harmfully or offensively touched, for instance, suffices for the purposes of battery. Intent is also satisfied where the defendant intended only a near miss.

The most important aspect of battery, when compared to negligence and strict liability, is that there is no injury requirement. Spitting on someone, for instance, rarely causes an injury. But it will constitute a battery. In a case without an injury, it might not be possible to win

any appreciable monetary award, but a claim can nonetheless be made and vindicated. And since some harmless touchings are quite reprehensible (e.g., spitting), a large award of punitive damages might well be justified.

Battery covers an enormous range of conduct, from the inappropriate to the catastrophic. Pulling hair is a battery. So is a bombing.

The affirmative defense of consent is extremely important to battery. Consent can be expressed in words or implied by the circumstances or a past course of interaction. The defense of consent is what keeps contact sports out of the courtroom.

### **Assault**

The tort of assault is similar to battery, but it does not require a touching. Assault is defined as **the intentional creation of an immediate apprehension of a harmful or offensive touching**. In other words, making someone think they are about to be the recipient of a battery constitutes an assault. Like battery, assault does not require an injury as part of the prima facie case.

Also like battery, the intent requirement is nonspecific. Intending to hit someone, but actually missing, qualifies as intent for the purpose of establishing battery.

### **False Imprisonment**

The tort of false imprisonment is established by proof of **intentional confinement – experienced or harmful – of a person to a bounded area**. Kidnapping counts as false imprisonment. But a very brief period of locking someone in a room is false imprisonment as well. An actionable confinement can be accomplished by physical force, threat of physical force, or improper claim of legal authority. For instance, overzealous store security guards can accrue liability for false imprisonment by making improper assertions of legal authority in detaining persons suspected of shoplifting.

No harm needs to be done, nor any injury inflicted, for a claim of false imprisonment.

A key affirmative defense is **consent**, which, for instance, keeps airlines from incurring liability for making passengers wait for the ding before getting out of their seats. Another key affirmative defense is the **lawful arrest privilege**, which allows the police and sometimes citizens to effect the arrest of a criminal suspect.

### **Outrage (or Intentional Inflection of Emotional Distress)**

The tort of outrage is commonly called intentional infliction of emotional distress, a name unwieldy enough that it is usually shortened to “IIED.” Liability for the tort is triggered by **the intentional or reckless infliction, by extreme and outrageous conduct, of severe emotional distress.**

The key to remember with outrage is that merely insulting or treating someone badly will not suffice. The conduct has to be *extreme and outrageous*. Teasing and name-calling does not qualify. Falsely telling someone that a loved one is dead, however, certainly would. Sometimes an outrage claim can be successfully pursued in employment situations where a worker’s boss engaged in a prolonged campaign of harassment.

Also important, the emotional distress experienced by the plaintiff must be *severe*. Making someone cry is not enough. Reducing someone to uncontrolled screaming or prolonged hysterical sobbing, however, would likely qualify as severe. Over the longer term, severity could be established by proving recurring night sweats, heart palpitations, panic attacks, or the wearing down of teeth through chronic grinding.

### **Trespass to Land**

The intentional tort of trespass to land requires **an intentional physical invasion of a person’s real property**. Real property is land along with anything built on or affixed to the land, as well as the subsurface below and the airspace above to a reasonable distance.

Failing to remove something from the plaintiff’s land that the defendant is obligated to remove also counts as trespass to land.

To have a valid claim for trespass to land, no injury is necessary. Touching a physical portion of the land is not even necessary. A disgruntled homeowner could theoretically sue neighborhood kids for playing a game of catch in which a ball is thrown over a corner of the homeowner's lot. Of course, in such a case, no compensatory damages would be awarded, since there is no harm needing compensation. Punitive damages would be unavailable as well, since the kids' behavior would not warrant it. In such a case a court would likely award only nominal damages of \$1. So, such a case would, as a practical matter, be pointless to pursue. But the fact that bringing such a claim is possible serves to illustrate the incredible sweep of the tort of trespass to land.

Also important for trespass to land is how the intent requirement is construed. The defendant does not need to have the specific intent to trespass. If the defendant intends only to walk upon a public right-of-way, but nonetheless strays onto private property, the intent of putting one foot in front the other is sufficient intent to establish the cause of action.

Of course, consent is a defense, as it is to intentional torts generally. So when the neighborhood kids come trick-or-treating, they will have a defense of implied consent.

### **Trespass to Chattels**

Chattels are items of tangible property that do not qualify as real property. Motor vehicles, paper clips, jewelry, horses, and helium balloons are all chattels. An action for trespass to chattels will lie when there is **an intentional interference with plaintiff's chattel by use, intermeddling, or dispossession.**

The requirement for trespass to chattels is stricter than for trespass to land. Merely touching or waving a limb over real property counts as trespass to land. But for trespass to chattels, a mere touch will not qualify, nor will merely picking the item up. There has to be something more – not damage, but something that amounts to an interference with the plaintiff's rights in the chattel. Stealing the item, damaging it, or destroying it would be more than enough.

## Conversion

The intentional tort of conversion is an alternative cause of action for chattels. A conversion is effected by **an intentional exercise of dominion or control over a chattel that so substantially interferes with the plaintiff's rights as to require the defendant to be forced to purchase it.**

If the plaintiff wants to pursue conversion, the plaintiff will need to make a heightened showing compared to trespass to chattels, proving that the defendant so substantially interfered with the chattel that a forced sale is warranted.

The main difference between trespass to chattels and conversion is the remedy. For conversion, the court will order the defendant to pay the plaintiff for the value of the chattel before the defendant interfered with it. It is an example of what is called a “forced sale.” Afterwards, the plaintiff must deliver the chattel to the defendant – or whatever is left of it.

If the plaintiff wants to keep the chattel, regardless of its condition, then the plaintiff should pursue an action for trespass to chattels. The monetary recovery might be lower, but the plaintiff does not have to part company with the object.

## B. The Oblique Torts – Economic or Dignitary Harm

The other major group of tort causes of action applies where the harm is not a direct one to person or property. The harm may be financial, or it may be to one's sense of dignity or reputation. We will only discuss these very briefly, just enough to demonstrate the range of situations in which tort law provides a mode of redress for oblique harms.

Many oblique torts concern a purely financial loss.

The tort of **fraud** allows a cause of action in certain circumstances we would call, in the ordinary vernacular, “getting ripped off.” A fraud claim requires that the defendant made a misrepresentation to the plaintiff, that the plaintiff relied on it, and that this ended up making the plaintiff worse off. A typical situation is where the defendant lies

in order to get the plaintiff to purchase worthless goods or put money into a shady investment.

The tort of **intentional economic interference** allows a plaintiff to sue when someone does something to prevent the plaintiff from closing a business deal or getting the benefits of a valid contract. In the prototypical case, the defendant is an intermeddler, who for some reason, possibly out of spite, wants to make someone flounder in their career or line of business. The most important thing to understand about the intentional economic interference tort is that it cannot be brought against a party to a contract for failing to live up to the terms of a deal. The action available in such a situation is one for breach of contract. The intentional economic interference tort can only be brought against third parties who have no business involving themselves in the matter.

Other oblique torts are more concerned the plaintiff's sense of dignity and integrity.

The tort of **defamation** can be brought against a person who communicates false, reputation-harming statements about the plaintiff. Defamation in writing is called **libel**, while the defamation that is spoken is **slander**. Libel is easier to allege. For slander, a plaintiff will only be able to make out a prima facie case under certain circumstances, such as if the false statement is about certain sensitive topics or if the plaintiff can prove a direct financial loss resulting from the statement. The largest limitation on defamation comes in the form of the **First Amendment**, which can make it nearly impossible for public officials and public figures to sue their critics in most circumstances.

There are multiple torts that fit under the banner of **invasion of privacy**. One, **false light**, is similar to defamation in that it allows a cause of action for certain false statements, but it does not require the kind of harm to reputation that defamation requires. The tort of **intrusion upon seclusion** allows lawsuits against peeping toms and others engaged in eavesdropping, surveillance, or various other sorts of creepiness. Meanwhile, the cause of action for **public disclosure** allows suits against people who communicate embarrassing, private



information about the plaintiff to the public at large. And finally, the tort cause of action called the **right of publicity** creates liability for certain commercial uses of a person name, voice, or likeness. It is principally useful to celebrities suing makers of unauthorized merchandise – like t-shirts, stickers, and coffee mugs – as well as for anyone whose name is unwittingly used in an advertisement. Consent is a defense – one, in fact, that you will find buried in the terms of service for Facebook and Google.

There yet more common-law tort causes of action, some of them quite exotic. Examples are some relics of a different age that allow lawsuits to be brought by cuckolds and jilted bridegrooms. These may be more interesting for their historical value than anything else.

Other torts – many with considerable present-day relevance – are statutory in origin. These include claims against government officials for civil rights violations.

### **C. The Whole Torts Landscape Considered Together**

As you can see, there are a variety of torts, each with its own tangle of convoluted doctrine prescribing when persons are entitled to redress. Ultimately, the range of tort claims and defenses reflects society's ideas about what counts as hurtful and wrong and what we owe to one another as citizens of the same complicated, crowded society. Our views on these subjects, of course, are complicated, so it is probably inevitable that tort law is complex as well. But as a student, take heart, because as complicated as it might be, tort law takes its current form from having been hammered over the lumps and bumps of human concern – and that is a subject that you, just by living on this planet, have already become intimately familiar with.

## Part II: Negligence

## 3. Introduction to Negligence

### A. Introduction

The center-stage cause of action in torts is negligence. In terms of its economic impact and social importance, negligence predominates.

In its briefest form, the doctrine of negligence holds that if you are to blame, through your carelessness, for an injury to the person or property of another, you will be liable for the damage.

Attorneys who practice “personal injury law” are, for the most part, working with the negligence cause of action. Bus-stop ads and billboards offering legal representation for “ACCIDENTS” are mostly aimed at negligence claims. On the other side of the coin, defending against negligence suits is a major preoccupation of insurance companies.

### B. The Central Idea: Shifting the Burden of Loss

Negligence is all about who should bear the burden of the loss that results from an injury-producing incident. It takes as a given that something bad has happened. Often it is something tragic. Negligence tries to make the best out of a bad situation by allowing the burden of the loss to be shifted from one party to another where appropriate.

Fundamentally, the negligence cause of action is about compensation. It is not about punishment. It is possible to get punitive damages as an added remedy in a negligence lawsuit, but doing so requires proving more than negligence. In particular a punitives damages award requires showing that the defendant’s conduct was reckless, wanton or willful. But at its most basic level, the cause of action for negligence is about trying to allow a less blameworthy party to shift the burden of misfortune on to a more blameworthy party.

There are many stories of runaway jury verdicts in negligence cases that give plaintiffs a huge windfall of cash. Some of these stories are apocryphal. Most omit important context that would make the verdict seem less shocking. Jackpot verdicts happen, but they are outliers, and even those are usually cut down to size on a post-trial motion or appeal.

Real-life jury verdicts that run to the millions of dollars often include large punitive damage components, meaning more than negligence was at work. If a huge verdict is handed down merely on the basis of negligence alone, and thus comprises only what are called “compensatory damages,” then it is usually because the plaintiff will suffer lifelong chronic pain, has permanent injuries that will make normal life impossible, or will be unable to pursue what had been a very lucrative career. Or it might be a combination of these factors. For example, a multi-million-dollar verdict consisting of only compensatory damages could well be possible – and might even be expected – for a young Wall Street financial whiz whose brilliant career was cut short by a massive brain injury that has left her in constant, severe pain and unable to eat, drink, or use the toilet without assistance. In other words, a person with a huge compensatory damages verdict is probably someone you wouldn’t want to switch places with.

### **C. The Elements and Defenses for Negligence**

The law of negligence is both complicated and simple. Negligence is simple in terms of its central idea. That idea is that a party injured in an accident should be able to recover the loss from whoever is at fault for causing the accident. The core notion is one of *responsibility*.

A good way to think about the law of negligence is that it is a formalized system for assigning blame. The elements of the prima facie case for negligence, and the defenses that are allowed, form a highly structured way for the courts to “think” about issues of responsibility and blame, and thereby hold a party accountable. This is where negligence law gets complicated. Exactly what does it mean to say that someone is “to blame” for an injury?

Try to imagine that you are shipwrecked on a remote island with a large group of castaways. None are lawyers or judges. There are no books and no internet. You are appointed as a judge in this cleaved-off society. A dispute comes before you, and you are asked to determine whether someone is to blame for an accident. “Blame” is a broad and vague word. How could you subdivide the question for analysis? In other words, what things would have to be true for you to confidently say that a given person to be “to blame” for the injuries of another? Essentially, these were questions that have been put to the common law over the past centuries. And the answer the common law has come up with is the modern cause of action for negligence. The prime facie elements and affirmative defenses of negligence reflect a way of dividing up the blame question into many subsidiary issues.

Here are the elements of a **prima facie case for negligence**:

- (1) The defendant owed a **duty of care** to the plaintiff. (That is, the defendant had a reason to be careful.)
- (2) The defendant’s conduct constituted a **breach** of that duty of care. (In other words, the defendant was *not* careful.)
- (3) The defendant’s conduct was an **actual cause** of the plaintiff’s injury. (Without the defendant’s conduct, there would not have been an injury.)
- (4) The defendant’s conduct was a **proximate cause** of the plaintiff’s injury. (This concept is complicated, but it means something like the plaintiff’s injury isn’t so indirectly connected to the defendant’s actions that it isn’t fair to hold the defendant responsible.)
- (5) There was an **injury** to the plaintiff’s person or property. (An injury “to the person” here generally means the person’s body, and “property” means something tangible.)

This way of dividing up the question of blame in the case of accidents is not a logical necessity. Other people could have come up with other systems. In fact, it’s not hard to argue that other systems would be better. Regardless, this is the system we have.

In talking about a different body of American law, legal scholar Sarah Burstein said, “It’s a weedy garden, but it’s out garden.” The exact same sentiment could be expressed about American negligence law.

This is a good point at which to pause and note that some other people writing about torts – such as lawyers, commentators, or judges – might tell you that the negligence cause of action only has four elements. Others might say the number is six. Accountings of the elements vary. But if you look closely at the content of what other sources say, you will find that it is, in essence, the same as the five elements laid out above.

Plausibly, a court could say that the negligence cause of action consists of just *two* elements: (1) a breach of a duty of care owed to the plaintiff, (2) an injury that was caused thereby. While this formulation looks different – since it is two elements instead of five – look closely and you will see that it is actually the same thing, just with various parts lumped together.

You may be tempted to ask about the “official” list of elements of the cause of action for negligence. Well, there is no official list. As a common-law subject, negligence is the product of many, many different courts, all reading each other’s work, but with no one really in charge. Add to that the fact that the doctrine evolves over time. The bottom line is that in learning torts, you will have to pay attention to concepts more than labels.

Now, going back to the list of the five elements above, you might think, right off the bat, that the concept of “duty of care” seems strange and unnecessary. Once we get into it, however, you will see that this element helps to filter out a lot of cases where it would seem unfair for the plaintiff to be able to recover.

In particular, the duty-of-care concept helps filter out many cases where the plaintiff’s injury seems too indirectly connected with the defendant’s conduct. That the duty-of-care element would do this is strange, since the proximate-cause element also helps filter out cases where there is an indirect connection between the plaintiff’s injury and the defendant’s conduct.

The fact is, the elements of negligence contain considerable room for overlap. In fact, the conceptual overlap between the duty of care element and the proximate causation element is at the heart of what is likely the most famous torts case of all time: *Palsgraf v. Long Island Railroad*. We will get to that in a later chapter.

An alternative to the prima facie elements would be for every case to be decided on its own, with a judge listening to both sides and simply determining what is fair. And that is a very plausible way things could be done. But it's an anathema to the common law. The project of the common law is to build a body of doctrine that helps to ensure that like cases will be decided alike, no matter who the judge is and who the parties are. By setting out a formal system, rather than depending on intuition and a rough sense of justice, then the courts can avoid arbitrary decisions, achieving a "rule of law" rather than a "rule of persons." That's the idea, anyway. Throughout your study of torts, you can constantly ask yourself whether negligence law, through its structure of elements, is achieving that goal. At times you may find that the determination with regard to any individual element in any given case seems to be decided arbitrarily – not according to any system, but just according to the judge's "rough sense of justice." In fact, one way of defining the proximate causation element, as we will see in the *Palsgraf* case, is that it is a placeholder for "a rough sense of justice."

At the end of the day, the use of individual elements within the prima facie case for negligence reflects the common law's incomplete project of striving to avoid arbitrariness. The elements give us a helpful structure to organize our thinking about negligence.

Alongside the prima facie elements of the negligence case are the principle defenses to negligence, which include:

**Comparative negligence** – With the defense of comparative negligence, if the plaintiff's injury is at least partly attributable to the plaintiff's own negligence, then the defendant will not be liable to the plaintiff for the full amount of the plaintiff's damages. If the plaintiff's relative fault is very large in comparison to the defendant, then, depending on the

jurisdiction, the plaintiff may be barred from any recovery whatsoever. (Instead of “comparative negligence,” courts and statutes often refer to this defense as **comparative fault**, a usefully broadened name, since the defense is available in contexts other than negligence, namely the cause of action of strict liability.)

**Contributory negligence** – The defense of contributory negligence is a more defendant-friendly version of comparative negligence. It is used in a minority of jurisdictions in lieu of comparative negligence. Under contributory negligence, if the plaintiff’s own negligence contributed even slightly to the injuries sued upon, the plaintiff is completely barred from any recovery.

**Assumption of the risk** – Despite the existence of a prima facie case for negligence, the plaintiff will not be able to recover if the plaintiff willingly assumed the potential burden that something bad might happen. Such an assumption of the risk can implied by the circumstances or expressed in words, written or oral.

In addition to these defenses, there are generic defenses available – defenses that are available in all torts cases. These include the statute of limitations, which causes you to lose your claim if you wait too long to file. There are also some unique defenses that are only applicable to certain kinds of defendants, such as charities and governmental entities. But we will wait to study those until after we have explored the elements of negligence and the general defenses.

### **Check-Your-Understanding Questions About Elements and Defenses**

- A.** A plaintiff is able to establish a preponderance of the elements, including duty of care, actual causation, and injury. Based on this showing, will the plaintiff be able to prevail?
- B.** A defendant’s negligence played a large part in the plaintiff’s injury, but the plaintiff’s own negligence played a role, too. Because



of the law applicable in this jurisdiction, the plaintiff will be entitled to only a partial recovery. Why?

**C.** If a defendant undertook the utmost care in trying to prevent the plaintiff's injury, but the plaintiff was injured anyway, which element of the prima facie case will fail?

**D.** Must a plaintiff prove reckless, wanton, or willful conduct on the part of the defendant to establish a prima facie case for negligence?

## 4. An Example of a Negligence Case

In the following case, you will be able to see how tort law works within a structure made of causes of action, elements, and affirmative defenses. The case does a great job, as well, of showing the different roles of the judge and the jury. It also shows the common-law method at work – past decisions being applied as precedent to help decide a new case presenting different facts.

### **Case: Georgetown v. Wheeler**

#### *Georgetown v. Wheeler*

District of Columbia Court of Appeals

September 19, 2013

75 A.3d 280. PRESIDENT and DIRECTORS OF GEORGETOWN COLLEGE, et al., Appellants, v. Crystal WHEELER, Appellee. Nos. 12–CV–671, 12–CV–672. Before WASHINGTON, Chief Judge, BLACKBURNE–RISGBY, Associate Judge, and BELSON, Senior Judge.

#### **Senior Judge JAMES BELSON:**

This is an appeal by a hospital and a physician from a large judgment against them in a medical malpractice case. Appellee Crystal Wheeler suffered various medical complications as the result of a Rathke’s cleft cyst behind her left eye, which went undetected for nearly ten years despite its appearance on a 1996 MRI report. Wheeler brought a medical-malpractice suit against the appellants, Marilyn McPherson-Corder, M.D., and the President and Directors of Georgetown College (“Georgetown”), claiming that their negligence caused the cyst to go undiscovered. Following a lengthy trial in Superior Court, a jury awarded Wheeler more than \$2.5 million in damages. Dr. McPherson-Corder and Georgetown now appeal, making four arguments: (1) the

jury's verdict was irreconcilably inconsistent, in that it found that the appellants' negligent failure to detect the cyst was a proximate cause of Wheeler's injuries, but also found that Wheeler's own failure to follow up on the 1996 MRI report, while negligent, was not a proximate cause; (2) the trial court erred by admitting Wheeler's proffered expert testimony, as her experts' conclusion that her cyst caused certain gastrointestinal problems has not been generally accepted in the medical scientific community; (3) Wheeler's counsel made improper and prejudicial statements during her closing argument; and (4) the jury's verdict was against the weight of the evidence.

We reject the appellants' first argument because they waived their objection to any alleged inconsistency by failing to raise the issue before the jury's dismissal. We find their second argument lacking, as it misstates our standard for the admission of expert testimony. We likewise find their third argument unpersuasive, as we see no impropriety in Wheeler's counsel's remarks. We do, however, find merit in one aspect of appellant's argument on the weight of the evidence, i.e., insofar as it relates to the jury's award of greater future medical costs than the evidence established. Because the jury awarded \$19,450 more than the record supports, we remand with instructions that the trial court amend its order to reduce the award in that amount. In all other respects, we affirm.

#### I.

Wheeler has long suffered from a litany of health problems, including serious gastrointestinal difficulties. At several times in her youth, she was hospitalized due to extreme nausea and vomiting. These problems persisted throughout her adolescence, and have lasted well into her adult life.

In 1996, Wheeler began attending college in southern Virginia. When she returned home to Washington, D.C., the following summer, she complained of severe headaches to

her then-pediatrician, Dr. Marilyn McPherson-Corder. Accordingly, Dr. McPherson-Corder referred her to a Georgetown University Hospital pediatric neurologist, Dr. Yuval Shafrir.

Dr. Shafrir saw Wheeler twice that summer, once on July 8, and again on August 5. During the first visit, Wheeler was also experiencing leg and ear pain. Because of these other maladies, Dr. Shafrir was unable to fully diagnose her headaches. He prescribed medication for her ear pain, which he concluded was the result of an ear infection, and asked her to come back in a few weeks when her symptoms cleared. When she returned, Dr. Shafrir diagnosed her headaches as migraines. Accordingly, he instructed her on migraine management, prescribed medication, and asked her to keep a headache diary. He also noticed “a new complete blurring of [Wheeler’s] right optic disk,” which prompted him to give her a prescription and tell her to arrange an EKG and an MRI through her primary-care physician.

The parties dispute exactly what Dr. Shafrir told Wheeler about these tests. At trial, Wheeler testified that Dr. Shafrir told her that both procedures were merely “precautionary,” and that he would contact her if there were “any concerns with the MRI.” Dr. Shafrir, however, testified that while he does not have any independent memory of Wheeler’s visits, he “always” told patients to contact him within three days of having an MRI if they did not hear from him. He also testified that whenever he ordered an MRI he would instruct the patient to come back for a follow-up visit. He said that this system, which placed the onus on the patient to follow up on test results, had “never” failed him. He testified that it would be “impossible” for him to track down every result independently, in light of the system he used for having patients get an MRI.

After Wheeler’s second visit, Dr. Shafrir wrote to Dr. McPherson-Corder, informing her that he asked Wheeler to undergo an MRI and EKG. Although he indicated that he

had already received the EKG results, which came back “normal,” he did not mention any MRI results. He also wrote that he would “like to see [Wheeler] again in my office during her next college vacation.”

Wheeler obtained a referral for the MRI from Dr. McPherson-Corder’s office. She then had the MRI performed at Georgetown Hospital on August 16. This MRI revealed a 3–5 mm suprasellar cyst behind her left eye – likely a Rathke’s pouch cyst. At the time, the cyst was not pressuring her pituitary gland, hypothalamus, or her optic chiasm. Neither Dr. McPherson-Corder nor Dr. Shafrir ever saw the results of this MRI during the time relevant to this proceeding.

Wheeler’s gastrointestinal issues troubled her throughout college. She continued to struggle with nausea, vomiting, and low appetite. After her graduation in 2000, her symptoms only worsened. She began losing weight, required at least four gastric-emptying procedures, and on several occasions had to be hospitalized. Eventually, her condition deteriorated to the point that her doctors were forced to insert a feeding tube. In 2003, she was diagnosed with gastroparesis: a condition that makes it more difficult for the stomach to empty properly.

Wheeler’s physical decline correlated with her deteriorating mental health. In 2002, she reported increasing depression and stress, which she attributed to her physical maladies. In 2003, her depression worsened, and she began to suffer from panic attacks. She was diagnosed with depressive disorder in 2004 and major depression in 2005. She was also diagnosed with a mood disorder.

Her medical problems came to a head when, in December 2005, she checked into George Washington University Hospital (“GWU”) complaining of vertigo and double vision. At that time, GWU doctors ordered an MRI. Like the 1996 MRI, this new test showed a cyst-like mass behind Wheeler’s left eye. The cyst had visibly grown, now measuring approximately 11 x 8.5 x 10 mm, and was causing “mass

effects” on Wheeler’s optic chiasm. Also at this time, GWU doctors diagnosed Wheeler with thyroid and adrenal deficiencies, as well as abnormally low levels of human growth hormone.

After her discharge from GWU Hospital, Wheeler saw Dr. Walter Jean, a neurosurgeon at Georgetown University Hospital. Dr. Jean asked Wheeler to undergo another MRI. While examining the results of this MRI in March 2006, Dr. Jean discovered the 1996 MRI. Comparing the two MRIs, he noted that Wheeler’s cyst had “progress[ed]” during the intervening decade, becoming “bigger.” Dr. Jean then performed surgery to remove the cyst, without complication.

Wheeler brought suit against Georgetown and Dr. McPherson-Corder on November 24, 2008. Over the course of a thirteen-day trial, both sides called several competing medical experts. Through her experts, Wheeler sought to establish that the cyst caused or contributed to her hormone deficiencies, gastroparesis, and mental-health issues. Her experts testified that, had the cyst been detected and removed earlier, she would have avoided these problems. The appellants’ experts vigorously disputed any such causal connection. The appellants also disputed Wheeler’s claim that Drs. McPherson-Corder and Shafrir breached their respective duties of care, argued that the doctors’ actions did not cause Wheeler’s injuries, and contested the extent of her damages. In addition, they maintained that, because Wheeler failed to follow up on the MRI results herself, she was contributorily negligent.

The jury ultimately returned a verdict in Wheeler’s favor. It found that the doctors breached their respective standards of care and that their breaches proximately caused Wheeler’s injuries. It also found that Wheeler was “contributorily negligent” for not “following Dr. Shafrir’s instructions to follow up with him after obtaining the MRI.” However, it concluded that her negligence was not a proximate cause of her injuries. It awarded her \$505,450.37 in past medical

expenses, \$800,000 in future medical expenses, and \$1,200,000 in noneconomic damages, for a total of \$2,505,450.37.

The verdict form's first three questions, and the jury's answers to them, read:

***VERDICT FORM***

1(a). Did Yuval Shafrir, M.D., as agent and employee of Georgetown University Hospital, breach the standard of care in his care and treatment of Crystal Wheeler? Yes *x*; No \_\_\_\_.

1(b). Did Marilyn McPherson-Corder, M.D. breach the standard of care in her care and treatment of Crystal Wheeler? Yes *x*; No \_\_\_\_.

**If you answered "NO" to BOTH Questions # 1(a) and # 1(b), STOP ANSWERING QUESTIONS HERE. THE FOREPERSON SHOULD SIGN AND DATE THIS FORM, AND NOTIFY THE JUDGE.**

**If you answered "YES" to Question # 1(a), please answer Question # 2(a).**

**If you answered "YES" to Question # 1(b), please answer Question # 2(b).**

2(a). Was the breach of the standard of care by Yuval Shafrir, M.D., as agent and employee of defendant Georgetown University Hospital, a proximate cause of injuries and damages to Crystal Wheeler? Yes *x*; No \_\_\_\_.

2(b). Was the breach of the standard of care by Marilyn McPherson-Corder, M.D. a proximate cause of injuries and damages to Crystal Wheeler? Yes *x*; No \_\_\_\_.

**If you answered "NO" to Questions # 2(a) and # 2(b), STOP ANSWERING QUESTIONS HERE. THE**

**FOREPERSON SHOULD SIGN AND DATE THIS FORM, AND NOTIFY THE JUDGE.**

**If you answered “YES” to Question # 2(a) or # 2(b), please proceed to Question # 3.**

3(a). Was Crystal Wheeler contributorily negligent in not following Dr. Shafrir’s instructions to follow up with him after obtaining the MRI? Yes *x*; No \_\_\_\_.

\* \* \* \*

3(b). Was Crystal Wheeler's negligence a proximate cause of her injuries and damages? Yes \_\_\_\_; No *x*.

Following trial, Georgetown and Dr. McPherson-Corder moved jointly for judgment notwithstanding the verdict, or in the alternative for a new trial. In support of this motion, they presented four arguments. First, they claimed that the jury could not rationally have concluded that the negligence of each of the physicians was a proximate cause of Wheeler’s injuries, but that her own negligent failure to follow up with Dr. Shafrir was not. Therefore, they argued, the jury’s verdict was irreconcilably inconsistent. Second, they asserted that there was no general acceptance in the medical scientific community of a causal connection between Rathke’s cleft cysts and gastroparesis. Accordingly, Wheeler’s expert testimony on that point had been inadmissible under *Dyas v. United States*, 376 A.2d 827 (D.C.1977), and *Frye v. United States*, 54 App.D.C. 46, 293 F. 1013 (1923). Third, they claimed that the jury’s verdict was against the weight of the evidence. Fourth and finally, they argued that Wheelers’ attorney improperly appealed to the jury’s passions during her closing argument.

The trial court denied their motion on April 27, 2012. This appeal followed.



## II.

On appeal, Georgetown and Dr. McPherson-Corder reiterate the arguments they presented in their post-trial motion. We address these arguments in turn, beginning with their claim that the verdict was irreconcilably inconsistent.

Georgetown and Dr. McPherson-Corder's first argument on appeal is essentially the same one they made to the trial court: that the jury could not rationally have concluded that their negligent conduct was a proximate cause of Wheeler's injuries, but that the contributory negligence it found Wheeler had committed was not a proximate cause. The trial court rejected this argument, finding that the verdict was not irreconcilable. We now affirm, but on alternate grounds. We do not reach the question of whether the verdict was irreconcilably inconsistent. Rather, we conclude that the appellants waived their objection by failing to raise the issue before the jury's discharge.

In general, a civil jury will return one of three types of verdicts. In many cases, this will be a standard general verdict. A general verdict is "[a] verdict by which the jury finds in favor of one party or the other, as opposed to resolving specific fact questions." *Wilbur v. Corr. Servs. Corp.*, 393 F.3d 1192, 1201 (11th Cir.2004) (quoting *Mason v. Ford Motor Co.*, 307 F.3d 1271, 1274 (11th Cir.2002)); accord BLACK'S LAW DICTIONARY 1696 (9th ed. 2009). The jury will also set damages, where appropriate. See *Mason, supra*, 307 F.3d at 1273. When the jury returns such a verdict, the basis for its decision is usually not stated explicitly; the jury simply announces a decision for one side or the other. See *Robinson v. Washington Internal Med. Assocs., P.C.*, 647 A.2d 1140, 1144 (D.C.1994) ("Because the jury returned a general verdict in favor of the defendants, we do not know whether the jury found that the defendants were not negligent (or that proximate causation was not proven) or that the plaintiff was contributorily negligent."); see also *Sinai v. Polinger Co.*, 498 A.2d 520, 523 n. 1 (D.C.1985).

In addition, Superior Court Civil Rule 49 authorizes trial courts to use two alternate verdict types. First, subsection (a) permits the trial court to submit to the jury “a special verdict in the form of a special written finding upon each issue of fact.” When returning such a “special verdict,” the jury answers only the specific factual questions posed by the court. *Trull v. Volkswagen of Am., Inc.*, 320 F.3d 1, 4 (1st Cir.2002) (describing special verdicts under the corresponding Fed.R.Civ.P. 49(a) as setting forth “written finding[s] upon each issue of fact”); *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1519 (6th Cir.1990) (“A special verdict is one in which the jury finds *all* the facts and then refers the case to the court for a decision on those facts.” (citation omitted)). Indeed, “[w]ith a special verdict, the jury’s sole function is to determine the facts; the jury needs no instruction on the law because the court applies the law to the facts as found by the jury.” *Mason, supra*, 307 F.3d at 1274.

Second, subsection (b) authorizes the court to “submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon [one] or more issues of fact the decision of which is necessary to a verdict.” Verdicts submitted under this section are “hybrid[s]” between standard general verdicts and special verdicts. *Mason, supra*, 307 F.3d at 1274; *see also Portage II, supra*, 899 F.2d at 1520 (“The general verdict with interrogatories may be viewed as a middle ground between the special verdict and the general verdict...”). They “permit[ ] a jury to make written findings of fact and to enter a general verdict,” *Lavoie v. Pacific Press & Shear Co.*, 975 F.2d 48, 53 (2d Cir.1992), and are useful when it is necessary to determine “specifically what the jury found.” *Sinai, supra*, 498 A.2d at 533 (Nebeker, J., concurring).

The distinction between these verdict types is crucial in this case, because a party waives its objection to any alleged inconsistency in a general verdict, with or without interrogatories, if it fails to object before the jury’s discharge. *See District of Columbia Hous. Auth., v. Pinkney*, 970 A.2d 854,

868 (D.C.2009) (“DCHA did not raise an objection based on inconsistent verdicts before the jury was excused, [after returning general verdict with special interrogatory,] and it therefore has waived this argument.”); *Estate of Underwood v. Nat’l Credit Union Admin.*, 665 A.2d 621, 645 (D.C.1995) (explaining that Rule 49, “particularly section (b), countenances a waiver of objections to inconsistencies in the verdict that are not pointed out before the jury is discharged”). That rule, however, may not apply to special verdicts. See *Mason, supra*, 307 F.3d at 1274 (“[I]f the jury rendered inconsistent general verdicts, failure to object timely waives that inconsistency as a basis for seeking retrial; inconsistent special verdicts, on the other hand, may support a motion for a new trial even if no objection was made before the jury was discharged.”).

In this case, the verdict form itself did not specify the type of verdict to be rendered. That form, labeled simply “Verdict,” first directed the jurors to determine whether Dr. Shafrir or Dr. McPherson-Corder breached the applicable standards of care in his or her care of and treatment of Wheeler. If the jurors answered either question with a “yes,” the form instructed them to determine whether the breach by either or both doctors was a proximate cause of injuries and damages to Wheeler. If the jurors answered “yes” again, the form instructed them to then determine whether Wheeler was “contributorily negligent in not following Dr. Shafrir’s instructions to follow up with him after obtaining the MRI.” Then, if the jurors found that she was, the form required them to determine whether Wheeler’s “negligence [was] a proximate cause of her injuries and damages.”

The appellants do not argue that the verdict form was facially inconsistent because it allowed the jury to reach different conclusions as to Wheeler’s “contributory negligence,” a concept which ordinarily encompasses negligence and proximate cause. Indeed, it is not clear they could do so, given that appellants’ counsel took primary responsibility for

drafting the verdict form. *See Preacher v. United States*, 934 A.2d 363, 368 (D.C.2007) (“Generally, the invited error doctrine precludes a party from asserting as error on appeal a course that he or she has induced the trial court to take.”).

Appellants could have avoided any potential confusion on this point by simply phrasing the verdict form to ask only whether Wheeler had been negligent by failing to follow Dr. Shafir's instructions (as opposed to *contributorily* negligent), and whether her negligence was a proximate cause of her injuries. Such phrasing would have tracked the language of the applicable Standardized Instructions. *See* Standardized Civil Jury Instructions for the District of Columbia, No. 5–15 (2013 rev. ed.) (“The defendant alleges that the plaintiff was negligent. The defendant is not liable for the plaintiff's injuries if the plaintiff's own negligence is a proximate cause of [his] [her] injuries.”).

The form also called on the jurors to consider the appellants' assumption-of-the-risk defense. Finally, if the jurors ultimately found in Wheeler's favor, the form required them to award damages.

The verdict form used in this case did not call for a general verdict of the most basic type. In the past, however, we have at times referred to similar verdicts as general. *See Nimetz v. Cappadona*, 596 A.2d 603, 606 (D.C.1991) (describing as “general” a verdict form that “require[ed] the jury to make separate findings only on negligence, proximate cause, and the award of damages for each plaintiff”). *Accord Portage II*, *supra*, 899 F.2d at 1518, 1522 (construing as “general” a verdict form that asked the jury whether the defendant was negligent and whether the plaintiff was contributorily negligent); *Pinkney*, *supra*, 970 A.2d at 868–69 (holding that appellant waived its objection to inconsistency in remarkably similar verdict by failing to raise it before jury's discharge). Nevertheless, this verdict does not comfortably fit the accepted definition of a “general” verdict, because it required the jurors to expressly resolve at least one discrete factual

issue: whether Wheeler “follow[ed] Dr. Shafrir’s instructions to follow up with him after obtaining the MRI.” *See, e.g., Wilbur, supra*, 393 F.3d at 1201. Thus, although this verdict form was similar to others we have called “general,” it was not a general verdict in its most basic form.

But it is likewise unclear that the form called for a Rule 49(b) general verdict with interrogatories. True, one portion of the form suggests such a verdict, because, as noted above, the jury answered at least one question regarding a discrete factual issue (i.e., whether Wheeler failed to follow Dr. Shafrir’s instructions), while still deciding the ultimate issue of liability. *See Portage II, supra*, 899 F.2d at 1521 (holding that verdict form that asked jury several factual questions, but also required it to determine ultimate liability, called for a general verdict with interrogatories). But the trial court here did not indicate that it was exercising its authority under Rule 49(b). Rather, it used a form simply labeled “Verdict.” And that form did not pose any purely factual questions. Instead, each question required the jury to resolve both factual questions and legal issues. *But cf. Lavoie, supra*, 975 F.2d at 54 (finding verdict form was a general verdict with interrogatories despite the “unusual nature” of the form used).

The issues before us, however, do not require us to choose between labeling this verdict a general verdict or a Rule 49(b) general verdict with interrogatories, because we can clearly determine that it was not a special verdict – the only type of verdict to which a party might be permitted to raise an inconsistency objection after the jury’s discharge. Special verdicts do not require the jury to determine ultimate liability, or indeed reach any legal conclusions whatsoever. *Mason, supra*, 307 F.3d at 1274 (“[A] Rule 49(a) special verdict is a verdict by which the jury finds the facts particularly, and then submits to the court the questions of law arising on them.” (internal quotation marks omitted)). Indeed, when a trial court uses a special-verdict form, it generally will not instruct the jury on the law at all, because the jury will not be called

upon to apply the law. *See Bills v. Aseltine*, 52 F.3d 596, 605 (6th Cir.1995) (holding that verdict was general where the jury instructions “discussed legal matters in detail”); *Portage II, supra*, 899 F.2d at 1521. In other words, when rendering a special verdict, the jury *only* finds specific facts. BLACK’S LAW DICTIONARY 1697 (9th ed. 2009) (defining “special verdict” as “[a] verdict in which the jury makes findings *only* on factual issues submitted to them by the judge” (emphasis added)).

But here, the jury did much more. Not only did the jury determine ultimate liability, it explicitly resolved several mixed legal and factual issues along the way, including negligence, proximate cause, and assumption of the risk. *Cf. Jarvis v. Ford Motor Co.*, 283 F.3d 33, 56 (2d Cir.2002) (holding that Federal Rule 49(a), governing special verdicts, does not apply when “the jury is required to make determinations not only of issues of fact but of ultimate liability”). Recognizing that the jury would be applying law to facts, the trial court thoroughly instructed it on the applicable legal principles. *Cf. Portage II, supra*, 899 F.2d at 1521 (“If the written questions submitted to the jury were truly special verdicts, no instruction on the law, and certainly not one as detailed would have been given to the jury.”). With these facts in mind, we can comfortably conclude that, whatever type of verdict this was, it was not a special verdict.

Accordingly, because the verdict was not special, it was either a standard general verdict or a Rule 49(b) general verdict with interrogatories. To preserve an objection to an alleged inconsistency in either of these types, a party must raise the argument before the jury is discharged. Here, appellants failed to do so. Accordingly, they waived their objection to any inconsistency in the verdict. *See, e.g., Underwood, supra*, 665 A.2d at 645; *Pinkney, supra*, 970 A.2d at 868.

### III.

The appellants next argue that the trial court erred by permitting Wheeler's expert witnesses to testify that there was a causal link between her Rathke's cleft cyst and her gastroparesis. They assert that Wheeler failed to demonstrate that such a causal relationship is generally accepted in the medical scientific community.

In general, "[t]he trial court has broad discretion to admit or exclude expert testimony." *Russell v. United States*, 17 A.3d 581, 585 (D.C.2011). But this discretion is not unlimited. Before permitting expert testimony, the trial court must determine that the proffered testimony meets three threshold requirements:

- (1) the subject matter must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman; (2) the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth; and (3) expert testimony is inadmissible if the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.

*Id.* at 586 (quoting *Dyas v. United States*, 376 A.2d 827, 832 (D.C.1977)) (original emphasis omitted) (internal quotation marks omitted). Here, appellants acknowledge that Wheeler's experts satisfied the first two requirements. They argue only that the experts' testimony failed to meet the third requirement: that the "state of the pertinent art or scientific knowledge" permits the expert to state "a reasonable opinion." Specifically, they claim that "Wheeler's experts were required to demonstrate that the medical community recognizes and supports their conclusion that there is a causal

link between a Rathke's cleft cyst and gastroparesis or hormonal insufficiency and gastroparesis."

This argument misstates our admissibility standard. The third *Dyas* requirement focuses not on "the acceptance of a particular ... conclusion derived from [the] methodology," but rather on "the acceptance of the methodology itself." *Minor v. United States*, 57 A.3d 406, 420–21 (D.C.2012) (quoting *United States v. Jenkins*, 887 A.2d 1013, 1022 (D.C.2005)). In other words, "satisfaction of the third *Dyas* criterion begins – and ends – with a determination of whether there is general acceptance of a particular scientific methodology, not an acceptance, beyond that, of particular study results based on that methodology." *Burgess v. United States*, 953 A.2d 1055, 1063 n. 12 (D.C.2008) (quoting *Ibn-Tamas v. United States*, 407 A.2d 626, 638 (D.C.1979)).

Here, the appellants challenge Wheeler's experts' "conclusion[s]," not their methodology. This challenge fails, because it "focuse[s] on the wrong question." *Minor, supra*, 57 A.3d at 420. At trial, Wheeler's experts testified that they based their conclusions on case studies and medical literature, which listed endocrine conditions like hypothyroidism as a cause of gastroparesis. The appellants contested these conclusions during trial, and do so again on appeal. But they have offered no argument that reliance on relevant medical literature, which according to at least one expert dates back to the 1970s, as well as case studies appearing in that literature, is not a "generally accepted" method for forming an opinion regarding medical causation. Accordingly, we find the appellants' challenge unpersuasive.

#### IV.

Next, the appellants argue that the trial court should have ordered a new trial based on certain comments Wheeler's counsel made during closing arguments. Specifically, they point to counsel's statements regarding the applicable



standard of care, which they characterize as an improper send-a-message argument:

You know, the jury system in our country exists to protect the community. And in this medical malpractice case, you will decide what standards doctors must meet in the community when they provide care and treatment to patients. You will decide what standards doctors must meet to protect patient health and safety.... Remember, the standards ... in the medical community exist for a reason. They have been developed by doctors for doctors. They exist to promote patient safety. They exist to protect patient health. They're to provide a medical care system that above all prevents harm that's avoidable. And what these standards are in this community is what you will be deciding when you go back to the jury room.

This court will reverse on the basis of improper comments by counsel only when it is likely that the comments left “the jurors with wrong or erroneous impressions, which were likely to mislead, improperly influence, or prejudice them to the disadvantage of the [defendant].” *Psychiatric Inst. of Wash. v. Allen*, 509 A.2d 619, 629 (D.C.1986) (quoting *Simpson v. Stein*, 52 App.D.C. 137, 139, 284 F. 731, 733 (1922)). Because it has the advantage of observing the arguments as they occurred, the trial court is in a better position than this court to determine whether counsel’s statements were prejudicial. *Scott v. Crestar Fin. Corp.*, 928 A.2d 680, 690 (D.C.2007). Accordingly, we afford the trial court’s conclusions on that count broad deference, and will sustain its ruling so long as it is “rational.” *Id.*

Here, the trial court concluded that counsel’s statements “related to the determination the jury was being asked to make regarding the standard of care,” and found “no impropriety in the closing argument.” Based on our own

reading of counsel's comments, we conclude that the trial court's conclusion was "rational." *Id.* Counsel merely explained the jury's role in determining the applicable standard of care. She did not urge the jury to penalize the appellants based on irrelevant considerations or to return a verdict that would "send a message." Accordingly, we will defer to the trial court's judgment.

## V.

Finally, the appellants argue that the verdict was against the weight of the evidence. Although their argument is multifaceted,\* we focus in particular on their claim that the evidence did not support the jury's award of \$800,000 in future medical costs. Specifically, the appellants argue that the jury awarded \$19,450 more than Wheeler's damages expert testified was necessary, and that this additional award was based on pure speculation. We agree.

\* The appellants also make a broader weight-of-the-evidence argument, contending that the jury could not rationally have credited Wheeler's experts over their own. We do not think it necessary to restate the particulars of that argument here. We note only that it would not be proper for this court to usurp the jury's factfinding role by reweighing the evidence in a manner more to the appellants' liking. "When the case turns on disputed factual issues and credibility determinations, the case is for the jury to decide." *Durphy v. Kaiser Found. Health Plan of Mid-Atlantic States, Inc.*, 698 A.2d 459, 465 (D.C.1997); *see also Burke v. Scaggs*, 867 A.2d 213, 217 (D.C.2005) (holding that judgment as a matter of law is permissible "only if it is clear that the plaintiff has not established a *prima facie* case" (quoting *Haynesworth v. D.H. Stevens Co.*, 645 A.2d 1095, 1097 (D.C.1994))).

In general, we do not require plaintiffs to prove their damages “precisely” or “with mathematical certainty.” *District of Columbia v. Howell*, 607 A.2d 501, 506 (D.C.1992) (quoting *Garcia v. Llerena*, 599 A.2d 1138, 1142 (D.C.1991)). Nevertheless, plaintiffs must provide “some reasonable basis upon which to estimate damages.” *Id.* The jury may not award damages based solely on speculation. *Zoerb v. Barton Protective Servs.*, 851 A.2d 465, 470 (D.C.2004). Specifically in the context of future-medical-expenses awards, we have held that where there is “no basis upon which the jury could have reasonably calculated or inferred the cost of [the plaintiff’s] future medical expenses,” the trial court may not “allow the jury to speculate in this area of damages.” *Romer v. District of Columbia*, 449 A.2d 1097, 1100 (D.C.1982).

Here, Wheeler’s damages expert, economist Dr. Richard Lurito, testified that a lump-sum payment of \$780,550 would fully compensate Wheeler for her future medical costs. He reached this figure by looking at historical trends, projected treatment costs, and estimated inflation in the general economy. He testified that he used a 3.75% after-tax discount rate, which he described as “reasonable and conservative.” He adopted this rate based on current market conditions, accounting for current returns on short-and long-term government bonds, and adjusting for relatively low present interest rates. Then, during closing arguments, Wheeler’s counsel urged the jury to award Wheeler \$780,550 – the full amount Dr. Lurito recommended. But the jury was ultimately more generous, rounding Dr. Lurito’s figure up and awarding Wheeler \$800,000 for future medical expenses – a sum \$19,450 in excess of the amount Dr. Lurito indicated was necessary.

Wheeler points us to no record evidence upon which the jury could have reasonably awarded this additional \$19,450, nor can we discern any. Wheeler argues that the jury could have inferred that a larger sum would be necessary based on Dr. Lurito’s description of his estimate as “conservative.” But

there was no basis in the evidence for the jury to make such an inference. Although Dr. Lurito described in detail the factors he considered in his calculations, he did not testify what a more pessimistic forecast would have entailed, nor did he indicate how much additional money would be necessary under less-favorable circumstances. Accordingly, the jury could only speculate that Wheeler might require an extra \$19,450 to cover her medical costs. *Cf. Zoerb, supra*, 851 A.2d at 471 (“[E]ven if we were to conclude – which we do not – that generalizations such as ‘the sooner the better,’ without evidence as to how much sooner was how much better, were sufficient to preclude the direction of a verdict as to liability, the jury would face an impossible task in attempting to make a rational award of damages.”).

The jury is not permitted to award damages based on such speculation. *See Romer, supra*, 449 A.2d at 1100. Because the award of an additional \$19,450 was not supported by the evidence, the trial court should have granted a remittitur in that amount. *See Duff v. Werner Enters., Inc.*, 489 F.3d 727, 730–31 (5th Cir.2007) (ordering trial court to grant remittitur where future-medical-costs award exceeded “the ‘maximum amount calculable from the evidence’” (quoting *Carlton v. H.C. Price Co.*, 640 F.2d 573, 578 (5th Cir.1981))). Accordingly, we remand with instructions for the trial court to amend its order, reducing the future-medical-expenses award by \$19,450 to accord with the evidence.

So ordered.

**Check-Your-Understanding Questions About**  
*Georgetown v. Wheeler*

- A. What is the difference between the verdict and the judgment?
- B. What is the procedural posture of the case?
- C. The trial court’s rulings on what motions are being reviewed?
- D. What is an example of a common-law doctrine that is applied?

- E. What is an example of a rule of procedure that is applied?
- F. What is an example of a standard of review that is applied?

## 5. When and to Whom is a Duty of Care Owed

“A danger foreseen is half-avoided.”  
– Cheyenne Proverb

### A. Introduction

The first element that must be established by a plaintiff in proving a negligence case is that the defendant owed the plaintiff a duty of care. If the defendant did not owe the plaintiff a duty of care, then even if the defendant was careless and caused injury to the plaintiff, there will be no recovery in negligence.

Suppose someone asks you for one of your kidneys, explaining that otherwise they will die. In terms of negligence doctrine, you do not owe this person a duty to hand over a kidney. And even if the person dies as a result of not getting one of your kidneys, there is no prima facie case against you for negligence. You can probably intuit that there is not a good cause of action here, but it is instructive to consider the explicit reason. Check off the elements: There is an injury. There is causation. Those are not lacking. What *is* lacking is the duty of care.

Now, suppose you are carelessly operating a rocket-powered tricycle and, thanks to your lack of care, you careen out of control, hitting and injuring a pedestrian who was walking on a sidewalk. You owed the pedestrian a duty of care, and you breached that duty. And that breach caused an injury. Thus, the pedestrian will be able to establish a prima facie case for negligence. All the elements are in place.

In this chapter, the key question is when and to whom is a duty of care owed. In other words: Is there a duty? The question of what is required by a duty of care – in other words, just how careful do you have to be – is a question for the next chapter, in which we will talk about *breach of duty*.

Whether or not there is a duty of care is generally considered a *question of law*, meaning it is a matter for the judge to decide. Thus, the doctrine of duty of care can be used to prevent a jury from hearing a case that might otherwise result in a substantial award of damages.

### **B. The Essential Concept: Foreseeability**

The essential concept in defining the duty of care in negligence is *foreseeability*. A defendant is said to owe a duty of care to all foreseeable plaintiffs for all foreseeable harm.

#### **Case: Weirum v. RKO**

In this case there is carelessness, injury, actual and proximate causation. The only open question is whether a duty of care is owed.

#### *Weirum v. RKO General, Inc.*

Supreme Court of California

August 21, 1975

15 Cal.3d 40. RONALD A. WEIRUM et al., Plaintiffs and Appellants, v. RKO GENERAL, INC., Defendant and Appellant; MARSHA L. BAIME, Defendant and Respondent. L.A. No. 30452. In Bank. Opinion by Mosk, J., expressing the unanimous view of the court. Wright, C. J., McComb, J., Tobriner, J., Sullivan, J., Clark, J., and Richardson, J., concurred.

#### **Justice STANLEY MOSK:**

A rock radio station with an extensive teenage audience conducted a contest which rewarded the first contestant to locate a peripatetic disc jockey. Two minors driving in separate automobiles attempted to follow the disc jockey's automobile to its next stop. In the course of their pursuit, one of the minors negligently forced a car off the highway, killing its sole occupant. In a suit filed by the surviving wife and children of the decedent, the jury rendered a verdict against the radio station. We now must determine whether the station owed decedent a duty of due care.

The facts are not disputed. Radio station KHJ is a successful Los Angeles broadcaster with a large teenage following. At the time of the accident, KHJ commanded a 48 percent plurality of the teenage audience in the Los Angeles area. In contrast, its nearest rival during the same period was able to capture only 13 percent of the teenage listeners. In order to attract an even larger portion of the available audience and thus increase advertising revenue, KHJ inaugurated in July of 1970 a promotion entitled “The Super Summer Spectacular.” The “spectacular,” with a budget of approximately \$40,000 for the month, was specifically designed to make the radio station “more exciting.” Among the programs included in the “spectacular” was a contest broadcast on July 16, 1970, the date of the accident.

On that day, Donald Steele Revert, known professionally as “The Real Don Steele,” a KHJ disc jockey and television personality, traveled in a conspicuous red automobile to a number of locations in the Los Angeles metropolitan area. Periodically, he apprised KHJ of his whereabouts and his intended destination, and the station broadcast the information to its listeners. The first person to physically locate Steele and fulfill a specified condition received a cash prize. “The conditions varied from the giving of a correct response to a question to the possession of particular items of clothing.” In addition, the winning contestant participated in a brief interview on the air with “The Real Don Steele.” The following excerpts from the July 16 broadcast illustrate the tenor of the contest announcements:

9:30 and The Real Don Steele is back on his feet again with some money and he is headed for the Valley. Thought I would give you a warning so that you can get your kids out of the street.

The Real Don Steele is out driving on – could be in your neighborhood at any time and he’s



got bread to spread, so be on the lookout for him.

The Real Don Steele is moving into Canoga Park – so be on the lookout for him. I'll tell you what will happen if you get to The Real Don Steele. He's got twenty-five dollars to give away if you can get it ... and baby, all signed and sealed and delivered and wrapped up.

10:54 – The Real Don Steele is in the Valley near the intersection of Topanga and Roscoe Boulevard, right by the Loew's Holiday Theater – you know where that is at, and he's standing there with a little money he would like to give away to the first person to arrive and tell him what type car I helped Robert W. Morgan give away yesterday morning at KHJ. What was the make of the car. If you know that, split. Intersection of Topanga and Roscoe Boulevard – right nearby the Loew's Holiday Theater – you will find The Real Don Steele. Tell him and pick up the bread.

In Van Nuys, 17-year-old Robert Sentner was listening to KHJ in his car while searching for “The Real Don Steele.” Upon hearing that “The Real Don Steele” was proceeding to Canoga Park, he immediately drove to that vicinity. Meanwhile, in Northridge, 19-year-old Marsha Baime heard and responded to the same information. Both of them arrived at the Holiday Theater in Canoga Park to find that someone had already claimed the prize. Without knowledge of the other, each decided to follow the Steele vehicle to its next stop and thus be the first to arrive when the next contest question or condition was announced.

For the next few miles the Sentner and Baime cars jockeyed for position closest to the Steele vehicle, reaching speeds up to 80 miles an hour. “It is not contended that the Steele vehicle at any time exceeded the speed limit.” About a mile

and a half from the Westlake offramp the two teenagers heard the following broadcast: “11:13 – The Real Don Steele with bread is heading for Thousand Oaks to give it away. Keep listening to KHJ .... The Real Don Steele out on the highway – with bread to give away – be on the lookout, he may stop in Thousand Oaks and may stop along the way .... Looks like it may be a good stop Steele – drop some bread to those folks.”

The Steele vehicle left the freeway at the Westlake offramp. Either Baime or Sentner, in attempting to follow, forced decedent’s car onto the center divider, where it overturned. Baime stopped to report the accident. Sentner, after pausing momentarily to relate the tragedy to a passing peace officer, continued to pursue Steele, successfully located him and collected a cash prize.

Decedent’s wife and children brought an action for wrongful death against Sentner, Baime, RKO General, Inc. as owner of KHJ, and the maker of decedent’s car. Sentner settled prior to the commencement of trial for the limits of his insurance policy. The jury returned a verdict against Baime and KHJ in the amount of \$300,000 and found in favor of the manufacturer of decedent’s car. KHJ appeals from the ensuing judgment and from an order denying its motion for judgment notwithstanding the verdict. Baime did not appeal.

The primary question for our determination is whether defendant owed a duty to decedent arising out of its broadcast of the giveaway contest. The determination of duty is primarily a question of law. It is the court’s “expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.” (Prosser, *Law of Torts* (4th ed. 1971) pp. 325-326.) Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall. (Prosser, *Palsgraf Revisited* (1953) 52

MICH. L. REV. 1, 15.) While the question whether one owes a duty to another must be decided on a case-by-case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct. However, foreseeability of the risk is a primary consideration in establishing the element of duty. Defendant asserts that the record here does not support a conclusion that a risk of harm to decedent was foreseeable.

While duty is a question of law, foreseeability is a question of fact for the jury. The verdict in plaintiffs' favor here necessarily embraced a finding that decedent was exposed to a foreseeable risk of harm. It is elementary that our review of this finding is limited to the determination whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.

We conclude that the record amply supports the finding of foreseeability. These tragic events unfolded in the middle of a Los Angeles summer, a time when young people were free from the constraints of school and responsive to relief from vacation tedium. Seeking to attract new listeners, KHJ devised an "exciting" promotion. Money and a small measure of momentary notoriety awaited the swiftest response. It was foreseeable that defendant's youthful listeners, finding the prize had eluded them at one location, would race to arrive first at the next site and in their haste would disregard the demands of highway safety.

Indeed, "The Real Don Steele" testified that he had in the past noticed vehicles following him from location to location. He was further aware that the same contestants sometimes appeared at consecutive stops. This knowledge is not rendered irrelevant, as defendant suggests, by the absence of any prior injury. Such an argument confuses foreseeability with hindsight, and amounts to a contention that the injuries of the first victim are not compensable. "The mere fact that a particular kind of an accident has not happened before does

not ... show that such accident is one which might not reasonably have been anticipated.” (*Ridley v. Grifall Trucking Co.* (1955) 136 Cal.App.2d 682, 686.) Thus, the fortuitous absence of prior injury does not justify relieving defendant from responsibility for the foreseeable consequences of its acts.

It is of no consequence that the harm to decedent was inflicted by third parties acting negligently. Defendant invokes the maxim that an actor is entitled to assume that others will not act negligently. This concept is valid, however, only to the extent the intervening conduct was not to be anticipated. If the likelihood that a third person may react in a particular manner is a hazard which makes the actor negligent, such reaction whether innocent or negligent does not prevent the actor from being liable for the harm caused thereby. Here, reckless conduct by youthful contestants, stimulated by defendant’s broadcast, constituted the hazard to which decedent was exposed.

It is true, of course, that virtually every act involves some conceivable danger. Liability is imposed only if the risk of harm resulting from the act is deemed unreasonable – i.e., if the gravity and likelihood of the danger outweigh the utility of the conduct involved.

We need not belabor the grave danger inherent in the contest broadcast by defendant. The risk of a high speed automobile chase is the risk of death or serious injury. Obviously, neither the entertainment afforded by the contest nor its commercial rewards can justify the creation of such a grave risk. Defendant could have accomplished its objectives of entertaining its listeners and increasing advertising revenues by adopting a contest format which would have avoided danger to the motoring public.

Defendant’s contention that the giveaway contest must be afforded the deference due society’s interest in the First Amendment is clearly without merit. The issue here is civil

accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.

We are not persuaded that the imposition of a duty here will lead to unwarranted extensions of liability. Defendant is fearful that entrepreneurs will henceforth be burdened with an avalanche of obligations: an athletic department will owe a duty to an ardent sports fan injured while hastening to purchase one of a limited number of tickets; a department store will be liable for injuries incurred in response to a “while-they-last” sale. This argument, however, suffers from a myopic view of the facts presented here. The giveaway contest was no commonplace invitation to an attraction available on a limited basis. It was a competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit. In the assertedly analogous situations described by defendant, any haste involved in the purchase of the commodity is an incidental and unavoidable result of the scarcity of the commodity itself. In such situations there is no attempt, as here, to generate a competitive pursuit on public streets, accelerated by repeated importuning by radio to be the very first to arrive at a particular destination. Manifestly the “spectacular” bears little resemblance to daily commercial activities.

The judgment and the orders appealed from are affirmed.

### **Questions to Ponder About *Weirum v. RKO***

- A.** Does the duty-of-care concept work well to provide an outer boundary for what is recoverable in negligence? What might you replace it with?
- B.** The court held that the accident was foreseeable. If it was foreseeable, why do you think the radio station personnel staged the contest? Were they greedy? Were they ignorant? Were they in denial?

Or does “foreseeable” mean something different for the court than it does for an individual? If so, should it?

C. How could KHJ have changed the contest to avoid liability?

### **Some Historical Notes About *Weirum v. RKO***

**A. Mosk’s legacy:** Justice Mosk is the namesake of the Stanley M. Mosk Courthouse, the main courthouse of the Los Angeles County Superior Court for civil litigation. (The Clara Shortridge Foltz courthouse, site of many famous celebrity criminal trials, is a couple of blocks to the east.)

**B. Boss radio:** KHJ was a legendary AM radio station of the Top-40 format. Most notably, KHJ was the progenitor of the “Boss Radio” style that spread throughout the nation in the early 1970s. The Everclear song “AM Radio,” released in 2000, pays homage to KHJ and even includes a KHJ jingle at the beginning. KHJ was a launching pad for many famous radio personalities, including Rick Dees, Shadoe Stevens, and Charlie Tuna.

Don Steele was one of the most important personalities behind the boss sound, and he is considered to have been one of the greatest personalities in the history of L.A. radio. To really understand Steele’s boss-jock style, you need to listen to tapes of his radio shows from the early 70s. To say that he was extremely energetic is putting it mildly. His patter commonly included rapid-fire nonsensical rhymes and frequent outbursts of “Yeah, baby!” Steele died in 1997 at age 61 of lung cancer.

### **Doctrinal Wiggle Room**

One way to think about the elements of a negligence case is that they are the law’s way of providing an analytical structure that will pare down the universe of possible negligence matters into a subset of cases where awarding compensation is in tune with our basic intuitions of fairness. But when you try to construct simply stated rules that will both correspond with a sense of justice and work in any context, you run into the inevitable need for wiggle room. In tort law, the elements of duty of care and proximate causation do the most to provide that wiggle room, with duty of care being primarily

the domain of judge, and proximate causation being generally the province of the jury.

The duty of care can be defined as an obligation for people to exercise reasonable care to avoid foreseeable harm to others. It is a frustratingly fuzzy definition. So, if you feel like you are having a hard time understanding the concept of duty, do not worry. It probably just means that you are reading closely and thinking deeply. The duty-of-care standard is vague out of necessity.

The definition of the duty of care is probably less important than the way it is employed by courts. Justice Mosk describes the role of the duty of care with considerable candor when he says, “It is the court’s ‘expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.’”

### **Duty of Care in Entertainment Industry Cases**

*Weirum v. RKO* is frequently cited in negligence cases where the entertainment media is blamed for death or injury. In other cases, however, plaintiffs have not tended to fare as well as the Weirum family. For example, in *McCullum v. CBS, Inc.*, 202 Cal.App.3d 989 (1988), a 19-year-old killed himself with a gun after listening to the Ozzy Osbourne song, “Suicide Solution.” The song includes the lyrics “Suicide is the only way out” and “Get the gun and try it. Shoot, shoot, shoot ...” The California Court of Appeals rejected the plaintiffs’ attempt to use *Weirum v. RKO* to show a duty of care. While acknowledging *Weirum*’s broad language, the court found the case to be of limited applicability, concluding that while the accident in *Weirum* was foreseeable, the Osbourne fan’s suicide was not.

The court also noted the separation in time involved in recorded music versus live radio: “Osbourne’s music and lyrics had been recorded and produced years before. There was not a ‘real time’ urging of listeners to act in a particular manner. There was no dynamic interaction with, or live importuning of, particular listeners.” Emphasizing the policy implications of their decision, the court added, “[I]t is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their

creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. Such a burden would quickly have the effect of reducing and limiting artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense, provocation and controversy.”

### **Problem: WZX Cash Patrol**

Suppose you are an attorney for radio station WZX. The station is considering staging a “Cash Patrol” contest in which a disc jockey will drive around the city in an unmarked vehicle looking for cars with a WZX bumper sticker. When the disc jockey has found such a car, the disc jockey will go on the air via a remote hookup, describe the car she or he is following, and ask that car to pull over to receive a \$1,000 cash prize. How would you advise WZX on its liability risk? Should they do the contest or pull the plug? Does it matter that WZX’s sister station in another city tried the promotion and it resulted in a ratings spike that substantially increased station revenues?

### **A Quick Note About Respondeat Superior**

You probably are somewhat familiar with a doctrine called *respondeat superior* – even if you’ve never heard those particular words. Respondeat superior is Latin for “let the master respond.” It’s the doctrine that causes an employer to be liable for the torts of an employee committed in the course of and within the scope of their employment. It’s hard to imagine the world of torts without it. If it weren’t for respondeat superior, companies would rarely be liable. And if there were no companies and only employees to sue, few tort suits would make economic sense to bring in the first place, since you can’t collect a judgment from someone who lacks the means to pay it.

Respondeat superior is at work behind the scenes of the vast majority of torts lawsuits. The doctrine is discussed in somewhat more detail in Chapter 26, where it is included in a discussion of various forms of vicarious liability, of which respondeat superior is just one. But the use of the doctrine is so pervasive, it’s worth going slightly out of



order in your study of tort law to learn respondeat superior's name and to put a face with it. (Done and done.)

**Case: Kubert v. Colonna**

This case explores the duty of care in the context of texting while driving, a leading-edge area in negligence law.

*Kubert v. Colonna*

Superior Court of New Jersey, Appellate Division  
August 27, 2013

\_\_\_ A.3d \_\_\_, 2013 WL 4512313 Linda KUBERT and David Kubert, Plaintiffs–Appellants, v. Kyle BEST, Susan R. Best, Executrix of the Estate of Nickolas J. Best, Deceased, Defendants, and Shannon Colonna, Defendant–Respondent. Before Judges ASHRAFI, ESPINOSA and GUADAGNO. Espinosa, J.A.D., filed a concurring opinion, not reproduced here.

**Judge VICTOR ASHRAFI:**

Plaintiffs Linda and David Kubert were grievously injured by an eighteen-year-old driver who was texting while driving and crossed the center-line of the road. Their claims for compensation from the young driver have been settled and are no longer part of this lawsuit. Plaintiffs appeal the trial court's dismissal of their claims against the driver's seventeen-year-old friend who was texting the driver much of the day and sent a text message to him immediately before the accident.

We must determine as a matter of civil common law whether one who is texting from a location remote from the driver of a motor vehicle can be liable to persons injured because the driver was distracted by the text. We hold that the sender of a text message can potentially be liable if an accident is caused by texting, but only if the sender knew or had special reason to know that the recipient would view the text while driving and thus be distracted.

In this appeal, we must also decide whether plaintiffs have shown sufficient evidence to defeat summary judgment in favor of the remote texter. We conclude they have not. We affirm the trial court's order dismissing plaintiffs' complaint against the sender of the text messages, but we do not adopt the trial court's reasoning that a remote texter does not have a legal duty to avoid sending text messages to one who is driving.

#### I.

The Kuberts' claims against defendant Shannon Colonna, the teenage sender of the texts, were never heard by a jury. Since this appeal comes to us from summary judgment in favor of Colonna, we view all the evidence and reasonable inferences that can be drawn from the evidence favorably to plaintiffs, the Kuberts.

On the afternoon of September 21, 2009, David Kubert was riding his motorcycle, with his wife, Linda Kubert, riding as a passenger. As they came south around a curve on Hurd Street in Mine Hill Township, a pick-up truck being driven north by eighteen-year-old Kyle Best crossed the double center line of the roadway into their lane of travel. David Kubert attempted to evade the pick-up truck but could not. The front driver's side of the truck struck the Kuberts and their motorcycle. The collision severed, or nearly severed, David's left leg. It shattered Linda's left leg, leaving her fractured thighbone protruding out of the skin as she lay injured in the road.

Best stopped his truck, saw the severity of the injuries, and called 911. The time of the 911 call was 17:49:15, that is, fifteen seconds after 5:49 p.m. Best, a volunteer fireman, aided the Kuberts to the best of his ability until the police and emergency medical responders arrived. Medical treatment could not save either victim's leg. Both lost their left legs as a result of the accident.

After the Kuberts filed this lawsuit, their attorney developed evidence to prove Best's activities on the day of the accident.

In September 2009, Best and Colonna were seeing each other socially but not exclusively; they were not boyfriend and girlfriend. Nevertheless, they texted each other many times each day. Best's cell phone record showed that he and Colonna texted each other sixty-two times on the day of the accident, about an equal number of texts originating from each. They averaged almost fourteen texts per hour for the four-and-a-half-hour, non-consecutive time-span they were in telephone contact on the day of the accident.

The telephone record also showed that, in a period of less than twelve hours on that day, Best had sent or received 180 text messages. In her deposition, Colonna acknowledged that it was her habit also to text more than 100 times per day. She said: "I'm a young teenager. That's what we do." She also testified that she generally did not pay attention to whether the recipient of her texts was driving a car at the time or not. She thought it was "weird" that plaintiffs' attorney was trying to pin her down on whether she knew that Best was driving when she texted him.

During the day of the accident, a Monday, Best and Colonna exchanged many text messages in the morning, had lunch together at his house, and watched television until he had to go to his part-time job at a YMCA in Randolph Township. "Our record does not indicate why Colonna was not in school that day. Best was a student at a community college and also worked part-time." The time record from the YMCA showed that Best punched in on a time clock at 3:35 p.m. At 3:49 p.m., Colonna texted him, but he did not respond at that time. He punched out of work at 5:41. A minute later, at 5:42, Best sent a text to Colonna. He then exchanged three text messages with his father, testifying at his deposition that he did so while in the parking lot of the YMCA and that the purpose was to notify his parents he was coming home to eat dinner with them.

The accident occurred about four or five minutes after Best began driving home from the YMCA. At his deposition, Best testified that he did not text while driving—meaning that it was not his habit to text when he was driving. He testified falsely at first that he did not text when he began his drive home from the YMCA on the day of the accident. But he was soon confronted with the telephone records, which he had seen earlier, and then he admitted that he and Colonna exchanged text messages within minutes of his beginning to drive.

The sequence of texts between Best and Colonna in the minutes before and after the accident is shown on the following chart.~

Sent	Sender	Received	Recipient
5:42:03	Best	5:42:12	Colonna
5:47:49	Best	5:47:56	Colonna
5:48:14	Colonna	5:48:23	Best
5:48:58	Best	5:49:07	Colonna
(5:49:15	911 Call)		
5:49:20	Colonna	5:55:30	Best
5:54:08	Colonna	5:55:33	Best

This sequence indicates the precise time of the accident – within seconds of 5:48:58. Seventeen seconds elapsed from Best’s sending a text to Colonna and the time of the 911 call after the accident. Those seconds had to include Best’s stopping his vehicle, observing the injuries to the Kuberts, and dialing 911. It appears, therefore, that Best collided with the Kuberts’ motorcycle immediately after sending a text at 5:48:58. It can be inferred that he sent that text in response to Colonna’s text to him that he received twenty-five seconds earlier. Finally, it appears that Best initiated the texting with Colonna as he was about to and after he began to drive home.

Missing from the evidence is the content of the text messages. Plaintiffs were not able to obtain the messages Best and Colonna actually exchanged, and Best and Colonna did not provide that information in their depositions. The excerpts of Best's deposition that have been provided to us for this appeal do not include questions and answers about the content of his text messages with Colonna late that afternoon. When Colonna's deposition was taken sixteen months after the accident, she testified she did not remember her texts that day. Despite the fact that Best did not respond to her last two texts at 5:55 p.m., and despite her learning on the same evening that he had been involved in a serious accident minutes before he failed to respond to her, Colonna testified that she had "no idea" what the contents of her text messages with Best were that afternoon.

After plaintiffs learned of Colonna's involvement and added her to their lawsuit, she moved for summary judgment. Her attorney argued to the trial court that Colonna had no liability for the accident because she was not present at the scene, had no legal duty to avoid sending a text to Best when he was driving, and further, that she did not know he was driving. The trial judge reviewed the evidence and the arguments of the attorneys, conducted independent research on the law, and ultimately concluded that Colonna did not have a legal duty to avoid sending a text message to Best, even if she knew he was driving. The judge dismissed plaintiffs' claims against Colonna.

## II.

On appeal before us, plaintiffs argue that Colonna is potentially liable to them if a jury finds that her texting was a proximate cause of the accident. They argue that she can be found liable because she aided and abetted Best's unlawful texting while he was driving, and also because she had an independent duty to avoid texting to a person who was driving a motor vehicle. They claim that a jury can infer from the evidence that Colonna knew Best was driving home from

his YMCA job when she texted him at 5:48:14, less than a minute before the accident.

We are not persuaded by plaintiffs' arguments as stated, but we also reject defendant's argument that a sender of text messages never has a duty to avoid texting to a person driving a vehicle. We conclude that a person sending text messages has a duty not to text someone who is driving if the texter knows, or has special reason to know, the recipient will view the text while driving. But we also conclude that plaintiffs have not presented sufficient evidence to prove that Colonna had such knowledge when she texted Best immediately before the accident.

We first address generally the nature of a duty imposed by the common law.

In a lawsuit alleging that a defendant is liable to a plaintiff because of the defendant's negligent conduct, the plaintiff must prove four things: (1) that the defendant owed a duty of care to the plaintiff, (2) that the defendant breached that duty, (3) that the breach was a proximate cause of the plaintiff's injuries, and (4) that the plaintiff suffered actual compensable injuries as a result. The plaintiff bears the burden of proving each of these four "core elements" of a negligence claim.

Because plaintiffs in this case sued Best and eventually settled their claims against him, it is important to note that the law recognizes that more than one defendant can be the proximate cause of and therefore liable for causing injury. Whether a duty exists to prevent harm is not controlled by whether another person also has a duty, even a greater duty, to prevent the same harm.

"A duty is an obligation imposed by law requiring one party to conform to a particular standard of conduct toward another."

*Acuna v. Turkish*, 192 N.J. 399, 413 (2007) (quoting *Prosser & Keeton on Torts: Lawyer's Edition* § 53, at 356 (5th ed.1984)); see

also *Restatement (Second) of Torts* § 4 (1965) (“The word ‘duty’ ... denote[s] the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor’s conduct is a legal cause.”).

Whether a duty of care exists “is generally a matter for a court to decide,” not a jury. The “fundamental question [is] whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct.” *J.S. v. R.T.H.*, 155 N.J. 330, 338 (1998).

The New Jersey Supreme Court recently analyzed the common law process by which a court decides whether a legal duty of care exists to prevent injury to another. *Estate of Desir ex. rel. Estiverne v. Vertus*, — N.J. — (2013). The Court reviewed precedents developed over the years in our courts and restated the “most cogent explanation of the principles that guide [the courts] in determining whether to recognize the existence of a duty of care”:

“[w]hether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy. That inquiry involves identifying, weighing, and balancing several factors—the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution.... The analysis is both very fact-specific and principled; it must lead to solutions that properly and fairly resolve the specific case and generate intelligible and sensible rules to govern future conduct.”

The Court emphasized that the law must take into account “generally applicable rules to govern societal behaviors,” not

just an “outcome that reaches only the particular circumstances and parties before the Court today[.]” The Court described all of these considerations as “a full duty analysis” to determine whether the law recognizes a duty of care in the particular circumstances of a negligence case.

Plaintiffs argue that Colonna independently had a duty not to send texts to a person who she knew was driving a vehicle. They have not cited a case in New Jersey or any other jurisdiction that so holds, and we have not found one in our own research.

The trial court cited one case that involved distraction of the driver by text messages, *Durkee v. C.H. Robinson Worldwide, Inc.*, 765 F.Supp.2d 742 (W.D.N.C.2011). In *Durkee*, the plaintiffs were injured when a tractor-trailer rear-ended their car. In addition to the truck driver and other defendants, they sued the manufacturer of a text-messaging device that was installed in the tractor-trailer. They claimed the device was designed defectively because it could be viewed while the truck driver was driving and it distracted the driver immediately before the accident that injured them. The federal court dismissed the plaintiffs’ claims against the manufacturer of the device, holding that it was the driver’s duty to avoid distraction. Since other normal devices in a motor vehicle could distract the driver, such as a radio or GPS device, attributing a design defect to the product would have too far-reaching an effect. It would allow product liability lawsuits against manufacturers of ordinary devices found in many motor vehicles and hold them liable for a driver’s careless use of the product.

Similarly, at least two state courts have declined to hold manufacturers of cell phones liable for failing to design their products to prevent harm caused when drivers are distracted by use of the phones.

We view *Durkee* and these state cases as appropriately leading to the conclusion that one should not be held liable for



sending a wireless transmission simply because some recipient might use his cell phone unlawfully and become distracted while driving. Whether by text, email, Twitter, or other means, the mere sending of a wireless transmission that unidentified drivers may receive and view is not enough to impose liability.

Having considered the competing arguments of the parties, we also conclude that liability is not established by showing only that the sender directed the message to a specific identified recipient, even if the sender knew the recipient was then driving. We conclude that additional proofs are necessary to establish the sender's liability, namely, that the sender also knew or had special reason to know that the driver would read the message while driving and would thus be distracted from attending to the road and the operation of the vehicle. We reach these conclusions by examining the law in analogous circumstances and applying "a full duty analysis" as discussed in *Desir, supra*, slip op. at 24.

A section of the *Restatement* that the parties have not referenced provides:

An act is negligent if the actor intends it to affect, or realizes or should realize that it is likely to affect, the conduct of another, a third person, or an animal in such a manner as to create an unreasonable risk of harm to the other.

[*Restatement* § 303.]

To illustrate this concept, the *Restatement* provides the following hypothetical example:

A is driving through heavy traffic. B, a passenger in the back seat, suddenly and unnecessarily calls out to A, diverting his attention, thus causing him to run into the car of C. B is negligent toward C.

[*Restatement* § 303, comment d, illustration 3.]

We have recognized that a passenger who distracts a driver can be held liable for the passenger's own negligence in causing an accident. In other words, a passenger in a motor vehicle has a duty "not to interfere with the driver's operations."

One form of interference with a driver might be obstructing his view or otherwise diverting his attention from the tasks of driving. It would be reasonable to hold a passenger liable for causing an accident if the passenger obstructed the driver's view of the road, for example, by suddenly holding a piece of paper in front of the driver's face and urging the driver to look at what is written or depicted on the paper. The same can be said if a passenger were to hold a cell phone with a text message or a picture in front of the driver's eyes. Such distracting conduct would be direct, independent negligence of the passenger. Here, of course, Colonna did not hold Best's cell phone in front of his eyes and physically distract his view of the road.

The more relevant question is whether a passenger can be liable not for actually obstructing the driver's view but only for urging the driver to take his eyes off the road and to look at a distracting object. We think the answer is yes, but only if the passenger's conduct is unreasonably risky because the passenger knows, or has special reason to know, that the driver will in fact be distracted and drive negligently as a result of the passenger's actions.

It is the primary responsibility of the driver to obey the law and to avoid distractions. Imposing a duty on a passenger to avoid any conduct that might theoretically distract the driver would open too broad a swath of potential liability in ordinary and innocent circumstances. As the Supreme Court stated in *Desir*, courts must be careful not to "create a broadly worded duty and ... run the risk of unintentionally imposing liability in situations far beyond the parameters we now face." "The scope of a duty is determined under 'the totality of the

circumstances,' and must be 'reasonable' under those circumstances." *J.S.*, 155 *N.J.* at 339.

"Foreseeability of the risk of harm is the foundational element in the determination of whether a duty exists." *Id.* at 337. "Foreseeability, in turn, is based on the defendant's knowledge of the risk of injury."

It is foreseeable that a driver who is actually distracted by a text message might cause an accident and serious injuries or death, but it is not generally foreseeable that every recipient of a text message who is driving will neglect his obligation to obey the law and will be distracted by the text. Like a call to voicemail or an answering machine, the sending of a text message by itself does not demand that the recipient take any action. The sender should be able to assume that the recipient will read a text message only when it is safe and legal to do so, that is, when not operating a vehicle. However, if the sender knows that the recipient is both driving and will read the text immediately, then the sender has taken a foreseeable risk in sending a text at that time. The sender has knowingly engaged in distracting conduct, and it is not unfair also to hold the sender responsible for the distraction.

"When the risk of harm is that posed by third persons, a plaintiff may be required to prove that defendant was in a position to 'know or have reason to know, from past experience, that there [was] a likelihood of conduct on the part of [a] third person[]' that was 'likely to endanger the safety' of another." *J.S.*, 155 *N.J.* at 338. In *J.S.*, the Court used the phrase "special reason to know" in reference to a personal relationship or prior experience that put a defendant "in a position" to "discover the risk of harm." Consequently, when the sender "has actual knowledge or special reason to know," from prior texting experience or otherwise, that the recipient will view the text while driving, the sender has breached a duty of care to the public by distracting the driver.~

When the sender knows that the text will reach the driver while operating a vehicle, the sender has a relationship to the public who use the roadways similar to that of a passenger physically present in the vehicle. As we have stated, a passenger must avoid distracting the driver. The remote sender of a text who knows the recipient is then driving must do the same.

When the sender texts a person who is then driving, knowing that the driver will immediately view the text, the sender has disregarded the attendant and foreseeable risk of harm to the public. The risk is substantial, as evidenced by the dire consequences in this and similar cases where texting drivers have caused severe injuries or death.

With respect to the sender's opportunity to exercise care, “[a] corresponding consideration is the practicality of preventing [the risk].” We must take into account “how establishing this duty will work in practice.” In imposing an independent duty of the passengers in *Podias*, we noted the “relative ease” with which they could have used their cell phones to summon help for the injured motorcyclist. It is just as easy for the sender of a text message to avoid texting to a driver who the sender knows will immediately view the text and thus be distracted from driving safely. “When the defendant’s actions are ‘relatively easily corrected’ and the harm sought to be presented is ‘serious,’ it is fair to impose a duty.”

At the same time, “[c]onsiderations of fairness implicate the scope as well as the existence of a duty.” Limiting the duty to persons who have such knowledge will not require that the sender of a text predict in every instance how a recipient will act. It will not interfere with use of text messaging to a driver that one expects will obey the law. The limited duty we impose will not hold texters liable for the unlawful conduct of others, but it will hold them liable for their own negligence when they have knowingly disregarded a foreseeable risk of serious injury to others.

Finally, the public interest requires fair measures to deter dangerous texting while driving. Just as the public has learned the dangers of drinking and driving through a sustained campaign and enhanced criminal penalties and civil liability, the hazards of texting when on the road, or to someone who is on the road, may become part of the public consciousness when the liability of those involved matches the seriousness of the harm.~

To summarize our conclusions, we do not hold that someone who texts to a person driving is liable for that person's negligent actions; the driver bears responsibility for obeying the law and maintaining safe control of the vehicle. We hold that, when a texter knows or has special reason to know that the intended recipient is driving and is likely to read the text message while driving, the texter has a duty to users of the public roads to refrain from sending the driver a text at that time.~

In this case, plaintiffs developed evidence pertaining to the habits of Best and Colonna in texting each other repeatedly. They also established that the day of the accident was not an unusual texting day for the two. But they failed to develop evidence tending to prove that Colonna not only knew that Best was driving when she texted him at 5:48:14 p.m. but that she knew he would violate the law and immediately view and respond to her text.

As our recitation of the facts shows, Colonna sent only one text while Best was driving. The contents of that text are unknown. No testimony established that she was aware Best would violate the law and read her text as he was driving, or that he would respond immediately. The evidence of multiple texting at other times when Best was not driving did not prove that Colonna breached the limited duty we have described.

Because the necessary evidence to prove breach of the remote texter's duty is absent on this record, summary

judgment was properly granted dismissing plaintiffs' claims against Colonna.

Affirmed.

### **C. The Duty of Care and Criminal Acts**

One troublesome question regarding the duty of care is whether a duty of care will be present in the circumstance in which a person is pressured to accede to the demands of a criminal in order to prevent harm to an innocent person. Few courts have considered this question, but a majority have concluded that there is no duty.

#### **Case: Boyd v. Racine Currency Exchange**

The following case considers whether there is a duty to accede to criminal demands. While you read, ask yourself whether you find the court's use of precedent persuasive.

#### *Boyd v. Racine Currency Exchange, Inc.*

Supreme Court of Illinois

November 30, 1973

56 Ill.2d 95. Piney BOYD, Appellee, v. RACINE CURRENCY EXCHANGE, INC., et al., Appellants. No. 45557.

#### **Justice HOWARD C. RYAN:**

The plaintiff's husband, John Boyd, was present in the Racine Currency Exchange on April 27, 1970, for the purpose of transacting business. While he was there, an armed robber entered and placed a pistol to his head and told Blanche Murphy, the teller, to give him the money or open the door or he would kill Boyd. Blanche Murphy was at that time located behind a bulletproof glass window and partition. She did not comply with the demand but instead fell to the floor. The robber then shot Boyd in the head and killed him.

This is a wrongful death action against Racine Currency Exchange and Blanche Murphy to recover damages for the death of plaintiff's decedent. Plaintiff's complaint was

dismissed on motion of the defendants by the circuit court of Cook County for failure to state a cause of action. The appellate court reversed and remanded the cause to the circuit court.

Plaintiff alleges several acts of negligence by the Racine Currency Exchange and Blanche Murphy. Count I alleges that the defendants owed Boyd, a business invitee, the duty to exercise reasonable care for his safety and that they breached this duty when they refused to accede to the robber's demands. Count I also alleges that defendants acted negligently in adopting a policy, knowledge of which was deliberately withheld from their customers, according to which their money was to be protected at all costs, including the safety and the lives of the customers.

In count II the plaintiff alleges that the Currency Exchange was negligent in failing to instruct its employees regarding the course of conduct which would be necessary under the circumstances of this case to prevent exposing customers to unreasonable risks of harm. Count II further alleges that the Currency Exchange was negligent in employing a person who was incompetent to fulfill the responsibilities of her position. Negligence is also alleged in the failure to furnish guidelines of how to act in case of armed robbery, and alternatively that it was negligent in failing to disclose to its customers its policy of preserving its monies at all costs.

It is fundamental that there can be no recovery in tort for negligence unless the defendant has breached a duty owed to the plaintiff. The plaintiff contends that a business proprietor has a duty to his invitees to honor criminal demands when failure to do so would subject the invitees to an unreasonable risk. It is claimed that this duty arises from the relationship between a landowner and a business invitee.

It is the general rule in Illinois and other jurisdictions that a person has no duty to anticipate the criminal acts of third parties. An exception to this rule exists, however, when

criminal acts should reasonably have been foreseen. (*Neering v. Illinois Central R.R. Co.*, 383 Ill. 366.) *Neering*, and many of the other cases cited by the parties, involved the question of whether facts existed which should have alerted the defendant to a risk of harm to his invitees by criminals. These cases are of little help here since our case presents a question of whether the defendant who is faced with an imminent criminal demand incurs liability by resisting, not whether he is negligent in failing to take precautions against a possible future crime.

Also of little assistance in *Sinn v. Farmers Deposit Savings Bank*, 300 Pa. 85, 150 A. 163. In that case recovery for the plaintiff, who was injured when a bank robber detonated dynamite within the bank, was upheld. The plaintiff alleged that had the bank warned him that a bank robbery was in progress, as they had the opportunity to do, he could have escaped unharmed. The plaintiff's intestate in our case, however, was obviously on notice that a robbery was in progress, and plaintiff does not predicate her claim on the absence of warning.

We are aware of only two cases which have discussed issues similar to the one with which we are faced here – whether a person injured during the resistance to a crime is entitled to recover from the person who offered the resistance. In *Genovay v. Fox*, 50 N.J. Super. 538, a plaintiff who was shot and wounded during the robbery of a bowling alley bar claimed that the proprietor was liable because instead of complying with the criminal demand he stalled the robber and induced resistance by those patrons present. The plaintiff was shot when several patrons attempted to disarm the bandit. The court there balanced the interest of the proprietor in resisting the robbery against the interest of the patrons in not being exposed to bodily harm and held that the complaint stated a cause of action. The court stated: “The value of human life and of the interest of the individual in freedom from serious bodily injury weigh sufficiently heavily in the judicial scales to preclude a determination as a matter of law



that they may be disregarded simply because the defendant's activity serves to frustrate the successful accomplishment of a felonious act and to save his property from loss.' The court held that under the circumstances it was for the jury to determine whether defendant's conduct was reasonable.

In *Noll v. Marian*, 347 Pa. 213, the court held that no cause of action existed. The plaintiff was present in a bank when an armed robber entered and announced "It's a holdup. Nobody should move." The bank teller, instead of obeying this order, dropped down out of sight. The gunman then opened fire and wounded the plaintiff. The court held that even though the plaintiff might not have been injured if the teller had stood still, the teller did not act negligently in attempting to save himself and his employer's property.

In *Lance v. Senior*, 36 Ill.2d 516, this court noted that foreseeability alone does not result in the imposition of a duty. "The likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing the burden upon the defendant, must also be taken into account."

In the present case an analysis of those factors leads to the conclusion that no duty to accede to criminal demands should be imposed. The presence of guards and protective devices do not prevent armed robberies. The presence of armed guards would not have prevented the criminal in this case from either seizing the deceased and using him as a hostage or putting the gun to his head. Apparently nothing would have prevented the injury to the decedent except a complete acquiescence in the robber's demand, and whether acquiescence would have spared the decedent is, at best, speculative. We must also note that the demand of the criminal in this case was to give him the money or open the door. A compliance with this alternate demand would have, in turn, exposed the defendant Murphy to danger of bodily harm.

If a duty is imposed on the Currency Exchange to comply with such a demand the same would only inure to the benefit of the criminal without affording the desired degree of assurance that compliance with the demand will reduce the risk to the invitee. In fact, the consequence of such a holding may well be to encourage the use of hostages for such purposes, thereby generally increasing the risk to invitees upon business premises. If a duty to comply exists, the occupier of the premises would have little choice in determining whether to comply with the criminal demand and surrender the money or to refuse the demand and be held liable in a civil action for damages brought by or on behalf of the hostage. The existence of this dilemma and knowledge of it by those who are disposed to commit such crimes will only grant to them additional leverage to enforce their criminal demands. The only persons who will clearly benefit from the imposition of such a duty are the criminals. In this particular case the result may appear to be harsh and unjust, but, for the protection of future business invitees, we cannot afford to extend to the criminal another weapon in his arsenal.

For these reasons we hold that the defendants did not owe to the invitee Boyd a duty to comply with the demand of the criminal.

Accordingly, the judgment of the appellate court will be reversed, and the judgment of the circuit court of Cook County will be affirmed.

Appellate court reversed; circuit court affirmed.

**Justice JOSEPH H. GOLDENHERSH, dissenting:**

I dissent. The majority opinion fails to take into account the principles of law clearly enunciated in *Restatement (Second) of Torts* and on the basis of pure conjecture concludes that nothing that defendant's employee could have done would have saved the deceased from death or injury. The majority's polemic on the subject of the hazards which would be created

by an application of established legal principles to this case finds little support in logic and none whatsoever in the legal authorities.

This case comes to us only on the pleadings and I agree with the appellate court that “Whether what defendants did or did not do proximately caused the injury that befell plaintiff’s decedent, whether Blanche Murphy had the time so she could, under the circumstances alleged, exercise the kind of judgment expected of a person of ordinary prudence, were questions of fact which, from all the evidence, must be decided by a trier of the facts, judge or jury.” I would affirm the judgment of the appellate court.

### **Questions to Ponder About *Boyd***

**A.** Professor James Grimmelmann described *Boyd* this way: “Not the most tragic case of all time, but perhaps the most concisely tragic.” Do you agree that there is something briskly heartbreaking about these facts? What role does emotion play in your view of the case? How about in the view of the majority and the dissent?

**B.** The majority believes that imposing a duty in this situation might “encourage the use of hostages.” The court reasons as follows: “If a duty to comply exists, the occupier of the premises would have little choice in determining whether to comply with the criminal demand and surrender the money or to refuse the demand and be held liable in a civil action for damages brought by or on behalf of the hostage. The existence of this dilemma and knowledge of it by those who are disposed to commit such crimes will only grant to them additional leverage to enforce their criminal demands.” Do you think this is true? Is it realistic that robbers will learn finer points of tort doctrine and then apply that knowledge strategically?

**C.** The dissent does not argue that the Racine Currency Exchange should be liable. Note the procedural posture of the case. The question is whether the complaint should be dismissed for failure to state a cause of action. The dissent argues that the complaint should survive and that the issue of the bank employee’s responsibility in such a situation should be put to a jury. If the dissent prevailed and

this case had been heard by a jury, what would be your prediction about the verdict?

### **The Use of *Boyd* to Decide Duty in *Orrico v. Beverly Bank***

Several years later, the *Boyd* case was cited by a different bank in another wrongful death case. In *Orrico v. Beverly Bank*, 109 Ill.App.3d 102 (1982), a mentally disabled man was allowed to withdraw \$2,100 from his bank account in one-hundred dollar bills, despite the fact that the man's mother repeatedly expressed to the bank her concern for her son's safety should he be given such a large amount of cash. The bank at the time was also in receipt of a court order regarding the man's incompetency, a circumstance under which the bank would ordinarily freeze the man's account. After the man was given the cash and left the bank, he went to a park where he flashed the stack of money to people at a softball game. That night, the man was found dead, shot in the back of the head, all the money gone from his body. A jury in the case awarded \$9,500 to be paid by the bank to the mother. The bank appealed the verdict, citing *Boyd* to argue it owed no duty to the decedent. The Illinois Court of Appeals held for the plaintiff, saying that the bank did indeed owe a duty to the decedent because of its relationship to him. *Boyd*, the court said, reflected "a strong societal interest in not inducing criminal activity by acceding to criminal demands, even at the cost of harm to an individual." But the court held there was no such interest at stake in the later case. Thus, the court held that the bank owed the decedent "a duty not to utilize his funds in a manner which would increase the risk of danger to him."

### **D. Affirmative Duties**

It is well accepted that the general duty of care requires would-be defendants to refrain from actions that unreasonably subject foreseeable plaintiffs to a risk of harm. There is, however, no general duty to affirmatively engage in actions to prevent harm to plaintiffs.

Stated more plainly, you only have to try to not hurt people. You do not have to try to help them.

The distinction is sometimes said to be between “nonfeasance” on the one hand and “malfeasance” (a/k/a “misfeasance”) on the other. In this terminology, nonfeasance is doing nothing, while malfeasance or misfeasance is doing something harmful. Ordinarily, no legal duty is implicated in cases of nonfeasance – where the would-be defendant just stands by and watches harmful events unfold. This is true even, for instance, if there is an easy opportunity to step in and prevent massive loss of life or suffering. On the other the hand, any activity a person undertakes must be undertaken in a reasonably careful manner. Thus, malfeasance implicates the duty of care.

There are some important exceptions, which are discussed below. These include circumstances where there is a pre-existing special relationship between the plaintiff and defendant, and where the defendant’s own conduct created put the plaintiff in peril.

#### **The General Rule: No Affirmative Duty to Help**

The overarching rule is that the law does not require persons to be good Samaritans and step up to help people in distress. This rule is often hard for students to accept. The next two cases demonstrate that even cruel indifference to another’s suffering does not make for a cause of action.

#### **Case: Theobald v. Dolcimascola**

This next case is a more contemporary example of the general rule of that there is no affirmative duty to act.

#### *Theobald v. Dolcimascola*

Superior Court of New Jersey, Appellate Division

April 2, 1997

299 N.J. Super 299. Colleen Theobald, as administrator ad prosequendum for the heirs at law of Sean Theobald, deceased as administrator of the Estate of Sean Theobald, and Colleen Theobald, Harold Theobald, individually, plaintiffs-appellants, v. Michael Dolcimascola, Amy Flanagan and Robert Bruck, defendants-respondents. Charles Henn, Jr., Charles Henn, Joan Henn, Katherine Gresser and Jackson Sporting Goods, defendants-third-party plaintiffs, v. Chris

Smidt, third-party defendant. A-2863-95T3. Judges DREIER, D'ANNUNZIO and NEWMAN.

**Presiding Judge WILLIAM A. DREIER:**

Plaintiffs, Colleen Theobald as Administrator Ad Prosequendum for the heirs of Sean Theobald and as administrator of his estate, and Colleen Theobald and Harold Theobald (the parents of the late Sean Theobald), individually, appeal from summary judgments dismissing their complaint against the three remaining defendants, Michael Dolcimascola, Robert Bruck, and Amy Flanagan. Settlements or unappealed summary judgments have removed the remaining defendants from this case.

On January 20, 1991, plaintiffs' decedent, Sean Theobald, was in the second floor bedroom of his house with five of his friends. His father was downstairs watching television. The friends had gathered at 6:00 p.m. for a birthday party for one of the friends, Robert Bruck. The other teenagers present were Charles Henn, Michael Dolcimascola, Amy Flanagan and Katherine Gresser. At some time during the evening, the decedent produced an unloaded revolver and ammunition, both of which were examined by all of the teenagers. The discussion turned toward another friend of theirs who had died playing Russian Roulette, and the decedent indicated that he also would try the "game." According to the predominant version of the varying testimony, Sean put a bullet into the gun, pointed it at his head and pulled the trigger several times. He then put the gun down, checked the cylinder, and tried again three or four more times. The gun then went off, killing him. Other versions had the gun going off on the first occasion he tried, or the gun firing by accident without his putting the barrel to his head. There was, however, ample testimony that there were several attempts made while the five other teenagers merely sat around and watched. The trial judge determined that if none of the teenagers actively participated, they had no duty to stop the decedent, and therefore summary judgment was entered.

The first question before us is whether any of the defendants, if they were mere observers to this tragic event, can be held civilly liable to plaintiffs. We are at a loss for a viable theory. Had this been a joint endeavor in which all were participating in the “game” of Russian Roulette, there is some authority that each of the participants in the enterprise might be held responsible, although the only cases we have been able to retrieve involve the criminal responsibility of participants. *See e.g., Commonwealth v. Atencio*, 345 Mass. 627 (1963) (where the participants were found guilty of manslaughter). There is no reason to suppose that if the participants could be found criminally responsible, they could not also be held civilly liable. A line, however, has been drawn by the courts between being an active participant and merely being one who had instructed a decedent how to “play” Russian Roulette. In the latter case, a defendant was determined to be free of any potential criminal liability. *Lewis v. State*, 474 So. 2d 766, 771 (Ala.Crim.App. 1985). Another court, *in dictum*, stated that inducing an individual to engage in Russian Roulette creates a sufficiently foreseeable harm to engender potential civil liability. *Great Central Ins. Co. v. Tobias* 37 Ohio St.3d 127 (Ohio.Ct.App. 1987).

The most comprehensive New Jersey statement of the existence of a duty to another was expressed in *Wytupeck v. City of Camden*, 25 N.J. 450 (1957). Although the case involved the question of liability for the use of a dangerous instrumentality on defendant’s land, the case explored when a duty to act arises in inter-personal relationships:

“Duty” is not an abstract conception; and the standard of conduct is not an absolute. Duty arises out of a relation between the particular parties that in right[,] reason and essential justice enjoins the protection of the one by the other against what the law by common consent deems an unreasonable risk of harm, such as is reasonably foreseeable. In the field of negligence, duty signifies conformance “to

the legal standard of reasonable conduct in the light of the apparent risk;” the essential question is whether “the plaintiff’s interests are entitled to legal protection against the defendant’s conduct.” *Prosser on Torts*, (2d ed., section 36). Duty is largely grounded in the natural responsibilities of social living and human relations, such as have the recognition of reasonable men; and fulfillment is had by a correlative standard of conduct.

If defendants had either been participants or had induced decedent to play Russian Roulette, or even if there had been some other factor by which we could find a common enterprise, then defendants may have had a duty to act to protect Sean from the consequences of his foolhardy actions. Such a duty would nevertheless invoke the usual principles of comparative negligence.~ The problem with such potential liability, however, is the significant factor of a decedent’s own negligence which, when measured against any participant’s breach of a duty of care, would probably preclude recovery in most cases.

What we are left with in the case before us, positing that there was no proof of encouragement or participation, is a claim which is grounded in a common law duty to rescue. As has been explained in texts and reiterated in case law, there is no such duty, except if the law imposes it based upon some special relationship between the parties. *See* W. Page Keeton, et al., *Prosser and Keaton on Torts*, § 56, at 375 (5th ed. 1984) (“[T]he law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger, even if the other is in danger of losing his life.”); J.D. Lee and Barry A. Lindahl, *Modern Tort Law*, § 3.07, at 36 (1994 and Supp.1996) (“With regard to rescues, it has been stated that the general rule is that there is no liability for one who stands idly by and fails to rescue a stranger. ... ”); *Restatement (Second) of Torts*, § 314 (1965) (“The fact that the actor realizes or should realize that



action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.”). The Restatement's Illustration 1 is instructive. It posits the actor, A, viewing a blind man, B, stepping into the street in the path of an approaching automobile, where a word or touch by A would prevent the anticipated harm. The Restatement concludes that “A is under no duty to prevent B from stepping into the street, and is not liable to B.”

Recent New Jersey decisions have focused upon the exceptions to this general rule and involve situations where a duty to act exists as a result of the relationship between the parties, namely, police-arrestee (*Del Tufo v. Township of Old Bridge*, 147 N.J. 90 (1996); *Hake v. Manchester Township*, 98 N.J. 302 (1985)) and physician-patient (*Olah v. Slobodian*, 119 N.J. 119 (1990)). These cases also address the liability of a ship's captain for failing to attempt to rescue a drowning seaman.

All of these cases are distinguishable from the situation before us, assuming the five observers were mere bystanders upon whom the law places no duty to have protected the decedent. While we may deplore their inaction, we, as did the trial judge, find no legal authority to impose liability. We note the ease with which defendants could have reached out and taken away the revolver when Sean put it down between his two series of attempted firings, or the simple act of one of the five walking to the door and summoning Sean's father, or even remonstrating with Sean concerning his actions. But such acts would have been no more or less than the simple preventatives given in the Restatement Illustration of a word or touch necessary to save a blind pedestrian. Where there is no duty, there is no liability.

We recognize that the Supreme Court in *Wytupeck v. City of Camden, supra*, has defined duty as a flexible concept:

“Duty” is not a rigid formalism according to the standards of a simpler society, immune to the equally compelling needs of the present

order; duty must of necessity adjust to the changing social relations and exigencies and man's relation to his fellows; and accordingly the standard of conduct is care commensurate with the reasonably foreseeable danger, such as would be reasonable in the light of the recognizable risk, for negligence is essentially "a matter of risk \* \* \* that is to say of recognizable danger of injury."

But, if a legally actionable duty is to be found in a situation such as the one before us, it must be declared by the Supreme Court.~ In sum, we determine that there was no common law duty owed by defendants to the decedent if defendants were mere observers of his shooting. If, however, there is admissible evidence against one or more of the defendants that they participated in deceiving the decedent into assuming the weapon was not loaded when in fact one of them had placed a bullet in the cylinder, then liability may be imposed against such defendant or defendants for such conduct.~

### **Questions to Ponder About *Theobald***

- A.** This case reaches the same result as *Yania v. Bigan*, but seems to do so apologetically. Are you inclined to think that a concept of duty that "adjust[s] to the changing social relations and exigencies and man's relation to his fellows" requires recognizing an affirmative duty in a case such as this?
- B.** Does the doctrine barring a general affirmative duty to act reflect antiquated attitudes? If common-law tort doctrine were being written today on a blank slate, do you think the courts would recognize a general affirmative duty?
- C.** If courts were to recognize a general affirmative duty to act, what would be the limiting principle? Consider that most people have spent money on luxury items that they could have spent that money to feed starving children overseas. Should a failure to send to charity all money a person doesn't strictly need expose one to liability? If trauma surgeons refrained from taking vacations and days off, arguably they could save more lives. Should their leisure hours expose

them to tort liability? If your answer to those questions is no, how do you draw the line between those sorts of cases on the one hand and *Yania* and *Theobald* on the other?

### **The Exception of Defendant-Created Peril**

A generally recognized exception to the no-affirmative-duty rule is the situation in which the defendant's own negligence conduct created the plaintiff's peril. If the defendant has left a banana peel in the road, and the plaintiff slips on it and falls, the defendant has a duty of care to help the plaintiff out of the roadway before a truck comes along and strikes the plaintiff. If the plaintiff is hurt badly enough, the defendant also has an affirmative duty to call emergency services, etc.

Note that this exception applies when it is the defendant's negligence that has produced the perilous situation. If the defendant's innocent conduct somehow creates the peril, traditional doctrine holds that no affirmative duty is incurred.

### **Case: South v. Amtrak**

This case shows how one jurisdiction decided to broaden the defendant-created peril rule to include not just those situations occasioned by the defendant's negligence, but also those situations that were created by the defendant's innocent conduct.

#### *South v. Amtrak*

Supreme Court of North Dakota

March 20, 1980

290 N.W.2d 819. Civil No. 9664. Billy Lee South and Delores South, husband and wife, Plaintiffs and Appellees v. National Railroad Passenger Corporation (AMTRAK), Burlington Northern Railroad, Inc., Leslie Roy Strom and S. M. Burdick as Public Special Administrator of the Estate of Howard W. Decker, Deceased, Defendants and Appellants. Paulson, Pederson, VandeWalle, Sand, JJ., Erickstad, C.J.

**Justice WILLIAM L. PAULSON:**

This is an appeal by the defendants, National Railroad Passenger Corporation (Amtrak) [and others] (herein collectively referred to as the "Railroad"), from the judgment of the Grand Forks District Court, entered March 21, 1978, and amended May 12, 1978, in which the court, upon jury verdicts, awarded the plaintiff Billy Lee South (herein referred to as "South") \$948,552, including costs, and awarded the plaintiff Delores South \$126,000, including costs. The Railroad also appeals from the order of the district court, entered May 16, 1979, in which the court denied its motion for judgment notwithstanding the verdict or in the alternative for a new trial. We affirm.

An action was commenced by South for damages sustained as a result of a collision between a pickup truck, owned and driven by South, and the Railroad's train at the Barrett Avenue crossing in Larimore, North Dakota, on January 17, 1976, at approximately 6:20 a.m. South sustained serious injuries in the collision. He sued the Railroad for damages on a theory of negligence, and his wife, Delores, also sued the Railroad for damages allegedly incurred by the loss of her husband's consortium.~

Prior to the collision South was employed as a missile site superintendent. South lived in Larimore, and on the morning of the collision he, for the first time, was driving to work at a new missile site location to which he had been assigned. To drive to the old work site South crossed the railroad tracks in Larimore at the Towner Avenue crossing, but in order to drive to the new work site South took a route which crossed the tracks at the Barrett Avenue crossing.

As South approached the Barrett Avenue crossing traveling south at approximately 20 miles per hour, a westbound Amtrak passenger train was also approaching the Barrett Avenue crossing traveling at approximately 68 miles per hour. Both the train and South's pickup reached the crossing at approximately the same instant and the front of the train engine collided with the left front portion of South's vehicle.~

The Railroad asserts that it was not negligent in the operation of its train and that the maintenance of the crossbuck sign was not a material issue because South was aware of the location of the railroad tracks running through Larimore. Several witnesses testified, on behalf of the Railroad, that the train whistle did blow a warning on the morning of the collision. The Railroad also attempted to prove that South was negligent in failing to ascertain the presence of the train and in failing to safely stop his vehicle prior to reaching the railroad tracks.

At the conclusion of the trial the jury returned a verdict in favor of South and his wife, Delores, against the Railroad. The jury, upon finding that the Railroad was 100 percent negligent and that South was not negligent, awarded general and special damages of \$935,000 to South and \$125,000 to Delores South.~

Prior to opening argument the Railroad made a motion *in limine* to exclude all evidence referring to the train engineer's failure to cover South with his parka or to otherwise assist South at the scene of the accident, on the ground that such evidence was prejudicial. The engineer who was operating the train at the time of the accident died prior to the commencement of the trial in this case. Prior to his death, the Souths' counsel had taken the engineer's deposition, and it was part of this deposition testimony that the Railroad sought to exclude in its motion *in limine*. The motion was denied, and during opening argument the Souths' counsel made the following statement:

The evidence will show that as he was lying there, and I'm taking the deposition of Mr. Decker, the engineer, I says to Mr. Decker, 'Did you have anything to cover him up with?' 'No, I told the police,' he says. 'Was it cold out? What did you do?' 'I went to the cab.' I said, 'Did you have anything to cover him up with?' He said, 'My new jacket.' I says, 'Why

didn't you go and cover him up?' He says, 'That was a brand-new jacket. It cost \$55. I wasn't going to get it bloody. The hood cost me \$7 alone and I was going to be in Devils Lake the next day and I didn't want to get cold. I wasn't going to get a jacket bloody for anybody.' I said, 'If you'd have known he was alive, would you have covered him up?' He said, 'No, I wouldn't ruin that jacket.'

Subsequent to opening arguments, the trial court ruled in chambers that he would not allow certain parts of the engineer's deposition testimony regarding the parka incident to be read to the jury because its prejudicial effect outweighed its probative value. The trial court allowed the following portion of the engineer's deposition on this matter to be read to the jury:

Q. [Plaintiff's counsel]: And did you know where Billy South was laying during this time?

A. [Decker]: Yes. I saw a hump on the right-of-way there. But I didn't go over.

Q. Did you have anything in the cab to cover him up with, blanket or anything like that?

A. No, no.

\* \* \* \*

A. ... I tried to do my best to get the Highway Patrolman and police to get some covering for him.

Q. Sure. They are the ones who are supposed to do things like that. What kind of – what day of the week was this?

A. I think it was on a Saturday morning.

\* \* \* \*

Q. Okay. And if you had –

A. In the first place, when he was layin' there I honest to God thought he was dead. Wouldn't do any good to cover him up.

\* \* \* \*

A. No, I just went out there with my coveralls.

Q. I see.

A. All the time my coat was hanging in the cab.

Q. And before the police came how close did you walk over to Billy South to see whether or not –

\* \* \* \*

A. I couldn't do anything anyway. They tell you not to move an injured person, the ambulance crew.

Q. You have heard about shock, haven't you?

A. Yes. I never go over.

Q. Did you ever take any courses in first aid?

A. No.

Q. Never?

A. (Indicating no.)

During closing argument, the Souths' counsel commented on the foregoing testimony.

In its instructions to the jury the trial court stated that if the jury found by a fair preponderance of the evidence that the Railroad failed to provide any necessary care for South after the accident he could recover for damages proximately resulting from such failure.

The Railroad asserts that counsel's opening statement was highly prejudicial and constitutes grounds for a new trial. The Railroad also asserts that it was improper for the Souths' counsel to comment on the parka incident during closing

argument after the court had ruled to exclude such matters. The Railroad's latter assertion is based on an inaccurate premise of the trial court's ruling. The foregoing quoted portions of the deposition which were read to the jury demonstrate that the trial court did not exclude all testimony regarding the parka incident. Only certain statements made by the engineer which the court concluded were highly prejudicial and of little or no probative value were deleted from the deposition testimony. Provided the trial court did not err in admitting this evidence of the engineer's failure to assist South, then plaintiff counsel's comments during closing argument were not improper.

In order to determine whether it was error for the trial court to admit evidence of the engineer's failure to render assistance after the accident this Court must resolve, as a matter of first impression, whether there is an affirmative duty to render assistance to an injured person, and, if so, under what circumstances. Unless the engineer in this case had such an affirmative duty to assist South, all testimony regarding his failure to cover South with his parka or to otherwise assist was improperly admitted evidence – irrelevant and immaterial to any issue in the case.

During trial the Souths contended that the engineer had an affirmative duty to assist South by virtue of § 39-08-06, N.D.C.C., which imposes upon “the driver of any vehicle involved in an accident” a duty to render reasonable assistance to any person injured in such accident. We disagree that the engineer incurred a duty to assist under § 39-08-06, N.D.C.C. Trains are excluded from the definition of “vehicle” under Title 39, N.D.C.C, as follows:

39-01-01.Definitions. In this title, unless the context or subject matter otherwise requires:

...

72. ‘Vehicle’ shall include every device in, upon, or by which any person or property may be transported or drawn upon a public



highway, except devices moved by human power or used exclusively upon stationary rails or tracks.

We conclude that the requirements of § 39-08-06, N.D.C.C., do not pertain to trains, and no duty was imposed upon the engineer of the train in the instant case by virtue of that section.

On the subject of whether there is a common law duty to assist one in peril Prosser comments as follows in his treatise, Prosser, Law of Torts, Section 56 (4th Ed. 1971):

Because of this reluctance to countenance 'nonfeasance' as a basis of liability, the law has persistently refused to recognize the moral obligation of common decency and common humanity, to come to the aid of another human being who is in danger, even though the outcome is to cost him his life. ...

Thus far the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue one, has limited any tendency to depart from the rule to cases where some special relation between the parties has afforded a justification for the creation of a duty, without any question of setting up a rule of universal application."

It also is recognized that if the defendant's own negligence has been responsible for the plaintiff's situation, a relation has arisen which imposes a duty to make a reasonable effort to give assistance, and avoid any further harm. Where the original danger is created by innocent conduct, involving no fault on the part of the defendant, it was formerly the rule that no such duty arose; but this appears to have given way, in recent decisions, to a

recognition of the duty to take action, both where the prior innocent conduct has created an unreasonable risk of harm to the plaintiff, and where it has already injured him.

The Restatement (Second) of Torts S 322 (1965) takes the following position:

§ 322. Duty to Aid Another Harmed by Actor's Conduct

If the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.

Thus, the Restatement view is that one who harms another has an affirmative duty to exercise reasonable care to prevent further harm.

Although there is a paucity of case decisions involving this matter a few jurisdictions have discussed the issue. The Supreme Court of North Carolina held in *Parrish v. Atlantic Coast Line R.R. Co.*, 221 N.C. 292 (1942), that one who negligently harms another must take all steps necessary to mitigate the harm. See, also, *Whitesides v. Southern Railway Co.*, 128 N.C. 229 (1901). The Appellate Court of Indiana in *Tubbs v. Argus*, 140 Ind. App. 695 (1967), after quoting approvingly from § 322 of the Restatement (Second) of Torts, held that "... an affirmative duty arises to render reasonable aid and assistance to one who is helpless and in a situation of peril, when the injury resulted from the use of an instrumentality under the control of the defendant."

We believe that the position expressed by § 322, Restatement (Second) of Torts (1965), reflects the type of basic decency and human thoughtfulness which is generally characteristic of our people, and we therefore, adopt the standard imposed by that section. Accordingly, we hold that a person who knows

or has reason to know that his conduct, whether tortious or innocent, has caused harm to another has an affirmative duty to render assistance to prevent further harm. One who breaches such duty is subject to liability for damages incurred as a result of the additional harm proximately caused by such breach. We further hold that, in the instant case, the trial court did not err in the admission of the engineer's testimony regarding the assistance, or lack thereof, to South at the scene of the accident, nor did the court abuse its discretion in refusing to admit those portions of the testimony which the court determined were highly prejudicial and irrelevant.

During opening argument to the jury, the Souths' counsel referred to statements made by the engineer as to why he did not cover South with his jacket. As noted previously, some of those statements were never admitted into evidence because of the court's ruling that they were highly prejudicial. As part of its instruction to the jury the trial court gave a standard instruction that the arguments or other remarks of the attorneys were not to be considered as evidence in the case and that any comments by counsel concerning the evidence which were not warranted by the evidence actually admitted were to be wholly disregarded. We recognize the reality of a situation such as this wherein inflammatory comments made by counsel during opening argument, once impressed upon the minds of the jurors, can perhaps never be totally erased or their effect completely negated by an instruction that such comments are not evidence and should be wholly disregarded. Nevertheless, in view of the instruction as given and in view of the proper limited admission into evidence of the engineer's testimony regarding his failure to assist South after the accident we hold that the disputed comments of the Souths' counsel in opening argument did not constitute prejudicial error entitling the Railroad to a new trial.

### **Questions to Ponder About *South v. Amtrak***

**A.** Recall from *Weirum v. RKO* Justice Mosk's explanation of the legal doctrine of duty as being informed by "our continually refined

concepts of morals and justice.” The North Dakota Supreme Court appears to be working in this vein when it announces that it is following § 322 of the *Restatement (Second) of Torts*, saying the affirmative duty to render aid “reflects the type of basic decency and human thoughtfulness which is generally characteristic of our people.” Does this mean that North Dakota sees itself as a nicer state than jurisdictions that have kept the old common-law rule that there is no affirmative duty to render aid?

**B.** To get at the same sort of question from a different angle, does the American Law Institute’s adoption of § 322 in 1965 indicate that modern American society is nicer, more thoughtful, and more caring than the society that adopted the old rule – or at least sees itself as such?

### **Weather and “Atmospherics”**

Lawyers use the word “atmospherics” to refer to facts that, while not directly legally relevant, set a case’s overall mood. Legal irrelevance notwithstanding, atmospherics can be important in valuing a case and assessing a plaintiff’s likelihood of success. *South v. Amtrak* happens to have literal atmospherics. Northeastern North Dakota, where Larimore is, has the coldest winters in the lower 49 states. And the middle of January is the coldest time of the year. The case doesn’t say how cold it was on the morning of January 17, 1976, but according to archival weather data, it was approximately  $-9^{\circ}\text{F}$  with a wind-chill temperature of  $-24^{\circ}\text{F}$ . That’s not just uncomfortably cold – for someone not properly dressed, that’s lethally cold. Another aspect of this case’s atmospherics is the Cold War. The facts say that Billy South was on his way to a missile site. At the time, Grand Forks Air Force Base was home to the 321st Strategic Missile Wing, which controlled scores of nuclear-tipped Minuteman II intercontinental ballistic missiles loaded in underground silos spread out all over eastern North Dakota. The air base is about 20 minutes from where the accident occurred. So not only is it terrifically cold, we have a plaintiff who is serving his country. It would seem that neither America’s Cold War struggles nor North Dakota’s frigid winters were, strictly speaking, reasons to adopt a particular

negligence doctrine suggested by the Restatement. But no lawyer for the plaintiff in such a case would fail to put them before the court.

### **Evidence Law and Procedural Posture**

The *South v. Amtrak* case helps to show why procedural context is so important to understanding an opinion. The court needed to reach the substantive question of whether there is an affirmative duty to render aid in order to decide whether it was proper to admit testimony of the parka incident. Once that question of substantive tort-law question was answered, the admissibility of the testimony became a matter of the rules of evidence. Of course, what was really at stake in this case was the ability of the plaintiff's lawyer to put before the jury the emotionally charged vignette of the Amtrak engineer's refusal to use his jacket to keep the plaintiff warm. Technically, the importance of this testimony was slight. Lawyers on both sides, however, clearly understood the enormous potential of the testimony to make an impression on the jury.

### **Note About the Interpretation of Statutes**

*South v. Amtrak* illustrates how courts interpret statutes and how statutes are potentially useful in negligence cases. North Dakota Century Code § 39-08-06, imposes a duty on "the driver of any vehicle involved in an accident" to render reasonable assistance. The plaintiff hoped to use this statute to impose such a duty on the Amtrak engineer. The ordinary meaning of the word "vehicle" would certainly include a train, and imposing a duty of assistance on train engineers seems to be well within the spirit of the statute. Yet the court declined to apply the statute, hewing to a somewhat idiosyncratic and technical definition found elsewhere in Title 39. The mystery of why trains are excluded from the definition is resolved when you find out that Title 39 of the North Dakota Century Code is the state's comprehensive scheme for regulating the driving of cars and trucks on public roads. Without the definition's exclusion of trains from "vehicle," trains in North Dakota would be subject to all the provisions of Title 39, including requirements to use turn signals, display license plates, and even stop at railroad crossings when red lights were flashing. In this case, the plaintiff's lawyers were

hoping the court might stretch the meaning of “vehicle” in the context of § 39-08-06 to include trains. But to do so would have required ignoring the statute’s text. The court was, however, well within its mandate to uphold the spirit of the statute by announcing a new common-law doctrine.

### **“Good Samaritan” Laws**

Many people, when they first hear about the common law’s lack of a duty to rescue, ask, “What about Good Samaritan laws?”

All states have so-called “Good Samaritan” laws on the books – but they don’t work the way most people think. Instead of requiring people to come to one another’s rescue, these laws mostly function to provide a liability shield for the “clumsy rescuer,” who munificently decides to come to a person’s aid, but then ends up doing more harm than good. The idea of these statutes is to waylay the fears of someone who, at the scene of an accident, thinks, “Gosh, I know CPR, but if I try to help out, I might end up getting sued.”

Referring to the biblical parable that gives Good Samaritan laws their name, Dean William L. Prosser wrote, “[T]he Good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing.”

An example is *Swenson v. Waseca Mutual Insurance Co.*, 653 N.W.2d 794 (Minn. Ct. App. 2002). In that case, a group of friends were snowmobiling when one of them, 13-year-old Kelly Swenson, suffered what appeared to be a dislocated knee. The friends tried to flag down a passing motorist for help. A woman named Lillian Tiegs was nice enough to stop. After trying unsuccessfully to call 911 on her cell phone, Tiegs offered to take Swenson to the hospital. When Tiegs tried to make a U-turn on the highway to go the direction Swenson needed, a speeding tractor-trailer rig struck Tiegs’s vehicle and killed Swenson. Swenson’s family sued Tiegs, alleging she was negligent in making the turn. Tiegs’s insurance company was able to use the state’s Good Samaritan law as a liability shield.

Good Samaritan laws vary state by state in coverage. Typically, the laws provide immunity from ordinary negligence, but not from gross negligence or recklessness. Who is protected by the laws varies as well. Some laws extend immunity to any well-meaning stranger. Some only apply to persons with training or persons who are licensed professionals, such as nurses, EMTs, and physicians.

On balance, scholars think Good Samaritan laws do little to actually encourage people to render help. Professor Dov Waisman, however, argues that Good Samaritan laws are justified in at least some situations on the basis of fairness. See Waisman, *Negligence, Responsibility, and the Clumsy Samaritan: Is There a Fairness Rationale for the Good Samaritan Immunity?*, 29 GA. ST. U. L. REV. 609 (2013).

Although in the ordinary case, Good Samaritan laws do not require people to render aid, there are four states that have laws that impose some kind of a duty to stop and render aid. Maybe these statutes would be better called “Compelled Samaritan laws.” Minnesota, Rhode Island, and Vermont make it an offense to fail to render reasonable assistance at the scene of an emergency to someone who is exposed to or has suffered grave physical harm if it is possible to safely do so. In Minnesota and Rhode Island, such failure to render aid is a low-level misdemeanor; in Vermont it carries a maximum \$100 fine. See Minn. Stat. § 604A.01, R.I. Gen. Laws § 11-56-1, & 12 Vt. Stat. § 519. Wisconsin has a narrower duty that attaches when someone is the victim of a crime. See Wis. Stat. § 940.34.

### **The Exception for Special Relationships**

Despite the general no-affirmative-duty rule, there is an affirmative duty to render aid or take other affirmative actions in situations involving certain pre-existing relationships. Examples of duties owed on account of special relationships are:

- common carriers, to passengers
- innkeepers, to guests
- landlords, to tenants
- stores, to customers

- possessors of land open to the public, to members of the public lawfully present
- schools, to students
- employers, to employees
- jailers, to prisoner
- day-care providers, to the children or adults being cared for

So, for instance, if a hotel fire breaks out for reasons having nothing to do with negligence on the part of the hotel, the hoteliers are nonetheless under a duty to help patrons to safety. Similarly, if a customer in a store has a heart attack and falls to the floor, the storekeepers have an obligation to dial 911, clear a space, etc.

### **The Exception for Assumption of Duty**

Another exception to the no-affirmative-duty rule is when a defendant assumes the duty. A motorist is driving along the highway when comes upon the scene of a car crash. In this instance, he is under no duty to stop. This is true even if no other help has yet arrived. But if the motorist does stop to render aid, then he has assumed a duty. This means that the driver is liable for any additional harm caused by his failure to take whatever affirmative steps are reasonable under the circumstances. Certainly such a duty would include calling 911, assuming there is cell phone service. Moreover, once the motorist has stopped, the he cannot “unassume” the duty by getting back in his car and driving away. Of course, once emergency responders have arrived, he could leave, since reasonable care would not require him to stick around.

One rationale the courts have articulated for the assumption-of-duty rule is that once a bystander voluntarily intercedes to render aid, this makes it less likely that other people will do so. So if a would-be rescuer comes to the aid of someone, but then acts carelessly or fails to follow through, the plaintiff will be left in a worse position than if the defendant had never stopped in the first place.



### **The *Tarasoff* Exception**

One particular exception to the no-affirmative-duty rule is unique enough that it is largely associated with the case that announced it: *Tarasoff v. UC Regents*. The case held that a psychotherapist has a duty to warn third persons of potential dangers that have been revealed in the course of psychotherapy. Thus, if a patient tells a therapist about difficult-to-control urges to do harm to a third person, then a duty running from the therapist to the third party may be triggered. This rule is distinguished from the special-relationship exception discussed above. Under the special-relationship rule, the psychotherapist has affirmative duties to a patient. The *Tarasoff* rule, by contrast, creates an affirmative duty on the part of the psychotherapist to a person with whom the psychotherapist has no relationship at all.

#### **Case: *Tarasoff v. UC Regents***

The following case led a seachange in the law of liability for psychotherapists. And like *Boyd*, it is a good case to ask whether you find the court's use of precedent persuasive.

#### ***Tarasoff v. Regents of the University of California***

Supreme Court of California

July 1, 1976

17 Cal. 3d 425. VITALY TARASOFF et al., Plaintiffs and Appellants, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents. S.F. No. 23042. Judges: Opinion by Tobriner, J., with Wright, C. J., Sullivan and Richardson, JJ., concurring. Separate concurring and dissenting opinion by Mosk, J. Separate dissenting opinion by Clark, J., with McComb, J., concurring.

#### **Justice MATHEW O. TOBRINER:**

On October 27, 1969, Prosenjit Poddar killed Tatiana Tarasoff. Plaintiffs, Tatiana's parents, allege that two months earlier Poddar confided his intention to kill Tatiana to Dr. Lawrence Moore, a psychologist employed by the Cowell Memorial Hospital at the University of California at Berkeley. They allege that on Moore's request, the campus police

briefly detained Poddar, but released him when he appeared rational. They further claim that Dr. Harvey Powelson, Moore's superior, then directed that no further action be taken to detain Poddar. No one warned plaintiffs of Tatiana's peril.

Concluding that these facts set forth causes of action against neither therapists and policemen involved, nor against the Regents of the University of California as their employer, the superior court sustained defendants' demurrers to plaintiffs' second amended complaints without leave to amend. "The therapist defendants include Dr. Moore, the psychologist who examined Poddar and decided that Poddar should be committed; Dr. Gold and Dr. Yandell, psychiatrists at Cowell Memorial Hospital who concurred in Moore's decision; and Dr. Powelson, chief of the department of psychiatry, who countermanded Moore's decision and directed that the staff take no action to confine Poddar. The police defendants include Officers Atkinson, Brownrigg and Halleran, who detained Poddar briefly but released him; Chief Beall, who received Moore's letter recommending that Poddar be confined; and Officer Teel, who, along with Officer Atkinson, received Moore's oral communication requesting detention of Poddar." This appeal ensued.

Plaintiffs' complaints predicate liability on two grounds: defendants' failure to warn plaintiffs of the impending danger and their failure to bring about Poddar's confinement pursuant to the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000 *ff.*) Defendants, in turn, assert that they owed no duty of reasonable care to Tatiana and that they are immune from suit under the California Tort Claims Act of 1963 (Gov. Code, § 810 *ff.*).

We shall explain that defendant therapists cannot escape liability merely because Tatiana herself was not their patient. When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a

serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

In the case at bar, plaintiffs admit that defendant therapists notified the police, but argue on appeal that the therapists failed to exercise reasonable care to protect Tatiana in that they did not confine Poddar and did not warn Tatiana or others likely to apprise her of the danger. Defendant therapists, however, are public employees. Consequently, to the extent that plaintiffs seek to predicate liability upon the therapists' failure to bring about Poddar's confinement, the therapists can claim immunity under Government Code section 856. No specific statutory provision, however, shields them from liability based upon failure to warn Tatiana or others likely to apprise her of the danger, and Government Code section 820.2 does not protect such failure as an exercise of discretion.

Plaintiffs therefore can amend their complaints to allege that, regardless of the therapists' unsuccessful attempt to confine Poddar, since they knew that Poddar was at large and dangerous, their failure to warn Tatiana or others likely to apprise her of the danger constituted a breach of the therapists' duty to exercise reasonable care to protect Tatiana.

Plaintiffs, however, plead no relationship between Poddar and the police defendants which would impose upon them any duty to Tatiana, and plaintiffs suggest no other basis for such a duty. Plaintiffs have, therefore, failed to show that the trial court erred in sustaining the demurrer of the police defendants without leave to amend.

#### 1. Plaintiffs' complaints

Plaintiffs, Tatiana's mother and father, filed separate but virtually identical second amended complaints. The issue before us on this appeal is whether those complaints now state, or can be amended to state, causes of action against defendants. We therefore begin by setting forth the pertinent allegations of the complaints.

Plaintiffs' first cause of action, entitled "Failure to Detain a Dangerous Patient," alleges that on August 20, 1969, Poddar was a voluntary outpatient receiving therapy at Cowell Memorial Hospital. Poddar informed Moore, his therapist, that he was going to kill an unnamed girl, readily identifiable as Tatiana, when she returned home from spending the summer in Brazil. Moore, with the concurrence of Dr. Gold, who had initially examined Poddar, and Dr. Yandell, assistant to the director of the department of psychiatry, decided that Poddar should be committed for observation in a mental hospital. Moore orally notified Officers Atkinson and Teel of the campus police that he would request commitment. He then sent a letter to Police Chief William Beall requesting the assistance of the police department in securing Poddar's confinement.

Officers Atkinson, Brownrigg, and Halleran took Poddar into custody, but, satisfied that Poddar was rational, released him on his promise to stay away from Tatiana. Powelson, director of the department of psychiatry at Cowell Memorial Hospital, then asked the police to return Moore's letter, directed that all copies of the letter and notes that Moore had taken as therapist be destroyed, and "ordered no action to place Prosenjit Poddar in 72-hour treatment and evaluation facility."

Plaintiffs' second cause of action, entitled "Failure to Warn On a Dangerous Patient," incorporates the allegations of the first cause of action, but adds the assertion that defendants negligently permitted Poddar to be released from police custody without "notifying the parents of Tatiana Tarasoff that their daughter was in grave danger from Posenjit

Poddar.” Poddar persuaded Tatiana’s brother to share an apartment with him near Tatiana’s residence; shortly after her return from Brazil, Poddar went to her residence and killed her.~

2. Plaintiffs can state a cause of action against defendant therapists for negligent failure to protect Tatiana.

The second cause of action can be amended to allege that Tatiana’s death proximately resulted from defendants’ negligent failure to warn Tatiana or others likely to apprise her of her danger. Plaintiffs contend that as amended, such allegations of negligence and proximate causation, with resulting damages, establish a cause of action. Defendants, however, contend that in the circumstances of the present case they owed no duty of care to Tatiana or her parents and that, in the absence of such duty, they were free to act in careless disregard of Tatiana’s life and safety.

In analyzing this issue, we bear in mind that legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done. As stated in *Dillon v. Legg* (1968) 68 Cal.2d 728, 734: “The assertion that liability must ... be denied because defendant bears no ‘duty’ to plaintiff ‘begs the essential question – whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct. ... [Duty] is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.’ (Prosser, Law of Torts [3d ed. 1964] at pp. 332-333.)”

In the landmark case of *Rowland v. Christian* (1968) 69 Cal.2d 108, Justice Peters recognized that liability should be imposed “for injury occasioned to another by his want of ordinary care or skill” as expressed in section 1714 of the Civil Code. (3) Thus, Justice Peters, quoting from *Heaven v. Pender* (1883) 11 Q.B.D. 503, 509 stated: ““whenever one person is by

circumstances placed in such a position with regard to another ... that if he did not use ordinary care and skill in his own conduct ... he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.”

We depart from “this fundamental principle” only upon the “balancing of a number of considerations”; major ones “are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.”

The most important of these considerations in establishing duty is foreseeability. As a general principle, a “defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.” As we shall explain, however, when the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim. Since the relationship between a therapist and his patient satisfies this requirement, we need not here decide whether foreseeability alone is sufficient to create a duty to exercise reasonable care to protect a potential victim of another’s conduct.

Although, as we have stated above, under the common law, as a general rule, one person owed no duty to control the conduct of another, the courts have carved out an exception to this rule in cases in which the defendant stands in some special relationship to either the person whose conduct needs

to be controlled or in a relationship to the foreseeable victim of that conduct. Applying this exception to the present case, we note that a relationship of defendant therapists to either Tatiana or Poddar will suffice to establish a duty of care; as explained in section 315 of the Restatement Second of Torts, a duty of care may arise from either “(a) a special relation ... between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or (b) a special relation ... between the actor and the other which gives to the other a right of protection.”

Although plaintiffs’ pleadings assert no special relation between Tatiana and defendant therapists, they establish as between Poddar and defendant therapists the special relation that arises between a patient and his doctor or psychotherapist. Such a relationship may support affirmative duties for the benefit of third persons. Thus, for example, a hospital must exercise reasonable care to control the behavior of a patient which may endanger other persons. A doctor must also warn a patient if the patient’s condition or medication renders certain conduct, such as driving a car, dangerous to others.

Although the California decisions that recognize this duty have involved cases in which the defendant stood in a special relationship *both* to the victim and to the person whose conduct created the danger, we do not think that the duty should logically be constricted to such situations. “[For example,] *Ellis v. D’Angelo* (1953) 116 Cal.App.2d 310, upheld a cause of action against parents who failed to warn a babysitter of the violent proclivities of their child; *Johnson v. State of California* (1968) 69 Cal.2d 782, upheld a suit against the state for failure to warn foster parents of the dangerous tendencies of their ward; *Morgan v. County of Yuba* (1964) 230 Cal.App.2d 938, sustained a cause of action against a sheriff who had promised to warn decedent before releasing a dangerous prisoner, but failed to do so.”

Decisions of other jurisdictions hold that the single relationship of a doctor to his patient is sufficient to support the duty to exercise reasonable care to protect others against dangers emanating from the patient's illness. The courts hold that a doctor is liable to persons infected by his patient if he negligently fails to diagnose a contagious disease, or, having diagnosed the illness, fails to warn members of the patient's family.

Since it involved a dangerous mental patient, the decision in *Merchants Nat. Bank & Trust Co. of Fargo v. United States* (D.N.D. 1967) 272 F.Supp. 409 comes closer to the issue. The Veterans Administration arranged for the patient to work on a local farm, but did not inform the farmer of the man's background. The farmer consequently permitted the patient to come and go freely during nonworking hours; the patient borrowed a car, drove to his wife's residence and killed her. Notwithstanding the lack of any "special relationship" between the Veterans Administration and the wife, the court found the Veterans Administration liable for the wrongful death of the wife.

In their summary of the relevant rulings Fleming and Maximov conclude that the "case law should dispel any notion that to impose on the therapists a duty to take precautions for the safety of persons threatened by a patient, where due care so requires, is in any way opposed to contemporary ground rules on the duty relationship. On the contrary, there now seems to be sufficient authority to support the conclusion that by entering into a doctor-patient relationship the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself, but also of any third person whom the doctor knows to be threatened by the patient." (Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma* (1974) 62 CAL. L. REV. 1025, 1030.)

Defendants contend, however, that imposition of a duty to exercise reasonable care to protect third persons is



unworkable because therapists cannot accurately predict whether or not a patient will resort to violence. In support of this argument amicus representing the American Psychiatric Association and other professional societies cites numerous articles which indicate that therapists, in the present state of the art, are unable reliably to predict violent acts; their forecasts, amicus claims, tend consistently to overpredict violence, and indeed are more often wrong than right. Since predictions of violence are often erroneous, amicus concludes, the courts should not render rulings that predicate the liability of therapists upon the validity of such predictions.

The role of the psychiatrist, who is indeed a practitioner of medicine, and that of the psychologist who performs an allied function, are like that of the physician who must conform to the standards of the profession and who must often make diagnoses and predictions based upon such evaluations. Thus the judgment of the therapist in diagnosing emotional disorders and in predicting whether a patient presents a serious danger of violence is comparable to the judgment which doctors and professionals must regularly render under accepted rules of responsibility.

We recognize the difficulty that a therapist encounters in attempting to forecast whether a patient presents a serious danger of violence. Obviously, we do not require that the therapist, in making that determination, render a perfect performance; the therapist need only exercise “that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances.” Within the broad range of reasonable practice and treatment in which professional opinion and judgment may differ, the therapist is free to exercise his or her own best judgment without liability; proof, aided by hindsight, that he or she judged wrongly is insufficient to establish negligence.

In the instant case, however, the pleadings do not raise any question as to failure of defendant therapists to predict that

Poddar presented a serious danger of violence. On the contrary, the present complaints allege that defendant therapists did in fact predict that Poddar would kill, but were negligent in failing to warn.

Amicus contends, however, that even when a therapist does in fact predict that a patient poses a serious danger of violence to others, the therapist should be absolved of any responsibility for failing to act to protect the potential victim. In our view, however, once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger. While the discharge of this duty of due care will necessarily vary with the facts of each case, in each instance the adequacy of the therapist's conduct must be measured against the traditional negligence standard of the rendition of reasonable care under the circumstances. As explained in Fleming and Maximov, *The Patient or His Victim: The Therapist's Dilemma* (1974) 62 CAL. L. REV. 1025, 1067: "... the ultimate question of resolving the tension between the conflicting interests of patient and potential victim is one of social policy, not professional expertise. ... In sum, the therapist owes a legal duty not only to his patient, but also to his patient's would-be victim and is subject in both respects to scrutiny by judge and jury."~

The risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved. We would hesitate to hold that the therapist who is aware that his patient expects to attempt to assassinate the President of the United States would not be obligated to warn the authorities because the therapist cannot predict with accuracy that his patient will commit the crime.

Defendants further argue that free and open communication is essential to psychotherapy; that "Unless a patient ... is assured that ... information [revealed by him] can and will be

held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment ... depends.” (Sen. Com. on Judiciary, comment on Evid. Code, § 1014.) The giving of a warning, defendants contend, constitutes a breach of trust which entails the revelation of confidential communications.

“Counsel for defendant Regents and amicus American Psychiatric Association predict that a decision of this court holding that a therapist may bear a duty to warn a potential victim will deter violence-prone persons from seeking therapy, and hamper the treatment of other patients.” In *In re Lifschutz*, counsel for the psychiatrist argued that if the state could compel disclosure of some psychotherapeutic communications, psychotherapy could no longer be practiced successfully. We rejected that argument, and it does not appear that our decision in fact adversely affected the practice of psychotherapy in California. Counsels’ forecast of harm in the present case strikes us as equally dubious.”

We recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy, and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication. Against this interest, however, we must weigh the public interest in safety from violent assault. The Legislature has undertaken the difficult task of balancing the countervailing concerns. In Evidence Code section 1014, it established a broad rule of privilege to protect confidential communications between patient and psychotherapist. In Evidence Code section 1024, the Legislature created a specific and limited exception to the psychotherapist-patient privilege: “There is no privilege ... if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.”

Our current crowded and computerized society compels the interdependence of its members. In this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal. If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the endangered party or those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment. The containment of such risks lies in the public interest. For the foregoing reasons, we find that plaintiffs' complaints can be amended to state a cause of action against defendants Moore, Powelson, Gold, and Yandell and against the Regents as their employer, for breach of a duty to exercise reasonable care to protect Tatiana.~

**Justice STANLEY MOSK, concurring and dissenting:**

I concur in the result in this instance only because the complaints allege that defendant therapists did in fact predict that Poddar would kill and were therefore negligent in failing to warn of that danger. Thus the issue here is very narrow: we are not concerned with whether the therapists, pursuant to the standards of their profession, "should have" predicted potential violence; they allegedly did so in actuality. Under these limited circumstances I agree that a cause of action can be stated.

Whether plaintiffs can ultimately prevail is problematical at best. As the complaints admit, the therapists *did* notify the police that Poddar was planning to kill a girl identifiable as Tatiana. While I doubt that more should be required, this issue may be raised in defense and its determination is a question of fact.

I cannot concur, however, in the majority's rule that a therapist may be held liable for failing to predict his patient's tendency to violence if other practitioners, pursuant to the "standards of the profession," would have done so. The

question is, what standards? Defendants and a responsible amicus curiae, supported by an impressive body of literature discussed at length in our recent opinion in *People v. Burnick* (1975) 14 Cal.3d 306, demonstrate that psychiatric predictions of violence are inherently unreliable.

In *Burnick*, at pages 325-326, we observed: “In the light of recent studies it is no longer heresy to question the reliability of psychiatric predictions. Psychiatrists themselves would be the first to admit that however desirable an infallible crystal ball might be, it is not among the tools of their profession. It must be conceded that psychiatrists still experience considerable difficulty in confidently and accurately *diagnosing* mental illness. Yet those difficulties are multiplied manyfold when psychiatrists venture from diagnosis to prognosis and undertake to predict the consequences of such illness~”.

I would restructure the rule designed by the majority to eliminate all reference to conformity to standards of the profession in predicting violence. If a psychiatrist does in fact predict violence, then a duty to warn arises. The majority’s expansion of that rule will take us from the world of reality into the wonderland of clairvoyance.

**Justice WILLIAM PATRICK CLARK, JR., dissenting:**

Until today’s majority opinion, both legal and medical authorities have agreed that confidentiality is essential to effectively treat the mentally ill, and that imposing a duty on doctors to disclose patient threats to potential victims would greatly impair treatment. Further, recognizing that effective treatment and society’s safety are necessarily intertwined, the Legislature has already decided effective and confidential treatment is preferred over imposition of a duty to warn.

The issue whether effective treatment for the mentally ill should be sacrificed to a system of warnings is, in my opinion, properly one for the Legislature, and we are bound by its judgment. Moreover, even in the absence of clear legislative direction, we must reach the same conclusion

because imposing the majority's new duty is certain to result in a net increase in violence.~

The tragedy of Tatiana Tarasoff has led the majority to disregard the clear legislative mandate of the Lanterman-Petris-Short Act. Worse, the majority impedes medical treatment, resulting in increased violence from – and deprivation of liberty to – the mentally ill.

We should accept legislative and medical judgment, relying upon effective treatment rather than on indiscriminate warning.~

### **Questions to Ponder About *Tarasoff***

A. Both *Tarasoff* and *Boyd* implicate questions about the effect that the court's decision may have on future behavior. For instance, in *Boyd* there was a concern that finding a duty would encourage the use of hostages in future hold-ups. In *Tarasoff*, there is a concern that finding a duty will cause future psychotherapy patients to be less revelatory in therapy sessions, thereby making therapy less effective, which ultimately will cause society greater harm than the occasional harm done to third parties that might have been prevented with a warning. What do you think of that concern? Is there a difference between *Boyd* and *Tarasoff* on this score?

B. This case, like many, raises the question of whether the courts or legislatures are better equipped to deal with the competing concerns raised in considering a change to tort law. In what ways might legislatures be better than courts in making such changes? In what ways might courts be better than legislatures?

## 6. Breach of the Duty of Care

“What's called for here is not paranoia but its uptown cousin,  
reasonable caution.”

– Brendan I. Koerner, Wired Magazine, 2010

“I did my best, but I guess my best wasn't good enough.”

– James Ingram, in a song written by Cynthia Weil, 1981

### A. Determining Breach, in General

The next element in the negligence case is breach of the duty of care. Very roughly, this gets at the question of whether the defendant was “being careless.” In this sense, the breach element is really at the heart of negligence cause of action.

#### **Terminology Note: Negligence vs. Negligence**

This is a good point at which to pause to note some potentially confusing issues regarding terminology.

The term “negligence” is used for two different concepts. One use of the word “negligence” is to denote a legal cause of action, a basis upon which one person can sue another. This is the sense in which we have been using the word up to now. The other use of the word “negligence” is as a synonym for “carelessness.” And in this sense, “negligence” is sometimes used to refer to the breach of the duty of care. In this vein, a person might say “the defendant was negligent” or “the defendant's actions constituted negligence” as a way of saying that “the defendant breached his or her duty of care.” Of course it seems circular to speak of “negligence” as being just one of the several elements of “negligence.” But the apparent circularity is resolved when you understand the separate senses in which the word may be used.

More often than not the noun “negligence” refers to the cause of action, while the adjective “negligent” refers to the breach element. But you cannot count on the noun/adjective distinction to tell the concepts apart, because they often go the other way as well. To be literate in reading cases, briefs, and other documents, you will need to learn to look past the word to the concept it represents. It may sound confusing now, but if you keep reading, this is something that will soon come to you naturally, without conscious thought.

### **The Essential Question: Was the Risk Unreasonable?**

To speak in very broad terms, the breach question essentially comes down to the question of whether the risk was *reasonable*. Certainly there is much more the law has to say about the matter – and this chapter will cover that. But in terms of the basic idea, breach is defined by what can reasonably be expected of people living in civil society who do not wish to cause harm.

An example will help show reasonableness in action.

*Example: Banana Peels and Lasers* – Suppose a woman slips and falls on a banana peel in the produce aisle of the grocery store, causing her to suffer a broken wrist. Suppose also that the banana peel had only been there for a couple of minutes before the woman slipped. On these facts, can the woman establish a prima facie case for negligence against the grocery store? No, she cannot. But why not? It is certainly true that the grocery store could have prevented the accident if it had really wanted to. The store could have installed a sophisticated laser-tripwire alarm system to detect the presence of any foreign object on the floor. Or the grocery store could have hired a large number of employees to act as sentries, guarding every aisle to provide constant monitoring of all floors for hazards. Those things would have prevented the accident. But it is not *reasonable* to expect stores to do these sorts of things. The law only requires people to be reasonably careful, not triple-extra-super-duper careful.



### **Distinguishing Breach from the Other Elements**

Remember that each element in the negligence cause of action is essential to presenting a prima facie case. If a plaintiff can prove that a defendant owed the plaintiff a duty of care and undertook an action that actually and proximately caused an injury to the plaintiff's person or property, there can still be no recovery if there is no breach.

Consider again the banana case. Notice that in that case, absolutely every other element of the negligence case is there. There is a duty of care: That is easy, because stores owe their customers a duty of care. There is also actual causation: But for the banana peel being in the aisle, there would be no injury. Proximate causation is satisfied as well: There is a very direct connection between the presence of the banana peel and the broken wrist, and a slip-and-fall is a foreseeable consequence of an abandoned banana peel in a walkway. The existence-of-damages element is satisfied also: There is a broken wrist. What is missing is the breach element. It is the breach element – and it alone – that prevents the unlucky shopper from recovering from the grocery store.

### **Case: Rogers v. Retrum**

The following case is an example of a situation in which all the elements of a negligence cause of action are present except for breach of the duty of care. The court takes pains to explain why it all comes down to breach, and because of this, the case provides an excellent introduction to the breach element.

One thing to note about the terminology in the case: What the court calls “legal cause” is a lumping together of what this casebook treats as two separate elements: actual causation and proximate causation. Moreover, instead of using the term “actual causation,” the case uses the terms “but-for causation” and “causation-in-fact.”

### ***Rogers v. Retrum***

Court of Appeals of Arizona, Division One, Department E  
July 18, 1991

170 Ariz. 399. Kevin C. ROGERS, a minor, by and through his next best friend and natural mother, Sheila E.

STANDLEY, Plaintiffs-Appellants, v. Randolph RETRUM and Jane Doe Retrum, husband and wife; Prescott Unified School District, Defendants-Appellees. No. 1 CA-CV 89-356.

**Judge NOEL FIDEL:**

Plaintiff Kevin C. Rogers appeals from summary judgment entered for defendants Randolph Retrum and Prescott Unified School District on plaintiff's negligence claim. We affirm summary judgment because plaintiff's injury did not result from an unreasonable risk that may be charged to the conduct of these defendants.

**FACTUAL AND PROCEDURAL HISTORY**

We state the facts, as always, in the light most favorable to the party appealing from summary judgment.

On the morning of February 5, 1989, Kevin C. Rogers, a sixteen-year-old junior at Prescott High School, completed an advanced electronics test. Although Rogers anticipated a good grade, the teacher, Randolph Retrum, publicly gave him a failing grade. When Rogers asked why, Retrum threw the test in his direction and answered, "Because I don't like you."

Although class was not over, Retrum permitted students to leave class as they pleased, and Prescott High School permitted students to enter and leave the campus freely. (The defendants dispute these allegations, but also acknowledge that we must accept them as truthful for the purpose of reviewing summary judgment.)

Humiliated and upset, Rogers left class with a friend named Natalo Russo, punching a wall and kicking some trash cans on his way to Russo's car. As Russo tried to calm him, the friends left campus in Russo's car by a meandering route that eventually led them eastward on Iron Springs Road. There Russo, the driver, accelerated and lost control, passing in a curve at a speed exceeding 90 miles per hour. When the car struck an embankment, landed on its nose, and slid several

hundred feet, Rogers was ejected and sustained the injuries for which he sues.

After the accident, Retrum admitted that Rogers had actually passed the test. Retrum had falsely given Rogers a failing grade because Rogers had always done well in the class and Retrum “wanted [Rogers] to know what it felt like to fail.”

Rogers settled negligence claims against Natalo Russo and his parents, and the trial court granted summary judgment rejecting Rogers’s negligence claims against Retrum and the district. From this judgment, Rogers appeals.

#### PLAINTIFF’S CLAIM OF NEGLIGENCE

We first point out that Retrum’s alleged conduct, however egregious, is not the causal focus of plaintiff’s claim. If, in the flush of first reaction, plaintiff had blindly run into harm’s way, we would examine the range of foreseeable, unreasonable risks that might be attributed to a teacher’s false and deliberate humiliation of an impressionable teenager entrusted to his class.

Plaintiff, however, stepped into his friend Natalo Russo’s car. And plaintiff’s counsel has conceded at oral argument that there is no evidence that Retrum’s words to Rogers affected Russo’s operation of his car.

Counsel instead targets Retrum’s “open class” and the district’s “open campus” policies as the causal negligence in this case. By these policies, according to counsel, defendants breached their supervisory duty to plaintiff and exposed him to the risk of highway injury when he should have been in class. We confine our analysis to this claim.

#### DUTY

The first question in a negligence case is whether the defendants owed a duty to the plaintiff. We find that defendants had a relationship with plaintiff that entailed a duty of reasonable care.

Our supreme court has distilled, as the essence of duty, the obligation to act reasonably in the light of foreseeable and unreasonable risks.

Clearly, school teachers and administrators are “under [an] obligation for the benefit of” the students within their charge. This obligation includes the duty not to subject those students, through acts, omissions, or school policy, to a foreseeable and unreasonable risk of harm.

#### LEGAL CAUSE

We next take up defendants’ argument that summary judgment may be affirmed on the ground that Russo’s driving was an intervening, superseding cause. We do so before reaching the dispositive question of breach of duty because questions of breach and cause are too often confused and this case may serve to delineate them. We are guided by the comment of Professors Prosser and Keeton that

[i]n [certain] cases the standard of reasonable conduct does not require the defendant to recognize the risk, or to take precautions against it. ... In these cases the defendant is simply not negligent. When the courts say that his conduct is not “the proximate cause” of the harm, they not only obscure the real issue, but suggest artificial distinctions of causation which have no sound basis, and can only arise to plague them in the future.

Prosser and Keeton, *supra* § 42, at 275; *see also Tucker v. Collar*, 79 Ariz. 141, 145 (1955) (“Much confusion has resulted from many courts disposing of cases upon the ground defendant’s act was not the proximate cause of an injury when the proper basis was that there was no negligence.”).

One element of legal cause is “but-for causation” or causation-in-fact. *See Ontiveros v. Borak*, 136 Ariz. 500, 505 (1983) (“[A]s far as causation-in-fact is concerned, the general rule is that a defendant may be held liable if his conduct

contributed to the result and if that result would not have occurred 'but for' defendant's conduct."). This element is adequately established; a jury might reasonably find that, but for the open campus and classroom policies plaintiff complains of, Rogers and Russo would have been at school at 9:10 a.m. on February 5, 1989, and not in a car on Iron Springs Road.

The more elusive element of legal cause is foreseeability, and this, according to defendants, is lacking in this case. They argue:

[N]o reasonable person could or should have realized Russo would drive in a criminally reckless manner at 100 miles an hour so as to cause an accident. Thus it is the intervening superseding act of fellow student Russo, not the act of Retrum or Prescott Schools[,] which was the proximate cause of plaintiff's injury.

We decline to affirm the trial court's judgment on this ground.

First, "we must take a broad view of the class of risks and victims that are foreseeable, and the particular manner in which the injury is brought about need not be foreseeable." *Schnyder v. Empire Metals, Inc.*, 136 Ariz. 428, 431 (App.1983). It is not unforeseeable that mobile high school students, permitted to leave campus during classroom hours, will be exposed to the risk of roadway accidents.

Second, the reckless or criminal nature of an intervenor's conduct does not place it beyond the scope of a duty of reasonable care if that duty entails foresight and prevention of precisely such a risk.

The condition created by defendants' negligent conduct, according to plaintiff, was exposure to a preventable risk of vehicular injury off school grounds. Inherent in the risk of vehicular injury is the prospect of an intervenor's negligent or reckless driving of a car; to foresee the injurious end is to

foresee that a careless intervenor, one way or another, may be the means. For this reason, it does not advance analysis in this case to focus on the details of the intervenor's conduct. The essential question is not whether the district might have foreseen the risk of vehicular injury but whether the district, given its supervisory responsibilities, was obliged to take precautionary measures. This question, we conclude, is neither one of duty nor causation; it is one of breach.

A useful contrast is provided by *Williams v. Stewart*, 145 Ariz. 602 (App.1985). When a maintenance worker entered a swimming pool to unclog the drain, the dirty water allegedly caused his preexisting sinus infection to spread to his brain. Division Two of this court affirmed summary judgment, stating:

Even assuming that [a persistent failure to clean the pool] created an unreasonable risk of some kinds of harm, Williams' injury was well outside the scope of foreseeable risk, was unrelated to what made the conduct negligent, and no liability resulted. This is not a case "where the duty breached was one imposed to prevent the type of harm which plaintiff ultimately sustained."

The same cannot be said in this case. Here, to paraphrase [*Williams by Williams*], assuming that the school's failure to restrict egress from campus created an unreasonable risk of vehicular injury off campus, plaintiff's injury was within the scope of foreseeable risk. Analysis thus shifts from the causal question whether the risk was foreseeable to the negligence question whether the risk was unreasonable.

#### UNREASONABLE RISK

Not every foreseeable risk is an unreasonable risk. It does not suffice to establish liability to prove (a) that defendant owed plaintiff a duty of reasonable care; (b) that an act or omission of defendant was a contributing cause of injury to plaintiff; and (c) that the risk of injury should have been foreseeable to

defendant. The question whether the risk was unreasonable remains. This last question merges with foreseeability to set the scope of the duty of reasonable care. Cf. 3 F. Harper, F. James & O. Gray, *The Law of Torts* § 18.2, at 656-57 (2d ed. 1986) (“[T]he inquiry into the scope of duty is concerned with exactly the same factors as is the inquiry into whether conduct is unreasonably dangerous (i.e., negligent).”).

To decide whether a risk was unreasonable requires an evaluative judgment ordinarily left to the jury. “Summary judgment is generally not appropriate in negligence actions.” *Tribe v. Shell Oil Co., Inc.*, 133 Ariz. 517, 518 (1982). However, in approaching the question of negligence or unreasonable risk,

the courts set outer limits. A jury will not be permitted to require a party to take a precaution that is clearly unreasonable. ... Thus, for example, the jury may not require a train to stop before passing over each grade crossing in the country.

3 F. Harper, F. James & O. Gray, *supra* § 15.3, at 355-57.

In describing the question whether a risk was unreasonable as requiring evaluative judgment, we acknowledge that the question does not fall neatly into the category of question of fact or the category of question of law. These categories serve less as guides to analysis than as labels that attach after the court has decided whether to leave evaluation to the jury or preempt it for the court. See James, *Functions of Judge and Jury in Negligence Cases*, 58 Yale L.J. 667, 667-68 (1949) (The common generality that questions of law are for the court and questions of fact for the jury “has never been fully true in either of its branches and tells us little or nothing that is helpful.”).

*Coburn v. City of Tucson* is a recent example of the court’s preemption of the question of unreasonable risk. There, a child eastbound on a bicycle was struck and killed by a

southbound driver in an intersection collision. 143 Ariz. at 51. The child had ignored a stop sign and entered the intersection in the lane of westbound (oncoming) traffic. The child could not see the driver approaching because a bush at the northwest corner obscured his view. The child's parents sued the city for failure to remove the bush; the city both controlled the street and owned the lot where the bush grew. *Id.* The evidence established, however, that the bush would not have obstructed the view of south- or northbound traffic for any eastbound cyclist or driver who had stayed in the eastbound lane and stopped at the stop sign. *Id.* at 54. The supreme court affirmed summary judgment for the city, finding that the city had not breached its duty to provide intersections that are reasonably safe.

The lack of liability may be framed in terms of duty, but we prefer that duty be recognized as a distinct element involving the obligation of the actor to protect the other from harm. Here, there was a duty, but no negligence; therefore, there is no liability.

*Id.* (citations omitted).

We make the same determination in this case. Members of our mobile society face the risk of collision whenever they are in cars. This risk is arguably higher for teenage passengers of teenage drivers. The school in this case, however, did nothing to increase this general risk. It did not, for example, leave students inadequately supervised or instructed in a driver's education class. It did not tolerate drinking at a school affair. It simply chose not to restrict students to campus during the school day and thereby shield them from the ordinary risk of vehicular harm that they would face when out of school. We conclude that "the standard of reasonable conduct [did] not require the defendant[s] to ... take precautions against" that risk. Prosser and Keeton, *supra* § 42, at 275. More simply stated, the defendants' omission did not create an unreasonable risk of harm.



Although, in taking this issue from the jury, we find that reasonable persons could not differ, we do not mask the element of policy in our choice. First, the question of the legal consequence of an open campus high school policy is not a random judgment best left to case-by-case assessment, but a question likely to recur and one on which school boards need some guidance. Second, policy considerations appropriate to local school boards – local transportation options, inter-school transfer arrangements, and extracurricular activity locations, for example – are pertinent to the decision whether restrictions should be placed on high school students coming and going from the campus during ordinary hours. Finally, and most significantly, we decline to make high school districts that adopt an open campus policy insurers against the ordinary risks of vehicular injury that students face in driving off school grounds.

This is not to suggest that a school’s supervisory omissions can never give rise to liability for an accident off campus. We do not pretend that the range of foreseeable and unreasonable risks from supervisory omissions is automatically circumscribed by the school fence.

Nor do we suggest that a calculus of unreasonable risk will yield equivalent results at every level of the schools. We leave for resolution in other unsupervised egress cases such questions as whether parents’ supervisory expectations may reasonably differ at differing levels of the schools and whether the risks that may be deemed unreasonable may likewise differ with the age of the student involved.

In a prior elementary school case, our court held that the abduction and slaying of a ten-year-old child who left campus without permission were unforeseeable consequences of the school’s alleged supervisory lapse. However, because cases after *Chavez* have stressed that “we must take a broad view of the class of risks and victims that are foreseeable,” we have recognized the question of unreasonable risk – not the question of foreseeable risk – as dispositive in this case.

Our limited holding in this case is that the defendant high school and its teacher did not subject the plaintiff high school student to an unreasonable risk of vehicular injury by permitting unsupervised egress from class and campus during the school day.

#### CONCLUSION

Because plaintiff's injury was not a result within an unreasonable risk created by defendants, we hold that defendants were not negligent. The trial court's summary judgment in favor of defendants is affirmed.

#### **Intentional Conduct as a Breach of Duty**

Can intentional conduct count as a breach of the duty of due care? The logical answer would seem to be yes. To act with the intent to harm or with the substantial certainty of causing harm is one way of failing to act with due care for persons around you.

Nevertheless, several courts have held that intentional conduct cannot count as a breach of the duty of due care. These cases seem to focus on the everyday meaning of the word "negligence" as meaning "carelessness," rather than looking at the tort of negligence as series of elements, which, if proved by the plaintiff, make out a prima facie case for liability.

An example of this approach is found in *American National Fire Insurance Co. v. Schuss*, 221 Conn. 768 (Conn. 1992), in which the Connecticut Supreme Court held that the perpetrator of intentional conduct could not be held liable in negligence. The complaint alleged that the defendant set fire to a synagogue, and a jury found the defendant liable in negligence. Yet the trial court set aside the verdict and the Connecticut Supreme Court affirmed, seeing the evidence that the defendant set the fire intentionally as a kind of defense to the negligence claim:

It is axiomatic, in the tort lexicon, that intentional conduct and negligent conduct, although differing only by a matter of degree[,] are separate and mutually exclusive.~

It is true, of course, that intentional tortious conduct will ordinarily also involve one aspect of negligent conduct, namely, that it falls below the objective standard established by law for the protection of others against unreasonable risk of harm. That does not mean, however, as the plaintiff's argument suggests, that the same conduct can reasonably be determined to have been both intentionally and negligently tortious. The distinguishing factor between the two is what the negligent actor does not have in mind: either the desire to bring about the consequences that follow or the substantial certainty that they will occur. If he acted without either that desire or that certainty, he was negligent; if he acted with either that desire or that certainty, he acted intentionally.~ Application of these principles to the evidence in this case compels the conclusion that the defendant acted intentionally, and not merely negligently.

*Id.* at 775, 777-778 (internal citations omitted).

The Hawaii Supreme Court explained what it saw as wrong with this line of thinking in the case of *Dairy Road Partners v. Island Insurance Co., Ltd.*, 992 P.2d 93 (Haw. 2000):

We recognize that a number of jurisdictions have held that evidence of intentional conduct may not support a claim for negligence. These decisions are grounded in the proposition that the words "negligence" and "intentional" are contradictory, inasmuch as negligence connotes carelessness, whereas intent connotes purposefulness. However, in this jurisdiction, we have never restricted claims sounding in negligence to unintentional or "careless" conduct.~ [A] cause of action sounding in negligence will lie if the defendant breaches a duty owed to the plaintiff, thereby

legally causing the plaintiff injury. So long as such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other, i.e., so long as the defendant owes the plaintiff a duty, the thoughts passing through the defendant's mind as he or she breaches that duty are immaterial. In a tort action, the defendant's state of mind is relevant only when the plaintiff alleges that the defendant's conduct was intentionally tortious and/or the plaintiff is seeking to recover punitive – as opposed to merely compensatory – damages from the defendant. A showing that the defendant's actions were intentional may allow the plaintiff to obtain punitive as well as compensatory damages. A plaintiff who fails to allege such wilful, wanton, malicious, or intentional conduct – notwithstanding that it may have occurred – and who, instead, merely alleges that the defendant breached a duty of care, waives the opportunity to recover punitive damages. In effect, such a plaintiff has “undercharged” his or her case against the defendant, just as a prosecutor may undercharge a criminal defendant and successfully convict him or her of an offense requiring a lesser state of mind than that demonstrated by the evidence of the case. The contrary rule, embraced by [other] jurisdictions, leads to the absurdity of allowing the defendant to raise, as an exonerating defense to a claim of negligence, that he or she purposefully injured the plaintiff. It is illogical and inequitable to reward a defendant for morally reprehensible conduct. Therefore, we respectfully disagree with *Schuss* and the other decisions[.]

*Id.* at 114-16 (internal citations and quotes omitted).

## B. The Reasonable Person Standard of Care

### Basics

It is amazing how much of the law comes down to the word “reasonable.” Just from watching television or reading books, you are probably already familiar with the concept of “reasonable doubt” in criminal law. But you will find that much of the law in contracts, property, and torts – not to mention antitrust, family law, disability law, and many other fields – also ultimately funnels down to a question of whether something is *reasonable*. Certainly not all legal questions turn on reasonability. But many do. And, as you will see in this chapter, the breach element of negligence is one of those.

If a defendant owes a plaintiff a duty of care, then the default standard of care is what the reasonable person would do under the same circumstances. If the defendant is less careful than the reasonable person would be, then the duty of care has been breached.

So, for example, if the defendant in a negligence case is alleged to have caused an accident by texting and driving 10 miles an hour over the speed limit while applying makeup, then the breach-of-duty question is: Would the reasonable person have done that while driving along that freeway at that time under those circumstances? If not, then the duty of care has been breached.

A classic statement invoking the reasonable person as the way of determining whether the duty of care has been breached comes from Baron Alderson in *Blyth v Birmingham Waterworks Co.*, 11 Ex. Ch. 781 (1856):

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might be liable for negligence, if, unintentionally, they omitted to do that which a prudent and reasonable person would have done, or did

that which a person taking reasonable care would not have done.”

(Note that in this quote, the first time Baron Alderson uses the word “negligence,” it is in the sense of *breach of the duty of care*; the second instance of the word refers to the cause of action as a whole.)

The reasonable person is a mental construct that is used as a benchmark for analysis. As such, “reasonable person” is a term of art in tort law.

It is important that you understand that the reasonable person is not a real person. She or he does actually exist. When you are in your torts classroom, look around. No one you see is the reasonable person. You can search the whole world and never find the reasonable person. Thus, at the trial of a negligence case, you can never put “a reasonable person” on the stand as an expert witness and ask what that person would have done. If such a thing could be done, it would create the most sought after expert witness in America. Imagine the plaintiff’s attorney asking, “Reasonable Person, would you have been driving along the freeway at 85 miles per hour while applying lipstick and texting?” Personal injury litigation would be a whole lot simpler if you could do that, but you cannot.

The reasonable person is not merely a person who is reasonable. In the real world, reasonable people are occasionally careless. But the reasonable person of negligence law is always careful – 24 hours a day, every day of her or his hypothetical life.

It follows that the breach-of-duty question in a negligence case is not answered by asking whether the defendant is a reasonable person. The defendant is not the hypothetical reasonable person, and, since the defendant is a real person, the defendant could never aspire to be the reasonable person. The relevant question is whether the defendant was behaving as the reasonable person would have behaved at the moment of the occurrence being sued over. So a defendant might be a very careful driver – one who has driven for 40 years without ever having caused an accident or been ticketed for a moving violation. But that is irrelevant to the breach-of-duty question. All that matters is whether the defendant’s conduct met the

reasonable person standard at the critical moment when the calamity started to unfold.

You may think that it is not fair to expect everyone to behave as the reasonable person at all times. Most people would agree with that. And negligence law does not imply that everyone should behave as the reasonable person at all times. The issue in negligence law is whether, *given that someone has suffered a injury or property damage*, it is more fair for the plaintiff or the defendant to bear the burden of the loss. The answer from negligence law is that it is more fair for the burden to fall on the defendant if the defendant's level of care fell below that of the hypothetical reasonable person.

### **An Objective Standard**

The reasonable person standard is an objective one. It requires evaluating the situation as if viewing it from above. By contrast, a subjective standard would go to what a person's own thoughts were. If the reasonable person standard were a subjective standard, you could successfully defend a negligence lawsuit by convincing the jury that you genuinely thought you were being reasonable – that you were “trying your best.” Yet under the objective reasonable person standard, if your best isn't as good as the reasonable person, then your best isn't good enough.

### **Case: Vaughn v. Menlove**

This case is the classic example illustrating the reasonable person standard and its objective nature.

#### *Vaughan v. Menlove*

English Court of Common Pleas

January 23, 1837

3 Bing. (N.C.) 467, 132 Eng. Rep. 490. Judges on appeal: TINDAL, C.J., PARK, GASELEE, and VAUGHAN, JJ. Concurring opinions were delivered by Park, and Vaughan, JJ. Gaselee, J. concurred in the result.

**The FACTS as set forth by the REPORTER:**

The declaration alleged, in substance, that plaintiff was the owner of two cottages; that defendant owned land near to the said cottages; that defendant had a rick or stack of hay near the boundary of his land which was liable and likely to ignite, and thereby was dangerous to the plaintiff's cottages; that the defendant, well knowing the premises, wrongfully and negligently kept and continued the rick in the aforesaid dangerous condition; that the rick did ignite, and that plaintiff's cottages were burned by fire communicated from the rick or from certain buildings of defendant's which were set on fire by flames from the rick.

Defendant pleaded the general issue; and also several special pleas, denying negligence.

At the trial it appeared that the rick in question had been made by the defendant near the boundary of his own premises; that the hay was in such a state when put together, as to give rise to discussions on the probability of fire; that though there were conflicting opinions on the subject, yet during a period of five weeks the defendant was repeatedly warned of his peril; that his stock was insured; and that upon one occasion, being advised to take the rick down to avoid all danger, he said " he would chance it." He made an aperture or chimney through the rick; but in spite, or perhaps in consequence of this precaution, the rick at length burst into flames from the spontaneous heating of its materials; the flames communicated to the defendant's barn and stables, and thence to the plaintiff's cottages, which were entirely destroyed.

Patteson, J., before whom the cause was tried, told the jury that the question for them to consider was, whether the fire had been occasioned by gross negligence on the part of the defendant; adding, that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances.



A verdict having been found for the plaintiff, a rule nisi for a new trial was obtained, on the ground that the jury should have been directed to consider, not whether the defendant had been guilty of a gross negligence with reference to the standard of ordinary prudence, a standard too uncertain to afford any criterion, but whether he had acted bond fide to the best of his judgment; if he had, he ought not to be responsible for the misfortune of not possessing the highest order of intelligence. The action under such circumstances was of the first impression.

Talfourd, Serjt., and Whately, showed cause:

The pleas having expressly raised issues on the negligence of the defendant, the learned judge could not do otherwise than leave that question to the jury.~ On the same circuit a defendant was sued a few years ago for burning weeds so near the extremity of his own land as to set fire to and destroy his neighbors wood. The plaintiff recovered damages, and no motion was made to set aside the verdict. Then, there were no means of estimating the defendant's negligence, except by taking as a standard the conduct of a man of ordinary prudence: that has been the rule always laid down, and there is no other that would not be open to much greater uncertainties.

R.V. Richards, in support of the rule:

First, there was no duty imposed on the defendant, as there is on carriers or other bailees, under an implied contract, to be responsible for the exercise of any given degree of prudence: the defendant had a right to place his stack as near to the extremity of his own land as he pleased, under that right, and subject to no contract, he can only be called on to act bond fide to the best of his judgment; if he has done that, it is a contradiction in terms, to inquire whether or not he has been guilty of gross negligence. At all events what would have been gross negligence ought to be estimated by the faculties of the individual, and not by those of other men. The measure of

prudence varies so with the varying faculties of men, that it is impossible to say what is gross negligence with reference to the standard of what is called ordinary prudence. In *Crook v. Jadis*, 5 B. & Adol. 910, Patteson, J., says, "I never could understand what is meant by parties taking a bill under circumstances which ought to have excited the suspicion of a prudent man; " and Taunton, J., "I cannot estimate the degree of care which a prudent man should take."

**Chief Justice NICHOLAS CONYNGHAM TINDAL:**

I agree that this is a case of negligence; but I feel no difficulty in applying to it the principles of law as laid down in other cases of a similar kind. Undoubtedly this is not a case of contract, such as a bailment or the like, where the bailee is responsible in consequence of the remuneration he is to receive: but there is a rule of law which says you must so enjoy your own property as not to injure that of another; and according to that rule the defendant is liable for the consequence of his own neglect: and though the defendant did not himself light the fire, yet mediately he is as much the cause of it as if he had himself put a candle to the rick; for it is well known that hay will ferment and take fire if it be not carefully stacked. It has been decided that if an occupier burns weeds so near the boundary of his own land that damage ensues to the property of his neighbor, he is liable to an action for the amount of injury done, unless the accident were occasioned by a sudden blast which he could not foresee. *Turberville v. Stamp*, 1 Salk. 13. But put the case of a chemist making experiments with ingredients, singly innocent, but when combined liable to ignite; if he leaves them together, and injury is thereby occasioned to the property of his neighbor, can any one doubt that an action on the case would lie?

It is contended, however, that the learned judge was wrong in leaving this to the jury as a case of gross negligence, and that the question of negligence was so mixed up with reference to what would be the conduct of a man of ordinary prudence

that the jury might have thought the latter the rule by which they were to decide; that such a rule would be too uncertain to act upon; and that the question ought to have been whether the defendant had acted honestly and bona fide to the best of his own judgment. That, however, would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various.

Instead, therefore, of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule, which requires in all cases a regard to caution such as a man of ordinary prudence would observe. That was in substance the criterion presented to the jury in this case, and therefore the present rule must be discharged.

### **C. Accounting for Differences Among People**

#### **Basics**

For the most part, the reasonable person standard does not make allowances for differences among defendants. That goes with the territory of an objective standard.

The point made was made in an expressive way by Oliver Wendell Holmes, Jr. in *The Common Law*:

“[W]hen men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they

establish decline to take his personal equation into account.”

The general rule notwithstanding, there are some circumstances under which the reasonable person standard is adjusted to the particular characteristics of the defendant, including for physical limitations, childhood, and superior skills and knowledge.

### **Mental and Physical Capacity and Disability**

In general, the courts will take the physical characteristics of the defendant into account in applying the reasonable person standard, but not mental or cognitive limitations or disabilities. So, for example, if a defendant has impaired vision, impaired hearing, amputated limbs, or does not have the ability to walk, then these differences are tailored into the reasonable person standard. If a blind person runs into someone, causing an injury, the question is what a reasonable blind person would do under those circumstances. On the other hand, adjustments are generally not made for mental or cognitive differences. The hypothetical reasonable person is considered sane and cognitively normal. So if a person with Alzheimer’s dementia were to become disoriented and knock someone over in a restaurant, the reasonable person standard would ask whether someone without Alzheimer’s would have knocked someone over under the same circumstances.

The rule of adjusting the standard for persons with physical differences, but not for persons with mental/cognitive limitations, has been sharply criticized, and some jurisdictions have retreated from the rule in its full harshness.

### **Case: Breunig v. American Family Insurance Co.**

Here, Wisconsin’s high court confronts the question of whether the reasonable person standard should take into account a driver’s sudden bout of insanity.

*Breunig v. American Family Insurance Co.*

Supreme Court of Wisconsin

February 3, 1970

45 Wis. 2d 536. Phillip A. Breunig, Respondent, v. American Family Insurance Company, Appellant. No. 43.

**The FACTS in the OFFICIAL REPORTER:**

This is an action by Phillip A. Breunig to recover damages for personal injuries which he received when his truck was struck by an automobile driven by Erma Veith and insured by the defendant American Family Insurance Company (insurance company). The accident happened about 7 o'clock in the morning of January 28, 1966, on Highway 19 a mile west of Sun Prairie, while Mrs. Veith was returning home from taking her husband to work. Mrs. Veith's car was proceeding west in the eastbound lane and struck the left side of the plaintiff's car near its rear end while Breunig was attempting to get off the road to his right and avoid a head-on collision.

The insurance company alleged Erma Veith was not negligent because just prior to the collision she suddenly and without warning was seized with a mental aberration or delusion which rendered her unable to operate the automobile with her conscious mind.

The jury returned a verdict finding her causally negligent on the theory she had knowledge or forewarning of her mental delusions or disability. The jury also found Breunig's damages to be \$10,000. The court, on motions after verdict, reduced the amount of damages to \$7,000, approved the verdict's finding of negligence, and gave Breunig the option of a new trial or the lower amount of damages. Breunig elected to accept the lower amount and judgment was accordingly entered. The defendant insurance company appeals.

**Chief Justice E. HAROLD HALLOWS:**

There is no question that Erma Veith was subject at the time of the accident to an insane delusion which directly affected

her ability to operate her car in an ordinarily prudent manner and caused the accident. The specific question considered by the jury under the negligence inquiry was whether she had such foreknowledge of her susceptibility to such a mental aberration, delusion or hallucination as to make her negligent in driving a car at all under such conditions.

At the trial Erma Veith testified she could not remember all the circumstances of the accident and this was confirmed by her psychiatrist who testified this loss of memory was due to his treatment of Erma Veith for her mental illness. This expert also testified to what Erma Veith had told him but could no longer recall. The evidence established that Mrs. Veith, while returning home after taking her husband to work, saw a white light on the back of a car ahead of her. She followed this light for three or four blocks. Mrs. Veith did not remember anything else except landing in a field, lying on the side of the road and people talking. She recalled awaking in the hospital.

The psychiatrist testified Mrs. Veith told him she was driving on a road when she believed that God was taking ahold of the steering wheel and was directing her car. She saw the truck coming and stepped on the gas in order to become airborne because she knew she could fly because Batman does it. To her surprise she was not airborne before striking the truck but after the impact she was flying.

Actually, Mrs. Veith's car continued west on Highway 19 for about a mile. The road was straight for this distance and then made a gradual turn to the right. At this turn her car left the road in a straight line, negotiated a deep ditch and came to rest in a cornfield. When a traffic officer came to the car to investigate the accident, he found Mrs. Veith sitting behind the wheel looking off into space. He could not get a statement of any kind from her. She was taken to the Methodist Hospital and later transferred to the psychiatric ward of the Madison General Hospital.

The psychiatrist testified Erma Veith was suffering from “schizophrenic reaction, paranoid type, acute.” He stated that from the time Mrs. Veith commenced following the car with the white light and ending with the stopping of her vehicle in the cornfield, she was not able to operate the vehicle with her conscious mind and that she had no knowledge or forewarning that such illness or disability would likely occur.

In layman’s language, the doctor explained: “The schizophrenic reaction is a thinking disorder of a severe type usually implying disorientation with the world. Usually implying a break with reality. The paranoid type is a subdivision of the thinking disorder in which one perceives oneself either as a very powerful or being persecuted or being attacked by other people. And acute implies that the rapidity of the onset of the illness, the speed of onset is meant by acute.”

The insurance company argues Erma Veith was not negligent as a matter of law because there is no evidence upon which the jury could find that she had knowledge or warning or should have reasonably foreseen that she might be subject to a mental delusion which would suddenly cause her to lose control of the car. Plaintiff argues there was such evidence of forewarning and also suggests Erma Veith should be liable because insanity should not be a defense in negligence cases.

The case was tried on the theory that some forms of insanity are a defense to and preclude liability for negligence under the doctrine of *Theisen v. Milwaukee Automobile Mut. Ins. Co.* (1962), 18 Wis. 2d 91. We agree. Not all types of insanity vitiate responsibility for a negligent tort. The question of liability in every case must depend upon the kind and nature of the insanity. The effect of the mental illness or mental hallucinations or disorder must be such as to affect the person’s ability to understand and appreciate the duty which rests upon him to drive his car with ordinary care, or if the insanity does not affect such understanding and appreciation, it must affect his ability to control his car in an ordinarily

prudent manner. And in addition, there must be an absence of notice or forewarning to the person that he may be suddenly subject to such a type of insanity or mental illness.

In *Theisen* we recognized one was not negligent if he was unable to conform his conduct through no fault of his own but held a sleeping driver negligent as a matter of law because one is always given conscious warnings of drowsiness and if a person does not heed such warnings and continues to drive his car, he is negligent for continuing to drive under such conditions. But we distinguished those exceptional cases of loss of consciousness resulting from injury inflicted by an outside force, or fainting, or heart attack, or epileptic seizure, or other illness which suddenly incapacitates the driver of an automobile when the occurrence of such disability is not attended with sufficient warning or should not have been reasonably foreseen.

*Theisen* followed *Eleason v. Western Casualty & Surety Co.* (1948), 254 Wis. 134 and *Wisconsin Natural Gas Co. v. Employers Mut. Liability Ins. Co.* (1953), 263 Wis. 633. In *Eleason* we held the driver, an epileptic, possessed knowledge that he was likely to have a seizure and therefore was negligent in driving a car and responsible for the accident occurring while he had an epileptic seizure. In *Wisconsin Natural Gas Co. v. Employers Mut. Liability Ins. Co.*, *supra*, the sleeping driver possessed knowledge that he was likely to fall asleep and his attempts to stay awake were not sufficient to relieve him of negligence because it was within his control to take effective means to stay awake or cease driving.

The policy basis of holding a permanently insane person liable for his tort is: (1) Where one of two innocent persons must suffer a loss it should be borne by the one who occasioned it; (2) to induce those interested in the estate of the insane person (if he has one) to restrain and control him; and (3) the fear an insanity defense would lead to false claims of insanity to avoid liability. These three grounds were mentioned in the *Guardianship of Meyer* (1935), 218 Wis. 381



where a farm hand who was insane set fire to his employer's barn. The insurance company paid the loss and filed a claim against the estate of the insane person and was allowed to recover.

We think the statement that insanity is no defense is too broad when it is applied to a negligence case where the driver is suddenly overcome without forewarning by a mental disability or disorder which incapacitates him from conforming his conduct to the standards of a reasonable man under like circumstances. These are rare cases indeed, but their rarity is no reason for overlooking their existence and the justification which is the basis of the whole doctrine of liability for negligence, *i.e.*, that it is unjust to hold a man responsible for his conduct which he is incapable of avoiding and which incapability was unknown to him prior to the accident.

We hold is that a sudden mental incapacity equivalent in its effect to such physical causes as a sudden heart attack, epileptic seizure, stroke, or fainting should be treated alike and not under the general rule of insanity.

*By the Court.* – Judgment affirmed.

### **Experience and Level of Skill**

As the *Vaughn v. Menlove* case illustrates, differences in experience and knowledge are not taken into account in favor of the person accused of negligence. So, for instance, someone who has just learned to drive a car will be held to the same standard as the average, experienced driver.

On the other hand, if a person has superior skills or knowledge, then those ratchet up the standard of care. So if a champion NASCAR driver crashes into the plaintiff's car, the plaintiff is free to argue that the racecar driver should have used those race-honed superior skills to swerve, break, or otherwise avoid the crash. *See, e.g., Jackson v. Axelrad*, 221 S.W.3d 650, 656 (Tex. 2007), quoting William Lloyd Keeton, et al., *Prosser and Keeton on Torts* § 32, p. 185 (5th ed. 1984)

“Experienced milk haulers, hockey coaches, expert skiers, construction inspectors, and doctors must all use care which is reasonable in light of their superior learning and experience, and any special skills, knowledge or training they may personally have over and above what is normally possessed by persons in the field.” (citations omitted).

Here are some examples to help you keep straight what we have learned so far:

*Example: The Unknown Dangers of Haystacks* – Go back to the case of *Vaughn v. Menlove*, but suppose it evolved in an alternative universe where the propensity of piles of damp hay to catch fire was unknown in the community. In such a case, Menlove would win – his actions would not have breached the duty of care because the reasonable person in that community would not have known of the danger.

*Example: The Leading Edge of Haystack Design* – Let’s tweak the facts of *Vaughn v. Menlove* once more. We are still in our alternative universe where the dangers of wet haystacks are generally unknown. But suppose the evidence at trial uncovers the fact that Menlove subscribed to publications such as *The Journal of Hayrick Research* and also that he frequently attended academic conferences on haystack design. Suppose as well that pretrial discovery uncovers the fact that through his reading and conference-going, Menlove in fact knew that leading-edge research had determined that stacks of wet hay will tend to catch fire. Now Menlove will lose. In this case, however, Menlove loses not because of the reasonable-person standard, but in spite of it. Once he has the superior knowledge about the danger and how to avoid it, Menlove must use it to avoid the harm, or else he is liable.

### **Children**

An exception to the reasonable person standard is made for children. The rule, as stated in *Hardsaw v. Courtney*, 665 N.E.2d 603, 606-07 (Ind. Ct. App. 1996), is:

“The standard of care expected of a child is measured by that degree of care which would ordinarily be exercised by a child of like age, knowledge, judgment and experience under like conditions and circumstances.”

Notice that the standard is not only lowered for children and calibrated by age, but allowances are also made for differences in knowledge, judgment, and experience. So this standard is quite unlike the stalwart and unyielding objective standard for adults. The standard for children leans away from a purely objective standard, so much so that it arguably becomes quite subjective. In fact, one could say that the reasonable person standard is not just adjusted for children, but that it is thrown out entirely. Note that in the statement of doctrine from the Indiana court, there is no use of the word “reasonable” at all.

There is an important exception to the child standard of care, and that is when the activity that the child is engaged in is an adult activity. This is often applied to when a child is operating a motor vehicle, such as a car, motorboat, airplane, or snowmobile. But it has been applied in other contexts as well, including golf. In *Neumann v. Sblansky*, 58 Misc. 2d 128 (N.Y. County Ct. 1968), an 11-year-old golfer teeing off drove a ball into the plaintiff’s knee. The court wrote:

“As applied to the instant case, one of the critical elements in the opinion of the court is the risk involved when a dangerous missile is hit by a golfer. Just as a motor vehicle or other power-driven vehicle is dangerous, so is a golf ball hit with a club. Driving a car, an airplane or powerboat has been referred to as adult activity even though actively engaged in by infants. Likewise, golf can easily be determined to be an adult activity engaged in by infants. Both involve dangerous instruments. No matter what the age of a driver of a car or a driver of a golf ball, if he

fails to exercise due care serious injury may result.”

In many of these cases, the courts have rejected the argument that because children frequently engage in the activity, it should not be considered an adult activity. These courts tend to look at the level of danger associated with the activity, rather than its adulthood.

Other courts take a different view, however, and will allow a lowering of the standard of care for children even when the activity is inherently dangerous, so long as it is often engaged in by children. In *Purtille v. Shelton*, 474 SW 2d 123 (Ark. 1971), the adult standard was held not to be applicable to a 17-year-old engaged in deer hunting. The defendant, in a deer stand, shot at what he thought was a deer. In fact, the defendant shot in the vicinity of his 16-year-old friend. The bullet broke into shrapnel, hitting the friend in both eyes. The court said:

“We are unable to find any authority holding that a minor should be held to an adult standard of care merely because he engages in a dangerous activity. There is always the parallel requirement that the activity be one that is normally engaged in only by adults.~ We have no doubt that deer hunting is a dangerous sport. We cannot say, however, either on the basis of the record before us or on the basis of common knowledge, that deer hunting is an activity normally engaged in by adults only. To the contrary, all the indications are the other way.~ We know, from common knowledge, that youngsters only six or eight years old frequently use .22 caliber rifles and other lethal firearms to hunt rabbits, birds, and other small game. We cannot conscientiously declare, without proof and on the basis of mere judicial notice, that only adults normally go deer hunting.”

## Gender

Traditionally, the objective standard for negligence was known as the “reasonable man” standard. Courts and commentators have now shifted to speaking of the “reasonable person.” But the question remains as to whether the standard – by whatever name it is called – retains a male bias. Professor Leslie Bender of Syracuse University puts it this way in *A Lawyer’s Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988):

“Does converting a “reasonable man” to a “reasonable person” in an attempt to eradicate the term’s sexism actually exorcise the sexism or instead embed it?~ This “resolution” of the standard’s sexism ignores several important feminist insights. The original phrase “reasonable man” failed in its claim to represent an abstract, universal person. Even if such a creature could be imagined, the “reasonable man” standard was postulated by men, who, because they were the only people who wrote and argued the law, philosophy, and politics at that time, only theorized about themselves. When the standard was written into judicial opinions, treatises, and casebooks, it was written about and by men. The case law and treatises explaining the standard are full of examples explaining how the “reasonable man” is the “man on the Clapham Omnibus” or “the man who takes the magazines at home and in the evening pushes the lawn mower in his shirt sleeves.” When the authors of such works said “reasonable man,” they meant “male,” “man” in a gendered sense.”

Professor Bender suggests the possibility of a different and higher standard of care – a “reasonable neighbor” standard, in which people are expected to treat one another at least as well as we would social acquaintances. She also asks what would happen if we understood “standard of care” to mean “standard of caring.” In her view, “the

feminine voice can design a tort system that encourages behavior that is caring about others' safety and responsive to others' needs or hurts, and that attends to human contexts and consequences.”

### **Some Questions to Ponder About the Reasonable Person Standard**

**A.** Why should the reasonable person standard be deferential to child defendants of lesser cognitive/mental abilities, but unyielding for elderly defendants of lesser cognitive/mental abilities? Is there a sensible rationale that can be articulated? Is some emotional response at work? Is this pernicious discrimination?

**B.** Why should physical limitations be usable in the defendant's favor to decrease the standard of care, but not mental limitations? Should it matter that science can increasingly identify physical causes of mental limitations, such as brain chemistry, genetics, or brain tissue that is degenerated or damaged?

**C.** How do you think negligence law might have developed differently over the past centuries if women served on the bench in numbers equal to men?

**D.** Could you do away altogether with the mental construct of a hypothetical person as setting the standard of care? What might you use instead?

### **D. Negligence Per Se**

#### **Basics**

Usually the standard of care is a matter for the parties to argue about through the mental construct of the fictional reasonable person. But the plaintiff can argue to the court that the case should instead be submitted to the jury with a specific standard of care that is borrowed from a statute or regulation. The doctrine governing this is called **negligence per se**.

*Example: Flatbed with Rebar* – Suppose a statute says that (1) that a driver who has a cargo load protruding beyond the rear bumper of a vehicle must attach a red flag to the protrusion to warn drivers behind the vehicle, and (2)

regardless of the flag, the load must not protrude more than four feet. The defendant, driving a 10-foot flatbed truck, is carrying a load of 16-foot-long rebar, such that the load protrudes six feet beyond the rear bumper. The defendant does not attach any flag. The plaintiff is driving behind the defendant when the defendant stops suddenly. The plaintiff's vehicle collides with the defendant's truck. As the plaintiff's car crumples into the truck's bumper assembly, the protruding rebar pierces the windshield and injures the plaintiff. The plaintiff would likely be able to use the statute to set the standard of care, obviating the need for argument about whether the defendant's actions were reasonable.

Negligence per se doctrine can be very helpful to plaintiffs because it can function as a free pass on the element of breach of the duty of care. If the evidence shows that the defendant failed to comply with the statute or regulation, and if the negligence per se doctrine applies, then there will be no need to make an elaborate argument to the jury about the conduct being unreasonable.

“Per se” is Latin meaning “by itself” or “in itself.” But translating this phrase does not help much. There are many situations irrelevant to negligence per se in which you could describe something as being “negligence, in itself.” The phrase “negligence per se” is a term of art: It refers specifically to the use of a statute or regulation to set the standard of care in a negligence case.

### **What Makes a Statute or Regulation Amenable**

Not every statute or regulation can be used by a plaintiff as a replacement for the generic reasonable-person standard of care. The analysis for whether a statute or regulation can be used as a per-se standard can be summed up as **the class-of-risk/class-of-persons test**. Two questions must be asked:

- Does the injury or accident being sued on represent the kind of risk that the statute or regulation was designed to address?
- Is the plaintiff within the class of persons that the statute or regulation was designed to protect?

If the answers to both questions are yes, then the statute or regulation can be used. This test helps to filter out some cases where the negligence-per-se doctrine would lead to some unfair or bizarre results.

*Example: Young Smoker* – Suppose a statute prohibits persons under the age of 18 from using tobacco. The defendant, a 17-year-old, is smoking a cigarette in bed when he falls asleep. The smoldering cigarette starts a fire, which burns down a neighbor's apartment. To determine whether the tobacco-age-limit statute can be used to set the standard of care, first ask the class-of-risks question: Was the statute meant to protect against risks of structure fires? The answer would seem to be no. The statute was meant to protect young persons from the health hazards associated with inhaling tobacco smoke or placing tobacco in contact with the epithelial tissues of the mouth. It was not about preventing fires. So negligence per se will not apply here.

*Example: Young-looking Smoker* – Suppose a statute requires sellers of tobacco products to require any person appearing to be under the age of 35 to produce a state-issued identification card or driver's license to prove that she or he is 18 years of age or older. The plaintiff is and appears to be in his early 20s. The plaintiff gets cancer caused by the use of tobacco products and sues the store that sold the products. The plaintiff produces evidence that he has never had a state-issued identification card or driver's license, and thus would not have been able to produce the required identification at the sales counter. Can the statute be used to set the standard of care? The class-of-risks part of the test would seem to be satisfied. The risks intended to be addressed by the statute are the health risks of using tobacco. But a problem is revealed with the class-of-persons part of the test. We ask: Is the plaintiff within the class of persons meant to be protected by the statute? The answer would seem to be no. The statute appears to be aimed at protecting persons under the age of 18



– not adults without ID. So the statute could not be used to set the standard of care in this lawsuit.

It is important to understand what the class-of-risk/class-of-persons test does not require: It does not require that the statute or regulation was enacted with the *intent* that it be used in negligence lawsuits. It is almost always the case that such statutes and regulations were enacted with no thought about whether or not they could be used in tort lawsuits. Usually, such statutes are for the purpose of allowing criminal prosecutions or some form of administrative enforcement (such as by government regulatory agencies who conduct inspections, assess fines, revoke licenses, etc.). It may be that the enacting body never dreamed that the provisions it promulgated would be used in private tort lawsuits. Generally speaking, that lack of legislative or regulatory intent is irrelevant. Whether or not the statute or regulation can be commandeered under negligence-per-se doctrine depends instead on the class-of-risks/class-of-persons test.

**Case: Gorris v. Scott**

The following is a seminal case on negligence per se, applying the class-of-risk/class-of-persons test in classical fashion.

*Gorris v. Scott*

Court of Exchequer

April 22, 1874

L.R. 9 Ex. 125. Gorris and Another v. Scott. Kelly, C.B., Pigott, Pollock, and Amphlett, BB.

**Chief Baron FITZROY KELLY:**

This is an action to recover damages for the loss of a number of sheep which the defendant, a shipowner, had contracted to carry, and which were washed overboard and lost by reason (as we must take it to be truly alleged) of the neglect to comply with a certain order made by the Privy Council, in pursuance of the Contagious Diseases (Animale) Act, 1869. The Act was passed merely for sanitary purposes, in order to prevent animals in a state of infectious disease from communicating it to other animals with which they might

come in contact. Under the authority of that Act, certain orders were made; amongst others, an order by which any ship bringing sheep or cattle from any foreign port to ports in Great Britain is to have the place occupied by such animals divided into pens of certain dimensions, and the floor of such pens furnished with battens or foot holds. The object of this order is to prevent animals from being overcrowded, and so brought into a condition in which the disease guarded against would be likely to be developed. This regulation has been neglected, and the question is, whether the loss, which we must assume to have been caused by that neglect, entitles the plaintiffs to maintain an action.~

[I]f we could see that it was the object, or among the objects of this Act, that the owners of sheep and cattle coming from a foreign port should be protected by the means described against the danger of their property being washed overboard, or lost by the perils of the sea, the present action would be within the principle.

But, looking at the Act, it is perfectly clear that its provisions were all enacted with a totally different view; there was no purpose, direct or indirect, to protect against such damage; but, as is recited in the preamble, the Act is directed against the possibility of sheep or cattle being exposed to disease on their way to this country. The preamble recites that “it is expedient to confer on Her Majesty’s most honourable Privy Council power to take such measures as may appear from time to time necessary to prevent the introduction into Great Britain of contagious or infectious diseases among cattle, sheep, or other animals, by prohibiting or regulating the importation of foreign animals,” and also to provide against the “spreading” of such diseases in Great Britain. Then follow numerous sections directed entirely to this object. Then comes s. 75, which enacts that “the Privy Council may from time to time make such orders as they think expedient for all or any of the following purposes.” What, then, are these purposes? They are “for securing for animals brought

by sea to ports in Great Britain a proper supply of food and water during the passage and on landing,” “for protecting such animals from unnecessary suffering during the passage and on landing,” and so forth; all the purposes enumerated being calculated and directed to the prevention of disease, and none of them having any relation whatever to the danger of loss by the perils of the sea. That being so, if by reason of the default in question the plaintiffs’ sheep had been overcrowded, or had been caused unnecessary suffering, and so had arrived in this country in a state of disease, I do not say that they might not have maintained this action. But the damage complained of here is something totally apart from the object of the Act of Parliament, and it is in accordance with all the authorities to say that the action is not maintainable.

**Baron PIGOTT:**

For the reasons which have been so exhaustively stated by the Lord Chief Baron, I am of opinion that the declaration shews no cause of action. It is necessary to see what was the object of the legislature in this enactment, and it is set forth clearly in the preamble as being “to prevent the introduction into Great Britain of contagious or infectious diseases among cattle, sheep, or other animals,” and the “spread of such diseases in Great Britain.” The purposes enumerated in s. 75 are in harmony with this preamble, and it is in furtherance of that section that the order in question was made. The object, then, of the regulations which have been broken was, not to prevent cattle from being washed overboard, but to protect them against contagious disease.

**Baron CHARLES EDWARD POLLOCK:**

I also think this demurrer must be allowed. [T]he Act of Parliament was passed alio intuitu; the recital in the preamble and the words of s. 75 point out that what the Privy Council have power to do is to make such orders as may be expedient for the purpose of preventing the introduction and the spread

of contagious and infectious diseases amongst animals. Suppose, then, that the precautions directed are useful and advantageous for preventing animals from being washed overboard[.] [Y]et they were never intended for that purpose, and a loss of that kind caused by their neglect cannot give a cause of action.

**Baron RICHARD AMPHLETT:**

I am of the same opinion.

**Negligence Per Se in the Context of Contributory  
Negligence or Comparative Negligence**

When the plaintiff's own negligence contributes to the injury that the plaintiff is suing over, the defendant can use that fact to establish an affirmative defense – either comparative negligence or contributory negligence, depending on the jurisdiction. These defenses are discussed in more detail in a later chapter. For now, just note that negligence per se can be used by plaintiffs to establish a prima facie case for negligence and by defendants to establish an affirmative defense of contributory negligence or comparative negligence.

Consider the example of the rear-end collision with the truck loaded with rebar. Suppose the plaintiff's car was following the defendant's truck on the freeway at 80 miles per hour. Suppose also that the posted speed limit on this stretch of freeway is 65 miles per hour. If the plaintiff's speed was partly at fault for the plaintiff's injuries, then the defendant can use the violation of the statute to establish the plaintiff's negligence for a contributory or comparative negligence defense.

**Negligence Per Se and Causation**

In a properly pled prima facie case for negligence, the breach of the duty of due care must always be harnessed to the injury by a showing of actual causation and proximate causation. In other words, it must be that the particular breach proved by the plaintiff actually and proximately caused the injury being sued over. So, when it comes to negligence per se, keep in mind that for the prima facie case to work

as a whole, it must be that the violation of the statute caused the injury the plaintiff is suing over.

Let's go back to the example of the flatbed loaded with rebar. Suppose evidence at trial shows that before the accident, the plaintiff saw the truck from the side and mentally noted how far the rebar extended beyond the bumper. If that's what happened, then the violation of the statute requiring a red flag does not help the plaintiff's case, because it is clear that the red flag would not have made a difference in preventing the accident. The only thing the red flag was capable of doing was to make the plaintiff aware of the protuberance – yet the plaintiff was already aware. So the violation of the statute under these facts cannot be viewed as a cause of the accident.

It should be noted that the necessity of this causal link between breach and injury applies in all negligence cases – whether the reasonable person standard of care is used or the doctrine of negligence per se. But for some reason the causation analysis seems to be more intuitive when the reasonable person standard is used. With negligence per se, the issue of causal linkage seems to present a habitual pitfall.

#### **Case: Martin v. Herzog**

The following case is from the New York Court of Appeals, which, despite what you might guess from the name, is actually the highest state court in New York – equivalent to the “supreme” court in most jurisdictions. Written by the most famous New York Court of Appeals judge of all time – Benjamin N. Cardozo – this case provides a chance to think about negligence per se in the context of the two concepts introduced above: (1) the use of negligence per se by a defendant as part of an affirmative defense (in this case, contributory negligence), and (2) the necessity of the violation of the statute or regulation being casually connected to the injury. As you read, ask yourself whether you think the plaintiff's violation of the statute was an actual cause of the collision.

*Martin v. Herzog*

Court of Appeals of New York

February 24, 1920

Elizabeth Martin, as Administratrix of the Estate of William J. Martin, Deceased, Appellant, v. Samuel A. Herzog, Respondent, Impleaded with Another. Judges: Cardozo, J. Hiscock, Ch. J., Pound, McLaughlin, Andrews and Elkus, JJ., concur with Cardozo, J.; Hogan, J., reads dissenting opinion.

**Judge BENJAMIN N. CARDOZO:**

The action is one to recover damages for injuries resulting in death.

Plaintiff and her husband, while driving toward Tarrytown in a buggy on the night of August 21, 1915, were struck by the defendant's automobile coming in the opposite direction. They were thrown to the ground, and the man was killed. At the point of the collision the highway makes a curve. The car was rounding the curve when suddenly it came upon the buggy, emerging, the defendant tells us, from the gloom. Negligence is charged against the defendant, the driver of the car, in that he did not keep to the right of the center of the highway (Highway Law, sec. 286, subd. 3; sec. 332; Consol. Laws, ch. 25). Negligence is charged against the plaintiff's intestate, the driver of the wagon, in that he was traveling without lights (Highway Law, sec. 329a, as amended by L. 1915, ch. 367). There is no evidence that the defendant was moving at an excessive speed. There is none of any defect in the equipment of his car. The beam of light from his lamps pointed to the right as the wheels of his car turned along the curve toward the left; and looking in the direction of the plaintiff's approach, he was peering into the shadow. The case against him must stand, therefore, if at all, upon the divergence of his course from the center of the highway. The jury found him delinquent and his victim blameless. The Appellate Division reversed, and ordered a new trial.

We agree with the Appellate Division that the charge to the jury was erroneous and misleading. The case was tried on the assumption that the hour had arrived when lights were due. It was argued on the same assumption in this court. In such circumstances, it is not important whether the hour might have been made a question for the jury. A controversy put out of the case by the parties is not to be put into it by us. We say this by way of preface to our review of the contested rulings. In the body of the charge the trial judge said that the jury could consider the absence of light “in determining whether the plaintiff’s intestate was guilty of contributory negligence in failing to have a light upon the buggy as provided by law. I do not mean to say that the absence of light necessarily makes him negligent, but it is a fact for your consideration.” The defendant requested a ruling that the absence of a light on the plaintiff’s vehicle was “*prima facie* evidence of contributory negligence.” This request was refused, and the jury were again instructed that they might consider the absence of lights as some evidence of negligence, but that it was not conclusive evidence. The plaintiff then requested a charge that “the fact that the plaintiff’s intestate was driving without a light is not negligence in itself,” and to this the court acceded. The defendant saved his rights by appropriate exceptions.

We think the unexcused omission of the statutory signals is more than some evidence of negligence. It *is* negligence in itself. Lights are intended for the guidance and protection of other travelers on the highway (Highway Law, sec. 329a). By the very terms of the hypothesis, to omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform. That, we think, is now the established rule in this state.~ In the case at hand, we have an instance of the admitted violation of a statute intended for the protection of travelers on the

highway, of whom the defendant at the time was one. Yet the jurors were instructed in effect that they were at liberty in their discretion to treat the omission of lights either as innocent or as culpable. They were allowed to “consider the default as lightly or gravely” as they would (Thomas, J., in the court below). They might as well have been told that they could use a like discretion in holding a master at fault for the omission of a safety appliance prescribed by positive law for the protection of a workman. Jurors have no dispensing power by which they may relax the duty that one traveler on the highway owes under the statute to another. It is error to tell them that they have. The omission of these lights was a wrong, and being wholly unexcused was also a negligent wrong. No license should have been conceded to the triers of the facts to find it anything else.

We must be on our guard, however, against confusing the question of negligence with that of the causal connection between the negligence and the injury. A defendant who travels without lights is not to pay damages for his fault unless the absence of lights is the cause of the disaster. A plaintiff who travels without them is not to forfeit the right to damages unless the absence of lights is at least a contributing cause of the disaster. To say that conduct is negligence is not to say that it is always contributory negligence. “Proof of negligence in the air, so to speak, will not do” (Pollock Torts [10th ed.], p. 472). We think, however, that evidence of a collision occurring more than an hour after sundown between a car and an unseen buggy, proceeding without lights, is evidence from which a causal connection may be inferred between the collision and the lack of signals. If nothing else is shown to break the connection, we have a case, *prima facie* sufficient, of negligence contributing to the result. There may indeed be times when the lights on a highway are so many and so bright that lights on a wagon are superfluous. If that is so, it is for the offender to go forward with the evidence, and prove the illumination as a kind of substituted performance.



The plaintiff asserts that she did so here. She says that the scene of the accident was illumined by moonlight, by an electric lamp, and by the lights of the approaching car. Her position is that if the defendant did not see the buggy thus illumined, a jury might reasonably infer that he would not have seen it anyhow. We may doubt whether there is any evidence of illumination sufficient to sustain the jury in drawing such an inference, but the decision of the case does not make it necessary to resolve the doubt, and so we leave it open. It is certain that they were not required to find that lights on the wagon were superfluous. They might reasonably have found the contrary. They ought, therefore, to have been informed what effect they were free to give, in that event, to the violation of the statute. They should have been told not only that the omission of the lights was negligence, but that it was "*prima facie* evidence of contributory negligence," *i.e.*, that it was sufficient in itself unless its probative force was overcome (Thomas, J., in court below) to sustain a verdict that the decedent was at fault. Here, on the undisputed facts, lack of vision, whether excusable or not, was the cause of the disaster. The defendant may have been negligent in swerving from the center of the road, but he did not run into the buggy purposely, nor was he driving while intoxicated, nor was he going at such a reckless speed that warning would of necessity have been futile. Nothing of the kind is shown. The collision was due to his failure to see at a time when sight should have been aroused and guided by the statutory warnings. Some explanation of the effect to be given to the absence of those warnings, if the plaintiff failed to prove that other lights on the car or the highway took their place as equivalents, should have been put before the jury. The explanation was asked for, and refused.

We are persuaded that the tendency of the charge and of all the rulings following it, was to minimize unduly, in the minds of the triers of the facts, the gravity of the decedent's fault. Errors may not be ignored as unsubstantial when they tend to

such an outcome. A statute designed for the protection of human life is not to be brushed aside as a form of words, its commands reduced to the level of cautions, and the duty to obey attenuated into an option to conform.

The order of the Appellate Division should be affirmed, and judgment absolute directed on the stipulation in favor of the defendant, with costs in all courts.

**Judge JOHN W. HOGAN, dissenting:**

The following facts are undisputed. Leading from Broadway in the village of Tarrytown, Westchester county, is a certain public highway known as Neperham road, which runs in an easterly direction to East View, town of Greenburg. The worked portion of the highway varies in width from 21½ feet at the narrowest point a short distance easterly of the place of the collision hereinafter mentioned, to a width of 27½ feet at the point where the collision occurred.

On the evening of August 21st, 1915, the plaintiff, together with her husband, now deceased, were seated in an open wagon drawn by a horse. They were traveling on the highway westerly towards Tarrytown. The defendant was traveling alone on the highway in the opposite direction, viz., from Tarrytown easterly towards East View in an automobile which weighed about 3,000 pounds, having a capacity of 70 horse power, capable of developing a speed of 75 miles an hour. Defendant was driving the car.

A collision occurred between the two vehicles on the highway at or near a hydrant located on the northerly side of the road. Plaintiff and her husband were thrown from the wagon in which they were seated. Plaintiff was bruised and her shoulder dislocated. Her husband was seriously injured and died as a result of the accident.

As indicated in the prevailing opinion, the manner in which the accident happened and the point in the highway where the collision occurred are important facts in this case, for as

therein stated: "The case against him (defendant) must stand, therefore, if at all, upon the divergence of his course from the center of the highway." The evidence on behalf of plaintiff tended to establish that on the evening in question her husband was driving the horse at a jogging gait along on their right side of the highway near the grass which was outside of the worked part of the road on the northerly side thereof; that plaintiff observed about 120 feet down the road the automobile operated by defendant approaching at a high rate of speed, two searchlights upon the same, and that the car seemed to be upon her side of the road; that the automobile ran into the wagon in which plaintiff and her husband were seated at a point on their side of the road while they were riding along near the grass. Evidence was also presented tending to show that the rate of speed of the automobile was 18 to 20 miles an hour and the lights upon the car illuminated the entire road. The defendant was the sole witness on the part of the defense upon the subject under consideration. His version was:

"Just before I passed the Tarrytown Heights Station, I noticed a number of children playing in the road. I slowed my car down a little more than I had been running. I continued to drive along the road, probably I proceeded along the road 300 or 400 feet further, I do not know exactly how far, when suddenly there was a crash and I stopped my car as soon as I could after I realized that there had been a collision. Whether I saw anything in that imperceptible fraction of space before the wagon and car came together I do not know. I have an impression, about a quarter of a second before the collision took place, I saw something white cross the road and heard somebody call 'whoa' and that is all I knew until I stopped my car. ... My best judgment is I was travelling about 12 miles an

hour. ... At the time of the collision I was driving on the right of the road.”

The manner in which and the point in the highway where the accident occurred presented a question of fact for a jury. ~  
The trial justice charged the jury:~

“It is for you to determine whether the defendant was driving on the wrong side of the road at the time he collided with the buggy; whether his lights did light up the road and the whole road ahead of him to the extent that the buggy was visible, and so, if he negligently approached the buggy in which plaintiff and her husband were driving at the time. If you find from the evidence here, he was driving on the wrong side of the road and that for this reason he collided with the buggy which was proceeding on the proper side, or if you find that as he approached the buggy the road was so well lighted up that he saw or should have seen the buggy and yet collided with it then you may say, if you so find, that the defendant was careless and negligent.~ If [you] find that Mr. Martin was guilty of any negligence, no matter how slight, which contributed to the accident, the verdict must be for defendant.”~

The principal issue of fact was not only presented to the jury in the original charge made by the trial justice, but emphasized and concurred in by counsel for defendant.

The prevailing opinion in referring to the accident and the highway at the point where the accident occurred describes the same in the following language: “At the point of the collision, the highway makes a curve. The car was rounding the curve when suddenly it came upon the buggy emerging the defendant tells us from the gloom.” Such in substance was the testimony of the defendant but his version was rejected by the jurors and the Appellate Division, and the

evidence in the record is ample to sustain a contrary conclusion. As to the statement that the car was rounding "a curve," two maps made by engineers from actual measurements and surveys for defendant were put in evidence by counsel for plaintiff. Certain photographs made for the purposes of the trial were also before the jury. I think we may assume that the jurors gave credence to the maps and actual measurements rather than to the photographs and failed to discover therefrom a curve of any importance or which would interfere with an unobstructed view of the road. As to the "buggy emerging the defendant tells us from the gloom," evidence was adduced by plaintiff tending to show that the searchlights on defendant's car lighted up the entire roadway to the extent that the vehicle in which plaintiff and her husband were riding was visible, that the evening was not dark, though it appeared as though a rainfall might be expected. Some witnesses testified it was moonlight. The doctor called from Tarrytown who arrived within twenty minutes after the collision, testified that the electric lights all along the highway were burning as he passed over the road. The width of the worked part of the highway at the point of the accident was 27½ feet. About 25 feet westerly on the southerly side was located an electric light which was burning. A line drawn across the highway from that light to the point of the accident would be about 42 feet. One witness called by plaintiff lived in a house directly across the highway from the point of the accident. Seated in a front room it was sufficiently light for her to see plaintiff's intestate when he was driving along the road at a point near a telegraph pole which is shown on the map some 90 or 100 feet easterly of the point of the accident, when she observed him turn his horse into the right towards the fence. Soon thereafter she heard the crash of the collision and immediately went across the highway and found Mr. Martin in a sitting position on the grass. A witness called by the defendant testified that she was on the stoop of her house, which is across the highway from the point of the accident and about 40 feet distant from said

point and while seated there she could see the body of Mr. Martin. While she testified the evening was dark, the lights on the highway were sufficient to enable her to see the body of Mr. Martin lying upon the grass 40 feet distant. The defendant upon cross-examination was confronted with his testimony given before the coroner where he testified that the road was "fairly light."

The facts narrated were passed upon by the jury under a proper charge relating to the same, and were sustained by the Appellate Division. The conclusions deducible therefrom are: (A) Defendant was driving his car upon the wrong side of the road. (B) Plaintiff and her intestate were driving a horse attached to the wagon in which they were seated upon the extreme right side of the road. (C) The highway was well lighted. The evening was not dark. (D) Defendant collided with the vehicle in which plaintiff and her husband were riding and caused the accident.

I must here note the fact that concededly there was no light upon the wagon in which plaintiff and her husband were riding, in order that I may express my views upon additional phrases in the prevailing opinion. Therein it is stated: "There may indeed be times when the lights on a highway are so many and so bright that lights on a wagon are superfluous." I am in accord with that statement, but I dissent from the suggestion we may doubt whether there is any evidence of illumination sufficient to sustain the jury in drawing the inference that if defendant did not see the buggy thus illumined it might reasonably infer that he would not have seen it anyway. Further the opinion states:

"Here, on the undisputed facts, lack of vision, whether excusable or not, was the cause of the disaster. The defendant may have been negligent in swerving from the center of the road, but he did not run into the buggy purposely, nor was he driving while intoxicated, nor was he going at such a

reckless rate of speed that warning would of necessity be futile. Nothing of the kind is shown.”

As to the rate of speed of the automobile, the evidence adduced by plaintiff's witnesses was from 18 to 20 miles an hour, as “very fast,” further that after the collision the car proceeded 100 feet before it was stopped. The defendant testified that he was driving about 12 miles an hour, that at such rate of speed he thought the car should be stopped in five or six feet and though he put on the foot brake he ran 20 feet before he stopped. The jury had the right to find that a car traveling at the rate of 12 miles an hour which could be stopped within five or six feet, and with the foot brake on was not halted within 100 feet must at the time of the collision have been running “very fast” or at a reckless rate of speed, and, therefore, warning would of necessity be futile. No claim was made that defendant was intoxicated or that he purposely ran into the buggy. Nor was proof of such facts essential to plaintiff's right to recover. This case does not differ from many others wherein the failure to exercise reasonable care to observe a condition is disclosed by evidence and properly held a question of fact for a jury. In the earlier part of the prevailing opinion, as I have pointed out, the statement was: “The case against him (defendant) must stand or fall, if at all, upon the divergence of his course from the center of the highway.” It would appear that “lack of vision whether excusable or not was the cause of the disaster” had been adopted in lieu of divergence from the center of the highway. I have, therefore, discussed divergence from the center of the road. My examination of the record leads me to the conclusion that lack of vision was not on the undisputed facts the sole cause of the disaster. Had the defendant been upon his right side of the road, upon the plaintiff's theory he might have been driving recklessly and the plaintiff and her intestate being near to the grass on the northerly side of a roadway 27 feet and upwards in width the accident would not have happened and the presence of or

lack of vision would not be material. If, however, as found by the jury, defendant was wrongfully on plaintiff's side of the road and caused the accident, the question of whether or not under the facts in the exercise of reasonable care he might have discovered his error and the presence of plaintiff and thereupon avoid the collision was for the jury. The question was presented whether or not as defendant approached the wagon the roadway was so well lighted up that defendant saw or in the exercise of reasonable care could have seen the wagon in time to avoid colliding with the same, and upon that proposition the conclusion of the jury was adverse to defendant, thereby establishing that the lights of the car on the highway were equivalent to any light which if placed upon the wagon of plaintiff would have aroused the attention of defendant, and that no causal connection existed between the collision and absence of a light on the wagon.

At the close of the charge to the jury the trial justice was requested by counsel for defendant to charge "that the failure to have a light on plaintiff's vehicle is *prima facie* evidence of contributory negligence on the part of plaintiff." The justice declined to charge in the language stated, but did charge that the jury might consider it on the question of negligence, but it was not in itself conclusive evidence of negligence. For the refusal to instruct the jury as requested, the judgment of the Trial Term was reversed by the Appellate Division.

The request to charge was a mere abstract proposition. Even assuming that such was the law, it would not bar a recovery by plaintiff unless such contributory negligence was the proximate and not a remote contributory cause of the injury. The request to charge excluded that important requisite. The trial justice charged the jury that the burden rested upon plaintiff to establish by the greater weight of evidence that plaintiff's intestate's death was caused by the negligence of the defendant and that such negligence was the proximate cause of his death; that by "proximate cause" is meant that cause without which the injury would not have happened,



otherwise she could not recover in the action. In the course of his charge the justice enlarged on the subject of contributory negligence, and in connection therewith read to the jury the provisions of the Highway Law and then charged that the jury should consider the absence of a light upon the wagon in which plaintiff and her intestate were riding *and whether the absence of a light on the wagon contributed to the accident.* At the request of counsel for defendant, the justice charged that, if the jury should find any negligence on the part of Mr. Martin, no matter how slight, contributed to the accident, the verdict must be for the defendant. I cannot concur that we may infer that the absence of a light on the front of the wagon was not only the cause but the proximate cause of the accident. Upon the evidence adduced upon the trial and the credence attached to the same, the fact has been determined that the accident would have been avoided had the defendant been upon his side of the road or attentive to where he was driving along a public highway, or had he been driving slowly, used his sense of sight and observed plaintiff and her intestate as he approached them, they being visible at the time. The defendant's request to charge which was granted, "that plaintiff must stand or fall on her claim as made, and if the jury do not find that the accident happened as substantially claimed by her and her witnesses that the verdict of the jury must be for the defendant," presented the question quite succinctly. The jury found that the accident happened as claimed by the plaintiff and her witnesses and we cannot surmise or infer that the accident would not have happened had a light been located on the wagon.

In my opinion the charge of the trial justice upon the subject of proximate cause of the accident was a full and complete statement of the law of the case, especially when considered in connection with the charge that the slightest negligence on the part of the intestate contributing to the accident would require a verdict for defendant.~

The charge requested and denied in this case was in effect that a failure to have a light upon the intestate's wagon was as matter of law such negligence on his part as to defeat the cause of action irrespective of whether or not such negligence was the proximate cause of the injury. My conclusion is that we are substituting form and phrases for substance and diverging from the rule of causal connection.

### **Excuse for Complying with a Statute or Regulation**

The courts will sometimes excuse failure to comply with a statute or regulation. Recognized excuses can include situations in which complying with the statute or regulation would be more dangerous than violating it, inability to comply with the statute or regulation despite an honest attempt to do so, and emergency circumstances – so long as the emergency itself was not the defendant's own fault.

*Example: Southbound Swerver* – Suppose a statute requires motorists to not travel on the wrong side of the road. A motorist is traveling southbound on a road when a group of children suddenly dart out into traffic. To avoid hitting them, the motorist swerves across the double yellow line and sideswipes a northbound vehicle. The southbound motorist is excused from complying with the statute, and thus negligence per se doctrine cannot be used to establish breach of the duty of care.

Keep in mind that even where a person is excused from complying with a statute, there is still the duty of reasonable care. So the southbound swerver must still exercise care reasonable under the circumstances when crossing the double-yellow line.

### **Complying with Statutes or Regulations as a Defense**

Since violating a statute or regulation can count as a breach of the duty of care under negligence-per-se doctrine, the question naturally arises whether complying with a relevant statute or regulation will suffice to show that the relevant standard of care was met. In other words, since statutes can be used by plaintiffs to establish breach, can

compliance with statutes be used by defendants to show a lack of breach?

The general rule is that defendants can introduce compliance with a statute or regulation to the jury as evidence that the relevant standard of care was met. However, compliance with a statute or regulation is not dispositive. A plaintiff is free to argue that the reasonable person standard of care required doing more than the statute or regulation itself required.

*Example: Retail Railing* – Suppose a statute requires that railings in retail stores be of a certain height. The defendant's railing meets the standard. Nonetheless, the plaintiff falls over the railing, with the theory of negligence being that the railing was not high enough to reasonably prevent falls. Can the defendant use compliance with the statute to defeat the negligence claim? Not necessarily. The defendant can present the statute to the jury and argue that the fact that the railing was as high as required by statute indicates that reasonable care was taken. But the plaintiff can argue that the railing height was not reasonable regardless. Suppose evidence at trial showed that several similar accidents had happened at the store in the past. One can imagine that the jury would be persuaded to find the railing height unreasonably low despite the fact that it was as high as the statute required.

So, for defendants, compliance with a statute or regulation forms an incomplete argument. For plaintiffs, however, violation of a statute or regulation, if it passes the negligence-per-se requirements, functions to end all argument and tally up a win for the plaintiff on the breach element of the negligence case.

### **Some Problems on Negligence Per Se**

**A. *Westbound Walker*** – A statute requires pedestrians walking along a roadway to walk such that they are facing traffic. William is driving along a rural road when his car breaks down. There being no cell phone service in this area, William will have to walk into town to get help. The nearest town to the east is 100 miles away. The nearest town to the west is three miles away. In the westbound direction, the

right side of the road has a wide shoulder, while the left side of the road – which faces traffic – has a narrow shoulder and drops off to the left over a cliff. William decides to walk westbound on the right side of the road with his back to traffic. Another motorist, Minsky, is travelling westbound along the road and hits William. Can Minsky prevail in a negligence suit against William for the damage to Minsky’s car? If William sues Minsky for bodily injuries he sustained in being hit by Minsky’s car, can Minsky successfully repel the suit by arguing that the man was contributorily negligent? (Assume that we are in a contributory negligence jurisdiction, where any negligence on the part of the plaintiff that contributed to the injury forms a complete defense.)

**B. *SparkleStar Skate*** – The following hypothetical uses a real statute and real language from a roller-rink sign.

Suppose there is a roller rink in North Carolina named SparkleStar Skate that hosts an open skate session on an unlucky afternoon.

A North Carolina statute provides as follows:

N.C. General Statutes § 99E-12. Duties of a roller skater.

Each roller skater shall, to the extent commensurate with the person’s age:

- (1) Maintain reasonable control of his or her speed and course at all times.
- (2) Heed all posted signs and warnings.
- (3) Maintain a proper lookout to avoid other roller skaters and objects.
- (4) Accept the responsibility for knowing the range of his or her ability to negotiate the intended direction of travel while on roller skates and to skate within the limits of that ability.
- (5) Refrain from acting in a manner that may cause or contribute to the injury of himself, herself, or any other person.

A sign inside SparkleStar Skate contains the following language:

### DRESS AND CONDUCT CODE

Skaters shall conduct themselves as ladies and gentlemen.

No in and out privileges, loitering, or littering around building. “When you leave – you leave.”

All skaters renting skates shall be required to wear socks. If you feel that your rental skates are defective or improperly adjusted, please return them to the rental skate counter immediately.

No foul language is permitted.

Parent spectators only.

Skate At Your Own Risk.

Six-year-old Jeanette, a novice roller skater, is using rental skates. She is not wearing socks. Jeanette skates around the skate floor, gradually going faster as her confidence builds. Still skating slower than most other skaters, Jeanette becomes flummoxed when closely passed by several tweens who are skating fast and laughing loudly. Jeanette starts to careen out of control. Though she tries to regain her balance, she tumbles into the path of Kevin, a 39-year-old father skating with his young son. Kevin falls and breaks his arm. Kevin, who is unemployed and without health insurance, asks Jeanette’s parents – both of whom are partners in a national accounting firm – for help with his subsequent medical bills. They refuse.

Four-year-old Lawrence, who has been skating since the age of 17 months, is whiz on the floor. Zooming in and out of much older skaters, he elicits ooohs and aaahs from everyone who sees him. While smiling and waving at onlookers, Lawrence runs into Molly, a 13-year-old novice who is struggling to stay up right. The collision causes Molly to lose her balance and fall, causing her to break several teeth. Molly will need thousands of dollars’ worth of dentistry, and Lawrence has money coming in from a national television commercial he landed thanks to his skating prowess.

Nilou, a 72-year-old skater at SparkleStar Skate with her great grandson, is an experienced and competent roller skater. She rents

skates. As she tries them out, her left skate feels as if it has a wobbly wheel. But Nilou ignores it, as her great-grandson is already skating off ahead. After a few minutes of skating, Nilou's left skate suddenly collapses, causing Nilou to fall and suffer a broken femur. It turns out there was indeed a wobbly wheel on the left skate owing to improper maintenance by SparkleStar Skate's tech, who was at the time unlawfully intoxicated with marijuana.

**A.** Can Kevin use N.C.G.L. §99E-12 to successfully sue Jeanette for negligence?

**B.** Can Molly use N.C.G.L. §99E-12 to successfully sue Lawrence for negligence?

**C.** Can Nilou successfully make out a prima facie case for negligence against SparkleStar Skate using N.C.G.L. §99E-12? Without using N.C.G.L. §99E-12?

**D.** Can SparkleStar Skate use N.C.G.L. §99E-12 to establish an affirmative defense of contributory negligence if sued by Nilou? (North Carolina is a contributory negligence jurisdiction, so if Nilou's negligence contributed to her injury at all, then she will be barred from recovering any damages.)

**E.** Can SparkleStar Skate use N.C.G.L. §99E-12 to sue Nilou for negligence for damage to the left skate?

### **E. The Role of Custom or Standard Practices**

Golfers yell "Fore!" before teeing off. Lumberjacks yell, "Timber!" Waiters serving fajitas say, "The plate is very hot." Adults insist that little kids hold hands in a parking lot. What is the relevance of such habitual ways of doing things on the standard of care in a negligence case?

Judges and people writing on torts call such conduct "custom." (Although in the business world, "standard practice" may be the more common term.) The rule with regard to custom is that it can be relevant evidence for the jury on the standard of care, but custom is not dispositive to the issue. In fact, no matter how firmly established custom is, custom itself is not the standard of care. The standard is

what it always is: what the reasonable person would do under the circumstances.

Custom can be relevant and helpful to the jury in many ways. Showing that a practice is customary tends to show that it is a practicable and well-known means of reducing risk. An established custom can also be reflective of the amalgamated judgment of a large community. These showings can go a long way in making an argument about what the reasonable person would have done.

An important exception to the rule that custom is not dispositive is professional-malpractice negligence – that is negligence in the practice of medicine, dentistry, law, etc. In the professional-malpractice context, the prevailing custom in the professional community is dispositive. That is, the custom actually sets the standard of care, replacing reasonable-person analysis. Professional malpractice is discussed in a later chapter on healthcare liability. Just remember that outside the context of negligence committed by a professional in the course of professional practice, custom cannot usurp the reasonable-person standard of care.

### **Case: The T.J. Hooper**

The following case is the classic exposition on the use of custom in tort law. Ironically, the case does not technically concern *torts*, but rather *admiralty law*, the common law of obligations arising at sea. Admiralty law covers a lot of topics – such as sunken treasure – that are not covered by tort. But when it comes to liability for accidents at sea, admiralty law and torts are largely consonant.

### *The T.J. Hooper*

United States Court of Appeals for the Second Circuit  
July 21, 1932

60 F.2d 737. *The T. J. Hooper*; *The Northern No. 30 and No. 17*; *The Montrose*. *In re Eastern Transp. Co., New England Coal & Coke Co. v. Northern Barge Corporation, H. N. Hartwell & Son, Inc., v. Same*. No. 430. Petition by the Eastern Transportation Company, as owner of the tugs

*Montrose* and *T.J. Hooper*. Before LEARNED HAND, SWAN, and AUGUSTUS N. HAND, Circuit Judges.

**Judge LEARNED HAND:**

The barges No. 17 and No. 30, belonging to the Northern Barge Company, had lifted cargoes of coal at Norfolk, Virginia, for New York in March, 1928. They were towed by two tugs of the petitioner, the *Montrose* and the *Hooper*, and were lost off the Jersey Coast on March tenth, in an easterly gale. The cargo owners sued the barges under the contracts of carriage; the owner of the barges sued the tugs under the towing contract, both for its own loss and as bailee of the cargoes; the owner of the tug filed a petition to limit its liability. All the suits were joined and heard together, and the judge found that all the vessels were unseaworthy; the tugs, because they did not carry radio receiving sets by which they could have seasonably got warnings of a change in the weather which should have caused them to seek shelter in the Delaware Breakwater en route. He therefore entered an interlocutory decree holding each tug and barge jointly liable to each cargo owner, and each tug for half damages for the loss of its barge.~

Each tug had three ocean going coal barges in tow, the lost barge being at the end. The *Montrose*, which had the No. 17, took an outside course; the *Hooper* with the No. 30, inside. The weather was fair without ominous symptoms, as the tows passed the Delaware Breakwater about midnight of March eighth, and the barges did not get into serious trouble until they were about opposite Atlantic City some sixty or seventy miles to the north. The wind began to freshen in the morning of the ninth and rose to a gale before noon; by afternoon the second barge of the *Hooper's* tow was out of hand and signalled the tug, which found that not only this barge needed help, but that the No. 30 was aleak. Both barges anchored and the crew of the No. 30 rode out the storm until the afternoon of the tenth, when she sank, her crew having been meanwhile taken off.~



The weather bureau at Arlington broadcasts two predictions daily, at ten in the morning and ten in the evening. Apparently there are other reports floating about, which come at uncertain hours but which can also be picked up. The Arlington report of the morning read as follows: 'Moderate north, shifting to east and southeast winds, increasing Friday, fair weather to-night.' The substance of this, apparently from another source, reached a tow bound north to New York about noon, and, coupled with a falling glass, decided the master to put in to the Delaware Breakwater in the afternoon. The glass had not indeed fallen much and perhaps the tug was over cautious; nevertheless, although the appearances were all fair, he thought discretion the better part of valor. Three other tows followed him, the masters of two of which testified. Their decision was in part determined by example; but they too had received the Arlington report or its equivalent, and though it is doubtful whether alone it would have turned the scale, it is plain that it left them in an indecision which needed little to be resolved on the side of prudence; they preferred to take no chances, and chances they believed there were. Courts have not often such evidence of the opinion of impartial experts, formed in the very circumstances and confirmed by their own conduct at the time.

Moreover, the *Montrose* and the *Hooper* would have had the benefit of the evening report from Arlington had they had proper receiving sets. This predicted worse weather; it read: "Increasing east and southeast winds, becoming fresh to strong, Friday night and increasing cloudiness followed by rain Friday." The bare "increase" of the morning had become "fresh to strong." To be sure this scarcely foretold a gale of from forty to fifty miles for five hours or more, rising at one time to fifty-six; but if the four tows thought the first report enough, the second ought to have laid any doubts. The master of the *Montrose* himself, when asked what he would have done had he received a substantially similar report, said

that he would certainly have put in. The master of the *Hooper* was also asked for his opinion, and said that he would have turned back also, but this admission is somewhat vitiated by the incorporation in the question of the statement that it was a "storm warning," which the witness seized upon in his answer. All this seems to us to support the conclusion of the judge that prudent masters, who had received the second warning, would have found the risk more than the exigency warranted; they would have been amply vindicated by what followed. To be sure the barges would, as we have said, probably have withstood the gale, had they been well found; but a master is not justified in putting his tow to every test which she will survive, if she be fit. There is a zone in which proper caution will avoid putting her capacity to the proof; a coefficient of prudence that he should not disregard. Taking the situation as a whole, it seems to us that these masters would have taken undue chances, had they got the broadcasts.

They did not, because their private radio receiving sets, which were on board, were not in working order. These belonged to them personally, and were partly a toy, partly a part of the equipment, but neither furnished by the owner, nor supervised by it. It is not fair to say that there was a general custom among coastwise carriers so to equip their tugs. One line alone did it; as for the rest, they relied upon their crews, so far as they can be said to have relied at all. An adequate receiving set suitable for a coastwise tug can now be got at small cost and is reasonably reliable if kept up; obviously it is a source of great protection to their tows. Twice every day they can receive these predictions, based upon the widest possible information, available to every vessel within two or three hundred miles and more. Such a set is the ears of the tug to catch the spoken word, just as the master's binoculars are her eyes to see a storm signal ashore. Whatever may be said as to other vessels, tugs towing heavy coal laden barges, strung out for half a mile, have little power to manoeuvre,

and do not, as this case proves, expose themselves to weather which would not turn back stauncher craft. They can have at hand protection against dangers of which they can learn in no other way.

Is it then a final answer that the business had not yet generally adopted receiving sets? There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission. But here there was no custom at all as to receiving sets; some had them, some did not; the most that can be urged is that they had not yet become general. Certainly in such a case we need not pause; when some have thought a device necessary, at least we may say that they were right, and the others too slack. The statute (section 484, title 46, U. S. Code) does not bear on this situation at all. It prescribes not a receiving, but a transmitting set, and for a very different purpose; to call for help, not to get news. We hold the tugs therefore because had they been properly equipped, they would have got the Arlington reports. The injury was a direct consequence of this unseaworthiness.

Decree affirmed.

## **F. The Negligence Calculus**

### **Introduction**

An alternative way of thinking about negligence has emerged from the law-and-economics movement: the negligence calculus, also called the “Hand Formula.” The idea is that a person is obliged to undertake a precaution when the benefits outweigh the costs. The particular way this is spelled out in the Hand Formula is that a

defendant has breached its duty of care if it fails to take a precaution when the burden of doing so is less than the probability of the harm multiplied by the magnitude of the harm.

Following the case, we will spell this out in a formal way with defined variables and a mathematically expressed inequality.

**Case: U.S. v. Carroll Towing**

The Hand Formula comes to us from an opinion filed 14 years after *the T.J. Hooper*. Yet this case was also authored by Judge Learned Hand and also happens to concern a tugboat.

*United States v. Carroll Towing*

United States Court of Appeals for the Second Circuit  
January 9, 1947

159 F.2d 169. Nos. 96 and 97, Dockets 20371 and 20372. Conners Marine Company, Inc., against Pennsylvania Railroad Company, charterer of the covered barge *Anna C* and proceedings in the matter of the petition of the Carroll Towing Company, Inc., as owner of the steamship *Joseph F. Carroll*. Grace Line, Inc. impleaded. Before L. HAND, CHASE and FRANK, Circuit Judges.

**Judge LEARNED HAND:**

These appeals concern the sinking of the barge, *Anna C*, on January 4, 1944, off Pier 51, North River. The Conners Marine Co., Inc., was the owner of the barge, which the Pennsylvania Railroad Company had chartered; the Grace Line, Inc., was the charterer of the tug, *Carroll*, of which the Carroll Towing Co., Inc., was the owner. The decree in the limitation proceeding held the Carroll Company liable to the United States for the loss of the barge's cargo of flour, and to the Pennsylvania Railroad Company, for expenses in salvaging the cargo and barge; and it held the Carroll Company also liable to the Conners Company for one half the damage to the barge; these liabilities being all subject to limitation. The decree in the libel suit held the Grace Line primarily liable for the other half of the damage to the barge, and for any part of

the first half, not recovered against the Carroll Company because of limitation of liability; it also held the Pennsylvania Railroad secondarily liable for the same amount that the Grace Line was liable. The Carroll Company and the Pennsylvania Railroad Company have filed assignments of error.

The facts, as the judge found them, were as follows. On June 20, 1943, the Connors Company chartered the barge, *Anna C* to the Pennsylvania Railroad Company at a stated hire per diem, by a charter of the kind usual in the Harbor, which included the services of a bargee, apparently limited to the hours 8 A.M. to 4 P.M. On January 2, 1944, the barge, which had lifted the cargo of flour, was made fast off the end of Pier 58 on the Manhattan side of the North River, whence she was later shifted to Pier 52. At some time not disclosed, five other barges were moored outside her, extending into the river; her lines to the pier were not then strengthened. At the end of the next pier north (called the Public Pier), lay four barges; and a line had been made fast from the outermost of these to the fourth barge of the tier hanging to Pier 52. The purpose of this line is not entirely apparent, and in any event it obstructed entrance into the slip between the two piers of barges. The Grace Line, which had chartered the tug, *Carroll*, sent her down to the locus in quo to 'drill' out one of the barges which lay at the end of the Public Pier; and in order to do so it was necessary to throw off the line between the two tiers. On board the *Carroll* at the time were not only her master, but a 'harbormaster' employed by the Grace Line. Before throwing off the line between the two tiers, the *Carroll* nosed up against the outer barge of the tier lying off Pier 52, ran a line from her own stem to the middle bit of that barge, and kept working her engines 'slow ahead' against the ebb tide which was making at that time. The captain of the *Carroll* put a deckhand and the 'harbormaster' on the barges, told them to throw off the line which barred the entrance to the slip; but, before doing so, to make sure that the tier on Pier

52 was safely moored, as there was a strong northerly wind blowing down the river. The 'harbormaster' and the deckhand went aboard the barges and readjusted all the fasts to their satisfaction, including those from the *Anna C* to the pier.

After doing so, they threw off the line between the two tiers and again boarded the *Carroll*, which backed away from the outside barge, preparatory to 'drilling' out the barge she was after in the tier off the Public Pier. She had only got about seventy-five feet away when the tier off Pier 52 broke adrift because the fasts from the *Anna C*, either rendered, or carried away. The tide and wind carried down the six barges, still holding together, until the *Anna C* fetched up against a tanker, lying on the north side of the pier below- Pier 51- whose propeller broke a hole in her at or near her bottom. Shortly thereafter: i.e., at about 2:15 P.M., she careened, dumped her cargo of flour and sank. The tug, *Grace*, owned by the Grace Line, and the *Carroll*, came to the help of the flotilla after it broke loose; and, as both had syphon pumps on board, they could have kept the *Anna C* afloat, had they learned of her condition; but the bargee had left her on the evening before, and nobody was on board to observe that she was leaking. The Grace Line wishes to exonerate itself from all liability because the 'harbormaster' was not authorized to pass on the sufficiency of the fasts of the *Anna C* which held the tier to Pier 52; the Carroll Company wishes to charge the Grace Line with the entire liability because the 'harbormaster' was given an over-all authority. Both wish to charge the *Anna C* with a share of all her damages, or at least with so much as resulted from her sinking. The Pennsylvania Railroad Company also wishes to hold the barge liable. The Conners Company wishes the decrees to be affirmed.

The first question is whether the Grace Line should be held liable at all for any part of the damages. The answer depends first upon how far the 'harbormaster's' authority went, for concededly he was an employee of some sort. Although the

judge made no other finding of fact than that he was an 'employee,' in his second conclusion of law he held that the Grace Line was 'responsible for his negligence.' Since the facts on which he based this liability do not appear, we cannot give that weight to the conclusion which we should to a finding of fact; but it so happens that on cross-examination the 'harbormaster' showed that he was authorized to pass on the sufficiency of the facts of the *Anna C.* He said that it was part of his job to tie up barges; that when he came 'to tie up a barge' he had 'to go in and look at the barges that are inside the barge' he was 'handling'; that in such cases 'most of the time' he went in 'to see that the lines to the inside barges are strong enough to hold these barges'; and that 'if they are not' he 'put out sufficient other lines as are necessary.' That does not, however, determine the other question: i.e., whether, when the master of the *Carroll* told him and the deckhand to go aboard the tier and look at the fasts, preparatory to casting off the line between the tiers, the tug master meant the 'harbormaster' to exercise a joint authority with the deckhand. As to this the judge in his tenth finding said: 'The captain of the *Carroll* then put the deckhand of the tug and the harbor master aboard the boats at the end of Pier 52 to throw off the line between the two tiers of boats after first ascertaining if it would be safe to do so.' Whatever doubts the testimony of the 'harbormaster' might raise, this finding settles it for us that the master of the *Carroll* deputed the deckhand and the 'harbormaster,' jointly to pass upon the sufficiency of the *Anna C.*'s fasts to the pier. The case is stronger against the Grace Line than *Rice v. The Marion A.C. Meseck*, was against the tug there held liable, because the tug had only acted under the express orders of the 'harbormaster.' Here, although the relations were reversed, that makes no difference in principle; and the 'harbormaster' was not instructed what he should do about the fast, but was allowed to use his own judgment. The fact that the deckhand shared in this decision, did not exonerate him, and there is no reason why both should not be held equally liable, as the judge held them.

We cannot, however, excuse the Connors Company for the bargee's failure to care for the barge, and we think that this prevents full recovery. First as to the facts. As we have said, the deckhand and the 'harbormaster' jointly undertook to pass upon the *Anna C's* fasts to the pier; and even though we assume that the bargee was responsible for his fasts after the other barges were added outside, there is not the slightest ground for saying that the deckhand and the 'harbormaster' would have paid any attention to any protest which he might have made, had he been there. We do not therefore attribute it as in any degree a fault of the *Anna C* that the flotilla broke adrift. Hence she may recover in full against the Carroll Company and the Grace Line for any injury she suffered from the contact with the tanker's propeller, which we shall speak of as the 'collision damages.' On the other hand, if the bargee had been on board, and had done his duty to his employer, he would have gone below at once, examined the injury, and called for help from the *Carroll* and the Grace Line tug. Moreover, it is clear that these tugs could have kept the barge afloat, until they had safely beached her, and saved her cargo. This would have avoided what we shall call the 'sinking damages.' Thus, if it was a failure in the Conner Company's proper care of its own barge, for the bargee to be absent, the company can recover only one third of the 'sinking' damages from the Carroll Company and one third from the Grace Line. For this reason the question arises whether a barge owner is slack in the care of his barge if the bargee is absent.

As to the consequences of a bargee's absence from his barge there have been a number of decisions; and we cannot agree that it never ground for liability even to other vessels who may be injured. It appears there is no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her moorings. However, in any cases where he would be so liable for injuries to others obviously he must reduce his damages proportionately, if the



injury is to his own barge. It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL. Applied to the situation at bar, the likelihood that a barge will break from her fasts and the damage she will do, vary with the place and time; for example, if a storm threatens, the danger is greater; so it is, if she is in a crowded harbor where moored barges are constantly being shifted about. On the other hand, the barge must not be the bargee's prison, even though he lives aboard; he must go ashore at times. We need not say whether, even in such crowded waters as New York Harbor a bargee must be aboard at night at all; it may be that the custom is otherwise, as Ward, J., supposed in *The Kathryn B. Guinan*; and that, if so, the situation is one where custom should control. We leave that question open; but we hold that it is not in all cases a sufficient answer to a bargee's absence without excuse, during working hours, that he has properly made fast his barge to a pier, when he leaves her. In the case at bar the bargee left at five o'clock in the afternoon of January 3rd, and the flotilla broke away at about two o'clock in the afternoon of the following day, twenty-one hours afterwards. The bargee had been away all the time, and we hold that his fabricated story was affirmative evidence that he had no excuse for his absence. At the locus in quo – especially during the short January days and in the full tide of war activity – barges were being constantly 'drilled' in and out. Certainly it was not beyond reasonable expectation that, with the inevitable haste

and bustle, the work might not be done with adequate care. In such circumstances we hold – and it is all that we do hold – that it was a fair requirement that the Connors Company should have a bargee aboard (unless he had some excuse for his absence), during the working hours of daylight.~

Decrees reversed and cause remanded for further proceedings in accordance with the foregoing.

### **The BPL Formula's Place in Torts**

Based on the *Carroll Towing* opinion, it does not appear that Judge Hand intended to wholly redefine negligence using algebra. Instead, it looks like he meant to use algebra as a way of illustrating the negligence concept of what is reasonable. Yet however modestly Judge Hand might have intended it, his algebraic way of thinking about breach of the duty of care has been embraced by law-and-economics scholars as holding the key to describing liability in a way that promotes economic efficiency.

The key figure in the promotion of the Hand Formula was Professor Richard A. Posner of the University of Chicago. In a 1972 article, Professor Posner – now a judge on the Seventh Circuit – saluted *Carroll Towing* as providing the path to understanding negligence in terms of a cost-benefit analysis. Posner rejected the view that negligence is about compensation or morals. Instead, he argued that it is about economics.

“It is time to take a fresh look at the social function of liability for negligent acts. The essential clue, I believe, is provided by Judge Learned Hand’s famous formulation of the negligence standard – one of the few attempts to give content to the deceptively simple concept of ordinary care. [I]t never purported to be original but was an attempt to make explicit the standard that the courts had long applied. ... Hand was adumbrating, perhaps unwittingly, an economic meaning of negligence. Discounting (multiplying) the cost of an accident if it occurs by the probability of

occurrence yields a measure of the economic benefit to be anticipated from incurring the costs necessary to prevent the accident.”

Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972). The idea of reconceptualizing negligence in economic terms, so that it will serve economic goals, has been highly influential in scholarly circles. The impact in the courts has been considerably smaller. While there are sporadic examples of courts expressly engaging in the negligence calculus – including opinions authored by Judge Posner – the formula has not been widely embraced by the bench. Insofar as the idea has had influence, it has been followed by controversy.

### How the BPL Formula Works

In *U.S. v. Carroll Towing*, the BPL formula assigns variables as follows: **B is the burden, P is the probability that something will go wrong, and L is the total loss that would result.**

When multiplied together, **P and L represent the total amount of risk.** It follows from this that just because the L is big, it is not necessarily the case that the total level of risk is big. A relatively large harm, when coupled with a miniscule probability, might represent a relatively small risk overall. The variable P can be thought of as “discounting” L.

What you might call the “negligence condition” exists when the following inequality is true:

$$B < PL$$

If we incorporate that formula into an algorithm, we would have this:

Regarding a certain precaution:

*If*  $B < PL$ ,

*and if* the certain precaution is not taken,

*then* the duty of care is breached.

If the PL is greater than B, there is a breach of the duty of care. If the B is greater than the PL, then there is there is no breach. What happens if  $B = PL$ ? This essentially reflects a tie between the plaintiff and defendant on the breach-of-duty question. Since the fundamentals

of civil procedure mandate that the plaintiff has the burden of proof, such a tie would, in essence, go to the defendant, since it is a failure to prove breach. Thus,  $B = PL$  means there is no breach of the duty of care.

Some important things to keep in mind:

**The L in the formula reflects the total amount of loss suffered – not the loss suffered by the defendant.** This is where BPL analysis can be distinguished from what most people think of as “cost-benefit analysis.” When a business manager weighs the costs and the benefits of undertaking some initiative, the manager is looking at the costs and the benefits to the firm. That is not how the BPL formula is meant to work. The BPL formula is meant to take into account the entire loss suffered anywhere.

**The P in the formula is a number ranging from 0 to 1.** If there is no chance that the harm could come to pass, then P is 0. If it is certain that the harm would come to fruition absent the precaution, then P is 1. If there is a 50% probability – alternately stated as odds of 1 to 1, or a chance of 1 in 2 – then the P is 0.5.

*Example: Dangling Danger* – Suppose a company will be using a crane to move a large generator assembly to the top of a tall building. If the crane or cabling fails, then the equipment package will fall, crushing a single-story restaurant below. The move will be done when the restaurant is closed and vacated, so there will be no danger to people. If the restaurant were to be destroyed, it would represent a loss to its proprietors of \$600,000. The kind of crane involved, making this kind of maneuver, has a failure rate of 1 in 10,000. Using a second crane to lift the load at the same time would eliminate this risk, but it would cost an additional \$12,000 to hire. If no second crane is used, and the load falls, destroying the restaurant, then according to BPL analysis, was there a breach of the duty of care? In this case,  $L = \$600,000$  and  $B = \$12,000$ . To get P, we divide 1 by 10,000, so  $P = 0.0001$ . P multiplied by L is \$60. Since the B of \$12,000 is not

less than the PL of \$60, it is not a breach of the duty of care to forgo the precaution.

In order to make the analysis work, you need to do it on a precaution-by-precaution basis. In the example just given, there are probably many things that the construction company could do to avoid danger to the restaurant. It could disassemble the package and move it in smaller bundles. It could redesign the new building so that it didn't require a generator assembly on top. It could build a temporary protective shell around the restaurant to protect it in the case of a crane failure. There is no need to put all these into the BPL formula at once, because they all represent different decisions. BPL analysis works on one decision at a time – providing an answer as to whether it is a breach of the duty of care to do or omit to do *a certain something*.

Also, to make the analysis work, the B and the L must be expressed in the same units. For instance, if B and L are both expressed in present-value dollars, the proper comparison can be made. If the B were in dollars and the L in euros, you would have to convert one into the other. The time value of money can be a complicating factor as well. If the B is expressed in present dollars – which would make sense, since money would have to be spent on the precaution now – the L must be expressed in present dollars as well. This may require some translation, because if the harm would be suffered 10 years from now, then whatever the loss would represent in dollars at that time must be translated into a figure stated in present dollars. This can be accomplished by “discounting” the future funds to present value. If the harm would not necessarily take place at a certain time in the future, but may take place at any time over the next 25 years, say, perhaps with the magnitude of the loss varying over time, then the calculation becomes very complex – something probably better suited for an accountant rather than a lawyer. The point is that BPL analysis is about comparing numerical values, and that necessarily means they must be expressed in equivalent units.

If compensation for different currencies and the time value of money is a difficult problem, an even bigger challenge lurks where the loss is not originally stated in terms of money at all, but is stated in terms of

lives potentially cut short. If the burden is expressed in terms of dollars, but the danger is one of loss of life, then to do the analysis you must put a dollar-value on human life. Distasteful as it may seem, if you are going to use BPL analysis in a situation where human life is on the line, there is no way around this need to monetize death.

As it turns out, the torts system is quite accustomed to putting a dollar value on human life in the case of wrongful death claims. This delicate and difficult damages question – how much money will fairly compensate a plaintiff for the loss of a loved one – is a subject for a later chapter.

Putting a dollar value on human life is also a regular part of the job for government regulators trying to decide questions such as how much money should be spent on motor vehicle safety measures or environmental remediation. The U.S. Department of Transportation has used a value of \$6 million per human life to justify new vehicle standards, such as more crush-resistant roofs on cars. In 2008, the U.S. Environmental Protection Agency valued a single human at \$7.22 million in making decisions about limits on air pollution. In 2010, the EPA used a value of \$9.1 million per life in proposing new, tighter standards. Another way of valuing human life is by the year. A common figure used by insurers to decide whether life-saving medical treatment should be provided is \$50,000 per year of “quality” life. Another estimate came up with \$129,000 per quality year per person. (*See* Binyamin Appelbaum, “As U.S. Agencies Put More Value on a Life, Businesses Fret,” N.Y. TIMES, Feb. 16, 2011; Kathleen Kingsbury, “The Value of a Human Life: \$129,000,” TIME, Tuesday, May 20, 2008.)

### **Check-Your-Understanding Questions About the Hand Formula**

**A.** Aaron does a Hand Formula calculation, specifying values as follows:  $B = \$77,000$ ,  $P = 25$ ,  $L = \$1$  million. On this basis he calculates that the defendant is negligent for not undertaking the precaution. What has Aaron done wrong?

**B.** Brinda does a Hand Formula calculation, specifying values as follows:  $B = 44$  work hours,  $P = 0.003$ ,  $L = \$10,000$ . On this basis

she calculates that the defendant is not negligent for neglecting the precaution. What has Brinda done wrong?

### **Some Simple Problems Using the Hand Formula**

**C.** A company built a temporary scaffolding structure near a parade route for a television network. The purpose was to support several remotely controlled television cameras to provide national coverage of a New Year's Day parade. On the day of the parade, a large float goes out of control and strikes the structure. The cameras plummet and are completely destroyed. At trial, the plaintiff television network produces evidence that the cameras together were worth \$65,000. The evidence shows that the defendant company could have built the scaffolding structure with reinforcements such that it would not have collapsed following such a collision, but this would have cost an additional \$2,000 to accomplish. Expert testimony at trial explains that based on past accidents, there was a 1-in-10,000 chance that a float would have veered off course at this particular place during the parade. Using BPL analysis, did the defendant company breach its duty of care?

**D.** A natural-gas pipeline operated by the defendant leaks and causes an explosion. The explosion destroys the plaintiff's aviation fuel depot. The plaintiff's fuel depot is the only structure along this section of pipeline. The lost depot and the inventory of fuel it contains totals \$12 million. The defendant company that operates the pipeline could have avoided the accident by installing an automatic cut-off mechanism on the section of pipeline near the plaintiff's warehouse. The installation of the mechanism would have cost \$8 per year, spread out over the life of the pipeline. Experts estimated the chance of a pipeline explosion along this section of pipe in any given year to be 1 in 140,000. Using BPL analysis, did the defendant pipeline company breach its duty of care?

### **Some Not-So-Simple Problems Using the Hand Formula**

**E.** A different natural gas pipeline leaks and causes an explosion, destroying the plaintiff's car, a new minivan valued at \$35,000. The theory of negligence urged at trial is that the defendant pipeline

operator should have installed a centrally controlled multi-modal pressure-monitoring/chemical-sniffer system, which, if installed, would have prevented this type of accident not only from happening at the location where plaintiff's car was parked, but anywhere along the pipeline. Installation of the system would have cost \$15 million per year, spread out over the pipelines' operational life. The pipeline is 500 miles long and runs through many densely populated urban areas, including under or adjacent to business/financial centers, hospitals, and government facilities. In that sense, it appears lucky that this mishap happened in an isolated area where it only destroyed an unoccupied minivan. At trial, an expert estimated that an average explosion along the length of the pipeline, taking into account the destructive radius and the concentration of people and property along the route, would represent a loss of 20 lives plus \$300 million in property damage. The probability of such an explosion, the expert estimated, was 1-in-200 in any given year over the operating lifetime of the pipeline. The probability that the defendant's minivan, in particular, would be destroyed, the expert estimated at 1 in 10,000,000. Can BPL analysis be used to determine whether the defendant company breached its duty of care? Is so, what result?

**F.** A new particle accelerator has been built to collide atomic nuclei together at enormous energies to probe the leading edge of fundamental physics. Physicists are very excited about the data the experiment will produce, and it is possible that it could reveal new truths about our universe. The project is not, however, expected to produce anything of practical value. Because the machine is built to explore new realms of physics, there are some unknowns about what the machine could produce. One hypothesized danger is that the collider could produce strangelets – microscopic particles of “strange matter” – that could start a chain reaction converting all normal matter on Earth into strange matter, which would reduce the Earth to a hyperdense ball, about 100 meters wide, destroying all life in the process. No one has calculated a probability of such a disaster, but one team of physicists calculated the ceiling on the probability of a strangelet disaster as no more than 1-in-50,000. The collider represents a total cost of about \$1.1 billion. Astronomers believe that



the Sun will eventually expand as it dies, scorching Earth and killing everything on it. Assume the planet has another 7 billion years before it is engulfed by the Sun. The current world population is about 7 billion. Can BPL analysis be used to determine whether operating the collider represents a breach of the duty of due care? If so, what result?

### **G. Res Ipsa Loquitor**

The doctrine of res ipsa loquitor provides a special way for a plaintiff to prevail on the element of breach of the duty of due care. To understand how res ipsa loquitor works and why it is advantageous to some plaintiffs, it's first necessary to understand some context.

#### **The Usual Necessity of Specific Evidence of Breach**

Ordinarily, a negligence plaintiff must have a specific theory of negligence to take to the jury. That is to say, the plaintiff must prove a breach of the duty of care with specific evidence as to what happened, allowing the jury to conclude that the particular conduct was in breach of the duty of care.

For instance, if the evidence shows that plaintiff fell in the defendant's store and was injured as a result, no prima facie case for negligence has been made out. Why not? There is nothing in evidence that can provide a fair inference that any breach of the duty of care occurred. Perhaps the plaintiff fell because he slipped on something just dropped by a fellow customer. Perhaps the plaintiff fell because he was tripped by another customer. Perhaps the plaintiff tripped over his own feet. If, however, the plaintiff presents testimony from a store clerk that where the plaintiff fell there was a pool of water on the floor owing to an unrepaired roof leak, then there is specific evidence of conduct constituting a breach of the duty of due care.

#### **The Place for Res Ipsa Loquitor**

While specific evidence of a breach of the duty of care is the norm in negligence law and is generally required, sometimes there is a lack of evidence as to how an accident happened. Yet, because of the circumstances, it may be obvious that there was negligence. In such a

case, the doctrine of *res ipsa loquitor* allows a plaintiff to prevail in spite of a lack of specific evidence showing a breach of the duty of care.

Suppose a pedestrian walks along the sidewalk next to a multistory building where a flour warehouse occupies an upper floor. A barrel of flour suddenly drops on top of the plaintiff. There is no specific evidence of how the barrel fell. Was there negligence? You might say that a falling barrel of flour pretty much speaks for itself. And that is exactly what the court said in the leading case of *Byrne v. Boadle*: “The thing speaks for itself.” Only Chief Baron Pollock said it in Latin: “Res ipsa loquitor.”

With the doctrine of *res ipsa loquitor*, the law is essentially saying that even when we don’t know exactly what happened, it is nonetheless obvious that, whatever it was, it was likely the defendant was being negligent.

#### **Case: Byrne v. Boadle**

This case, from mid-19th-Century Liverpool, is the progenitor of *res ipsa loquitor* doctrine.

#### *Byrne v. Boadle*

Court of Exchequer

November 25, 1863

159 E.R. 299. England. 2 Hurlstone and Coltman 722. Opinion by POLLOCK, C.B. BRAMWELL, B.; CHANNELL, B.; and PIGOTT, B. concurred, with CHANNELL writing separately.

#### **The FACTS as set forth by the REPORTER:**

The plaintiff was walking in a public street past the defendant’s shop when a barrel of flour fell upon him from a window above the shop, and seriously injured him. Held sufficient *prima facie* evidence of negligence for the jury, to cast on the defendant the onus of proving that the accident was not caused by his negligence.

Declaration:

For that the defendant, by his servants, so negligently and unskilfully managed and lowered certain barrels of flour by means of a certain jigger-hoist and machinery attached to the shop of the defendant, situated in a certain highway, along which the plaintiff was then passing, that by and through the negligence of the defendant, by his said servants, one of the said barrels of flour fell upon and struck against the plaintiff, whereby the plaintiff was thrown down, wounded, lamed, and permanently injured, and was prevented from attending to his business for a long time, to wit, thence hitherto, and incurred great expense for medical attendance, and suffered great pain and anguish, and was otherwise damnified.~

At the trial before the learned Assessor of the Court of Passage at Liverpool, the evidence adduced on the part of the plaintiff was as follows: A witness named Critchley said: "On the 18th July, I was in Scotland Road, on the right side going north, defendant's shop is on that side. When I was opposite to his shop, a barrel of flour fell from a window above in defendant's house and shop, and knocked the plaintiff down. He was carried into an adjoining shop. A horse and cart came opposite the defendant's door. Barrels of flour were in the cart. I do not think the barrel was being lowered by a rope. I cannot say: I did not see the barrel until it struck the plaintiff. It was not swinging when it struck the plaintiff. It struck him on the shoulder and knocked him towards the shop. No one called out until after the accident." The plaintiff said: "On approaching Scotland Place and defendant's shop, I lost all recollection. I felt no blow. I saw nothing to warn me of danger. I was taken home in a cab. I was helpless for a fortnight." (He then described his sufferings.) "I saw the path clear. I did not see any cart opposite defendant's shop." Another witness said: "I saw a barrel falling. I don't know how, but from defendant's." The only other witness was a

surgeon, who described the injury which the plaintiff had received. It was admitted that the defendant was a dealer in flour.

It was submitted, on the part of the defendant, that there was no evidence of negligence for the jury. The learned Assessor was of that opinion, and nonsuited the plaintiff, reserving leave to him to move the Court of Exchequer to enter the verdict for him with damages, the amount assessed by the jury.

**CHIEF BARON CHARLES EDWARD POLLOCK:**

There are certain cases of which it may be said *res ipsa loquitur*, and this seems one of them. I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are *prima facie* responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case upon the evidence comes to this, a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the

acts of his servants who had the controul of it; and in my opinion the fact of its falling is primâ facie evidence of negligence, and the plaintiff who was injured by it is not bound to shew that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

### **The Requirements for Res Ipsa Loquitor**

The two requirements for res ipsa loquitor are that the antecedent to the accident was (1) **likely negligence** (that is, likely a breach of the duty of care), and (2) **likely the conduct of the defendant**.

These requirements are dictated by logic: If it is not likely negligence or if it is not likely the defendant who caused the accident, then it cannot be said that the defendant likely breached the duty of care.

Note that some courts are stricter. Instead of requiring the plaintiff merely to show that it was likely the defendant's conduct at issue, some courts require proof that that the instrumentality of harm was in the defendant's "exclusive control." Such a view is not the prevailing modern one.

### **The Effect of Res Ipsa Loquitor**

If the plaintiff successfully convinces the court that res ipsa loquitor should be allowed in the case, then this usually means one of two things, depending on the jurisdiction. In some jurisdictions, the effect of res ipsa loquitor is that the jury is permitted – but not required – to draw an inference that the defendant breached the duty of care. Other jurisdictions hold that the effect of res ipsa loquitor is to establish the breach element of the negligence case in the plaintiff's favor, switching the burden to the defendant, who can then rebut the presumption of breach with specific evidence.

This burden-shifting function of res ipsa loquitor is potentially important where specific facts are difficult for the plaintiff to discover. Such was likely the case with *Byrne v. Boadle*. In modern American litigation, however, civil procedure rules allow very wide-ranging discovery. So with the kind of depositions and document requests that are allowed today, it might be quite easy to discover

exactly what happened. When such discovery does not work to shed light on the matter, however – perhaps because of uncooperative or unavailable witnesses – then the burden-shifting function of *res ipsa loquitor* remains important as a way of making it the defendant's problem to find out what was going on at the defendant's place of business or arena of operation that caused the emergence of the means that did the plaintiff harm.

### **Recurrent Situations for Res Ipsa Loquitor**

Certain situations come up again and again as candidates for *res ipsa loquitor*.

One such recurrent situation involves gravity-driven injuries – like the falling barrel of *Byrne*. There probably are no more upper-floor barrel warehouses in crowded pedestrian areas these days, but there are still many accidents where gravity is the moving force. A falling light fixture in a sports arena, for instance, is a good candidate for *res ipsa loquitor*: Lights don't usually fall absent negligence (so the first prong of "likely negligence" is met), and it is probable that the operator of the sports arena was the negligent party ("likely the conduct of the defendant").

Airplane crashes have been a frequent source for the invocation of *res ipsa loquitor*. For example, in *Widmyer v. Southeast Skyways, Inc.*, 584 P.2d 1 (Alaska 1978), the Supreme Court of Alaska held that "air crashes do not normally occur absent negligence, even in inclement weather." The court based its reasoning on the strong general track record of safety in aviation in the late 1970s. And of course, since then, aviation has only gotten safer.

Packaged food is another wellspring of *res ipsa loquitor* cases. In particular, an almost unbelievable number of mid-20th-century cases involve glass bottles of Coca-Cola soft drinks. In *Payne v. Rome Coca-Cola Bottling Co.*, 10 Ga.App. 762, (Ga.App. 1912), the court allowed *res ipsa loquitor* to be used by a customer whose sight was destroyed when an exploding bottle propelled glass fragments through his eye. The *Payne* court summed up *res ipsa loquitor* about as well as anyone before or since when it said:

“Bottles filled with a harmless and refreshing beverage do not ordinarily explode. When they do, an inference of negligence somewhere and in somebody may arise.”

A sampling of other cases: *Zentz v. Coca Cola Bottling Co. of Fresno*, 39 Cal.2d 436 (Cal. 1952) (restaurant worker severely cut by exploding bottle allowed to use res ipsa loquitor); *Groves v. Florida Coca-Cola Bottling Co.*, 40 So.2d 128 (Fla. 1949) (waitress injured by exploding bottle allowed to use res ipsa loquitor); *Honea v. Coca Cola Bottling Co.*, 143 Tex. 272 (Tex. 1944) (15-year-old boy who suffered a severe wrist injury from exploding bottle when moving a case of Coca-Cola allowed to argue res ipsa loquitor); *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal.2d 453 (Cal. 1944) (waitress injured by exploding bottle allowed to use res ipsa loquitor); *Starke Coca-Cola Bottling Co. v. Carrington*, 159 Fla. 718 (Fla. 1947) (vending machine customer injured by exploding bottle allowed to use res ipsa loquitor).

Another recurrent arena for res ipsa loquitor involves nursery schools and nursing homes – facilities where the very young or very old are cared for. What very young children and the infirmed elderly can have in common is an inability to speak for themselves, leaving them unable to explain how they were injured. When such persons are hurt without any witnesses other than the defendants, the situation is ripe for a cover up: If the defendants lie and destroy evidence, it may well be impossible to make a specific showing of negligent conduct.

#### **Case: Fowler v. Seaton**

While most cases in this book take the form of judicial opinions, the reading for this case is the opening statement delivered to the jury by the plaintiff's attorney. The case illustrates the potential for res ipsa loquitor in a child-care setting.

*Fowler v. Seaton*

Superior Court of Los Angeles

c. 1963

JENNY GENE FOWLER, a Minor, etc., Plaintiff, v. ANNABELLE SEATON, Defendant. L.A. No. 27865. Reproduced in 61 Cal.2d 684-686.

**OPENING STATEMENT for the PLAINTIFF by attorney WILLIAM P. CAMUSI:**

Plaintiff in this case of Fowler versus Seaton expects to prove the following facts: Minor plaintiff, Jenny Gene Fowler began attending the Happy Day Nursery School in September 1958. The Happy Day Nursery was a pre school nursery where children would be left for the day by their parents. Their nursery consisted of a house and a little children's playground with such playthings as a swing and slide and similar paraphernalia. The Happy Day Nursery is located in the City of Van Nuys. The Happy Day Nursery was owned and operated at all times herein relevant by the defendant, Annabelle Seaton.

The nursery school made a weekly monetary charge to the parents of such pre school age children who attended there. The school is, of course, a private school and the defendant was at all times licensed to operate such a school.

On January 21, 1959 the minor plaintiff, Jenny Gene Fowler was taken to the said Happy Day Nursery School by her mother and left in charge of and custody of the defendant at about 9:00 a.m. of that day. At that time Jenny Gene Fowler was three years and ten months of age. When her mother left her in the custody of the defendant on that morning of January 21, 1959, Jenny Gene Fowler was in good health and sound of limb and body and she was well and had no marks on her body.

Jenny Gene Fowler's mother picked her up at the nursery school at approximately 6:00 p.m. of said day. At that time



the defendant told plaintiff's mother that Jenny Fowler had had an accident in that the child had wet her pants.

However, we will offer proof that the child had stopped wetting her pants approximately a year prior to this day of January 21, 1959.

On the way home that evening and for the remainder of the evening the child appeared downcast or depressed and stayed close to her mother at all times. At the dinner table at approximately 7:00 p.m. Jenny Gene Fowler's father noticed that the child's eyes were crossed. The child's hair was arranged in bangs over her forehead and her forehead was not usually visible. At that time the mother approached the child to look into the child's eyes. The mother pushed the child's hair away from the forehead, for the first time noticed a sizable round protruding bump on the child's forehead.

Jenny Gene Fowler had been in the mother's immediate presence ever since the mother had picked her up at the school, the nursery school, and the child had not received any injury or had not been in any accident whatsoever from the time she was picked up at the nursery school until her parents observed the cross eyes and bump on the child's forehead at the dinner table.

The mother immediately called the defendant at the nursery school and asked what had happened to plaintiff at the school that day. Defendant replied that another child had struck the plaintiff.

Attorney for the minor plaintiff took the deposition of the defendant Annabelle Seaton and Miss Seaton testified in effect as follows:

Near the end of the day defendant had four or five children in a room seated in a semi circle on the floor looking at television while the children were waiting to be picked up by their parents. Minor plaintiff was one of the children in this group. None of the children in this group were more than

five years of age. The defendant testified that she was in the room somewhat behind the children at the time observing them, when suddenly a little boy named Bobbie Schimp seated on the floor next to minor plaintiff hit minor plaintiff without warning in the forehead area of her head. The defendant testified that Bobbie Schimp had nothing in his hands.

Some time early the following morning, January 22, 1959, minor plaintiff had a nose bleed and was vomiting. She also had a slight temperature. From the evening of January 21, 1959 minor plaintiff's eyes would intermittently cross and uncross until within several months the child's eyes were constantly crossed.

The minor plaintiff had never had cross eyes before the accident. Plaintiff will prove by a competent medical doctor that plaintiff, Jenny Gene Fowler, suffered a concussion of the brain on January 21, 1959, and that a blow to the forehead – and that said blow to the forehead caused said concussion, that said blow and assault resulted, and shock resulted in Jenny Gene Fowler's eyes becoming crossed.

We will prove through said medical authority that some children have a latent tendency to crossing of the eyes. That the fusion mechanism which causes a person's eyes to function in parallel unison and see singularly is very delicately balanced in a small child the age of minor plaintiff, and that a blow or deep shock which might result from a blow may cause the fusion mechanism to cease to function properly and that the delicate muscles of the eyes become imbalanced.

As a result of the accident minor plaintiff had had surgery to the right eye. Her eyes are still crossed. We will prove through a medical specialist that one additional operation will be necessary and possibly a third, that cosmetically the appearance of plaintiff's eyes can be improved to normal or almost normal position, she may have some impairment of good sight.

We will offer proof of certain unpaid medical bills to which plaintiff is responsible and the estimated cost of future medical care and surgery to her eyes necessitated by the accident.

[E]ither because of the shock or fright resulting from the accident or because of the age of plaintiff, she has been unable to state or give any information concerning the accident. No information is available from the other children because of their tender years.

Plaintiff will prove through a medical doctor that the blow on the forehead and resulting concussion to minor plaintiff on January 21, 1959 was of such a force that it would have been impossible for a boy five years of age or less sitting on the floor with nothing in his hands to have delivered a blow of such force as to have caused the said injuries to minor plaintiff, and that the only inference that can be drawn is that the defendant, Annabelle Seaton, is not telling us what really happened that day at the nursery school and that the only reasonable inference which can be drawn is that the defendant, Annabelle Seaton, did not exercise reasonable care for the safety of the children in her care and custody, and, more specifically with reference to minor plaintiff.

I should also state with regard to the damages sustained by the minor plaintiff and as a result of her eyes crossing she has become more withdrawn and has certain psychological problems and has not done as well in school as she might otherwise had it not been for this accident.

#### **Postscript on *Fowler v. Seaton***

Following the opening statement, the defendant moved to dismiss the case on the basis that the doctrine of *res ipsa loquitur* was inapplicable to the case. The court granted the motion, but the Supreme Court of California reversed, saying:

“Not only was the plaintiff healthy when delivered and badly injured when returned to her parents, but it appears that defendant had

a guilty conscience and tried to cover up the injury. Here we have a severe and unusual injury, one that does not normally occur in nursery schools if the children are properly supervised. We have a volunteer explanation that was inferably false, and, when faced with a demand to explain, the proffering of another inferably false explanation. We have a case where it appears that the plaintiff did not contribute to her own injuries. Thus the proffered evidence showed the existence of a duty of careful supervision owed by defendant to plaintiff. Under the circumstances it is inferable that defendant had a consciousness of guilt, knew the cause of the injury, was under a duty to explain, and was trying to conceal it. Thus it may be reasonably inferred that the duty was violated. Certainly it is more probable than not that the injury was the result of defendant's faulty supervision."

### **The Similarity of Res Ipsa Loquitur to Strict Liability**

The application of *res ipsa loquitur* in negligence bears considerable practical similarity to the cause of action for strict liability. As discussed in the tort-law overview of Chapter 2, strict liability is a cause of action that, like negligence, is available for personal injuries and property damage suffered as a result of accidents. In terms of doctrine, strict liability is the same as negligence with one very large difference: The elements of duty of care and breach of the duty of care in the negligence cause of action are replaced in strict liability by a single element of "absolute duty of safety," which requires the plaintiff to show that the situation in which the harm arose falls into one of five categories: ultrahazardous activities, defective products, wild animals, trespassing livestock, and domestic animals with known vicious propensities. If so, there is no need to show that the defendant was careless; so long as an injury and causation can be shown, the defendant is on the hook for the damages.

How *res ipsa loquitor* and strict liability are similar is that in either instance, the plaintiff is relieved of having to show that it was defendant's carelessness that led to the injury. With *res ipsa loquitor*, the plaintiff is given a presumption in lieu of having to present evidence on breach of the duty of care. With strict liability, the element of breach of duty of care is not part of the *prima facie* case. Either way, the defendant becomes absolutely responsible should something go wrong. You will also notice overlap in the situations in which *res ipsa loquitor* and strict liability are imposed. The exploding Coca-Cola bottle cases, for instance, were brought as negligence claims making use of *res ipsa loquitor*. Today, thanks to the evolution of tort law, those same cases could be brought as claims for strict liability, since exploding pop bottles would constitute defective products. (Happily, of course, pop bottles rarely explode these days thanks to advances in plastics and glass.)

#### **H. Special Rules for Land Owners and Occupiers**

An idiosyncratic aspect of the common law regards the standard of care expected of owners or occupiers of real property. When it comes to the liability for conditions of land and buildings, there are special rules that dictate the standard of care.

These special rules only apply when the injury arises from a *condition of real property*.

The phrase "real property" means land and anything built on the land along with all fixtures. In property law, a "fixture" is something attached to the real property. So an installed ceiling lamp is a fixture, and thus part of the real property, while a floor lamp that can be unplugged and repositioned is "chattel" – meaning property that is not real property.

The special rules apply to land owners *and occupiers* because one does not have to "own" the property outright to be liable for conditions on the property. Someone who is in possession of the property – a lessee, for example, can be liable in the same way as an owner.

The special rules apply only to *conditions* on the property. Note that *activities* on the property, as opposed to conditions, are not covered by

the special rules. If an injury results because of something the land owner/occupier is doing on the land, then the standard of care is that of the reasonable person. But if the injury results from a condition of the property – such as a rotted stair case or a knife-like edge on handhold – then the special rules are engaged.

The key to how the special rules work is that they require a different standard of care depending on the classification of the plaintiff – i.e., the person who enters the land.

The rules differ from jurisdiction to jurisdiction, so any restatement of them will be highly imperfect. But what follows is a fairly standard conception of the traditional rules, ordered from the lowest duty to the highest.

#### **Undiscovered/Unanticipated Trespassers**

A person is a trespasser if she or he intentionally enters upon someone else's land without permission (express or implied) or some other privilege to do so. And if the land owner/occupier has no reason to know of or anticipate the trespassers' presence on the land, then the trespasser is an "undiscovered/unanticipated" trespasser. Such a person is owed **no duty**. That is to say, there is no way the undiscovered/unanticipated trespasser can recover against a land owner/occupier in a negligence action for an injury sustained because of a condition of the real property.

#### **Discovered/Anticipated Trespassers**

A discovered/anticipated trespasser is a trespasser – someone intentionally entering upon the land without privilege – who the land owner/occupier either knows or expects to be on the land. If a land owner knows that people habitually cut across the property as a shortcut between two public places, then such people would be anticipated trespassers. Even if the owner/occupier has not witnessed trespassers in the past, if there is evidence on the property that a reasonable person would understand as indicating trespassers – such as a beaten path – then the owner/occupier will be considered to have constructive notice of the trespassers.

Discovered/anticipated trespassers are owed a duty. In courts following the traditional approach, there is **a duty to warn of or make safe any concealed artificial conditions which are capable of causing death or serious bodily injury**. This is lower than the reasonable-care standard in three key ways: (1) only concealed or hidden dangers – “traps” the courts sometimes say – trigger the duty; (2) the duty only applies to artificial conditions, not natural conditions; (3) the dangers must be very serious ones, such as those risking life or limb. A good example is an abandoned mine shaft: it’s hidden, it’s not a natural feature, and it’s potentially lethal. To obviate such liability the owner/occupier can either remedy the condition or create an effective warning – such as with posted signs.

Note that some courts have scrapped the traditional approach in favor of applying the ordinary reasonable-care standard for discovered/anticipated trespassers.

### **Discovered/Anticipated Child Trespassers**

An extra duty is placed on an owner/occupier in certain circumstances when the known (or knowable) trespassers are children. This rule is often called **attractive nuisance doctrine**, although as we will see that name is misleading.

Where a land owner/occupier knows or should be aware of child trespassers, that owner/occupier has **a duty to remediate a dangerous artificial condition on the land capable of causing death or serious bodily injury, so long as the condition can be remedied without imposing an unreasonable burden on the owner/occupier**.

The most important difference with regard to anticipated child trespassers as opposed to their adult counterparts is that the danger need not be concealed to trigger the duty. Another important difference is that prominent warning signs do not offer an easy way out of liability. These differences reflect that fact that children lack good judgment and are often drawn to obviously dangerous things rather than being revulsed by them.

The special treatment of children got its start in cases where children trespassed onto railroad land, attracted to the idea of playing on a rail turntable. A seminal case was *Keffe v. Milwaukee & St. Paul Railway Co.*, 21 Minn. 207 (Minn. 1875). A 7-year-old boy riding the turntable in this way got his leg caught, crushing it and necessitating an amputation. The court reasoned as follows:

“[T]he defendant knew that the turn-table, when left unfastened, was easily revolved; that, when left unfastened, it was very attractive, and when put in motion by them, dangerous, to young children: and knew also that many children were in the habit of going upon it to play. The defendant therefore knew that by leaving this turn-table unfastened and unguarded, it was not merely inviting young children to come upon the turn-table, but was holding out an allurements, which, acting upon the natural instincts by which such children are controlled, drew them by those instincts into a hidden danger; and having thus knowingly allured them into a place of danger, without their fault, (for it cannot blame them for not resisting the temptation it has set before them,) it was bound to use care to protect them from the danger into which they were thus led, and from which they could not be expected to protect themselves.”

For this reason the doctrine was often referred to as the “turntable doctrine.” A broader label, apparently traceable to the *Keffe* case, is the “attractive nuisance doctrine.” The doctrine reflects a special protectiveness courts often exhibit toward children. But not all courts. The doctrine was rejected in Michigan in *Ryan v. Towar*, 128 Mich. 463 (Mich. 1901), a case in which an 8-year-old girl was caught in a water wheel on an abandoned industrial site. When she began screaming, her older sister came to her aid and was injured as well. Justice Frank Hooker wrote for the Supreme Court of Michigan:



“There is no more lawless class than children, and none more annoyingly resent an attempt to prevent their trespasses. The average citizen has learned that the surest way to be overrun by children is to give them to understand that their presence is distasteful.~ The remedy which the law affords for the trifling trespasses of children is inadequate. No one ever thinks of suing them, and to attempt to remove a crowd of boys from private premises by gently laying on of hands, and using no more force than necessary to put them off, would be a roaring farce, with all honors to the juveniles. For a corporation with an empty treasury, and overwhelmed with debt, to be required to be to the expense of preventing children from going across its lots to school, lest it be said that it invited and licensed them to do so, is to our minds an unreasonable proposition.”

Originally, attractive nuisance doctrine required – as its name suggests – that the child be induced to trespass through attraction to the dangerous condition itself, in order for the land owner/occupier’s duty to be triggered. This is no longer generally the case. Although courts often still call the doctrine “attractive nuisance,” the danger need not attract the child in order for the land owner/occupier to have a duty. For instance Michigan – which these days recognizes attractive nuisance doctrine – has no requirement that the condition lure the children onto the land. The court in *Pippin v Atallah*, 245 Mich App 136 (Mich. App. 2001) explains, “The term ‘attractive nuisance’ is a misnomer (or historical leftover) because it is not necessary, in order to maintain such an action, that the hazardous condition be the reason that the children came onto the property.”

### **Licensees**

The category of licensee is the default category of nontrespassers. Someone who is not trespassing is a licensee unless for some reason they qualify as an invitee (discussed below). In general, people on

private property with the consent of the owner/occupier are licensees. Licensees include visitors to private homes, such as friends and family. Ironically (and confusingly), people who come into your home by way of a formal party invitation are not invitees; they are licensees.

With regard to conditions on real property, an owner/occupier owes to licensees **a duty to warn of or try reasonably to make safe concealed hazards that are known to the owner/occupier**. This is different from the duty to discovered/anticipated trespassers in that to trigger a duty, the danger need not be artificial, nor does it need to constitute a threat of serious bodily injury or death.

### **Invitees**

Invitees are people who are allowed to come on land to conduct business related to the owner/occupier's business, or who are members of the public on land that is held open to the general public. Customers at the mall, visitors in a hospital, fans at a concert, and sunbathers in a park are all invitees. Some jurisdictions also consider public employees such as police officers, firefighters, and mail carriers to be invitees, even when in private homes, so long as they are privileged to be there.

Invitees are owed the highest duty by land owners/occupiers.

When it comes to conditions of real property, invitees are owed **a duty to adequately warn of or render safe concealed hazards *plus* to make a diligent effort to inspect for unknown dangers**.

The key difference between licensees and invitees is that with invitees, there is a requirement to affirmatively go out and look for conditions that may be a hazard for the unwary. This makes sense if you consider that invitees are generally persons from whom the owner/occupier stands to make money. In cases where there is no money to be made, such as with public spaces like parks, there is at least a subtle cue that the space is one where visitors can feel entitled to be there, as opposed to a private locale where they should feel as if they are guests who are obliged to be a little more circumspect.

**Case: Campbell v. Weathers**

The following case makes use of the special rules for negligence of land owners/occupiers and explores the boundaries of the definition of “invitee.”

*Campbell v. Weathers*

Supreme Court of Kansas

March 8, 1941

153 Kan. 316. JOE CAMPBELL, Appellant, v. CLAUDE WEATHERS, doing business as WEATHERS CIGAR STORE AND LUNCH, THE FIRST NATIONAL BANK of WICHITA, as Trustee of the Colar Sims Estate, and R. E. BLACK, as Manager, etc., Appellees. No. 34,850.

**Justice HUGO T. WEDELL:**

This was an action against three defendants to recover damages for personal injury. The demurrers of the defendants to plaintiff's evidence were sustained and those rulings constitute the sole basis of appeal.

The defendants were the lessee of a building, who operated a cigar and lunch business, the owner of the building and the owner's manager of the building.

The building was located in the business section of the city of Wichita, and at the southeast corner of an intersection. The building faced the north. It had an entrance at the west front corner and from the north near the northeast corner. A counter was located near the front and across the building east and west. Between the east end of the counter and the east wall of the building was an opening which led to a hallway along the east side of the building. The hallway led to a toilet which was located toward the west end of the hall. The toilet was west of the hallway. Immediately to the south of the portion of the building occupied by the defendant lessee another tenant operated a shoeshine parlor. There was an entrance to the shoeshine parlor from the west. There was access from the shoeshine parlor to the toilet and hallway by

means of a door into the toilet. There was a trap door in the floor of the hallway approximately half way between the lunch counter of the defendant lessee and the toilet room. The hallway was 29 or 31 inches in width. Plaintiff had been a customer of the defendant lessee for a number of years. On Sunday morning, June 4, 1939, between 8:30 and 9 o'clock, plaintiff entered the place of business operated by the defendant lessee as a cigar and lunch business. He spent probably fifteen or twenty minutes in the front part of the building and then started for the toilet. He stepped into the open trap door in the floor of the hallway, broke his right arm and sustained some other injuries.

Other pertinent facts will be considered in connection with the contentions of the respective parties.

We shall first consider the sufficiency of the evidence to take the case to the jury on the question of lessee's liability. Lessee demurred to the evidence upon the ground it showed that if plaintiff sustained an injury it was due to his own contributory negligence and not the negligence of Weathers, the lessee. Appellant contends that demurrer raised only the question of his contributory negligence. The contention is not good. The demurrer was intended to raise, and did raise, also, the question of the sufficiency of the evidence to show negligence on the part of the lessee. It was so considered and ruled upon.

The first issue to be determined is the relationship between plaintiff and the lessee. Was plaintiff a trespasser, a licensee or an invitee? The answer must be found in the evidence. A part of the answer is contained in the nature of the business the lessee conducted. It is conceded lessee operated a business which was open to the public. Lessee's business was that of selling cigars and lunches to the public. It was conceded in oral argument, although the abstract does not reflect it, that the lessee also operated a bar for the sale of beer, but that beer was not being sold on Sunday, the day of the accident. Plaintiff had been a customer of the lessee for a number of

years. He resided in the city of Wichita. He was a switchman for one of the railroads. He stopped at the lessee's place of business whenever he was in town. He had used the hallway and toilet on numerous occasions, whenever he was in town, and had never been advised the toilet was not intended for public use. When he entered lessee's place of business the lessee and three of his employees were present. He thought he had stated he was going back to use the toilet, but he was not certain he had so stated. None of the persons present heard the remark. He saw no signs which warned him not to use the hallway or toilet. The hallway was the direct route to the toilet. One of lessee's employees testified he had never been told by the lessee or anyone else that the toilet was a private toilet. On that point the examination of one of lessee's employees discloses the following:

Q. Mr. Hodges, do you know or were you ever told by Mr. Weathers or by Mr. Black or anybody who purported to be the manager of that building that that toilet was a private toilet?

A. No, sir.

Q. Do you know whether or not it was used by people other than the employees and the lessees and lessors of that building?

A. Yes, sir.

Q. Well, was it used?

A. Yes, it was used by everybody, used by the public.

Appellant insists the evidence discloses he was an invitee. Appellee counters with the contention appellant was not an invitee for the purpose of using the toilet. Appellee also urges the evidence does not disclose appellant purchased anything on this particular day and hence was not a customer on this occasion.

The evidence disclosed appellant had been a regular customer of the lessee for a number of years and that he had used the hallway and toilet about every day he had been in town. He had never seen any signs not to use the toilet and had never been forbidden to use it. That the public had a general invitation to be or to become lessee's customers cannot be doubted. It appears the trial court sustained the demurrer on the ground appellant had received no specific invitation or express permission to use the toilet on this particular occasion. Was a specific invitation or permission necessary in this case? That lessee was operating a lunch counter is conceded. No valid reason is advanced by appellee for his contention that lessee was not conducting a restaurant business within the ordinary acceptance of that term. We think it would constitute undue and unwarranted nicety of discrimination to say that a person who operates a public lunch counter is not engaged in the restaurant business. This appellant, a restaurant operator in the city of Wichita, was required by statute to provide a water closet for the accommodation of his guests. G. S. 1935, 36-111 and 36-113, required that he furnish a public washroom, convenient and of easy access to his guests. The word "toilet" might refer to either a water closet or washroom. Appellant was an invitee not only while in the front part of the place of business where the lunch counter was located but while he was on his way to the toilet. He was an invitee at all times. Appellant had been a regular customer of the lessee for a number of years. We think it is clear appellant, in view of the evidence in the instant case, was an invitee to use the toilet. The mere fact appellant had received no special invitation or specific permission on this particular occasion to use the toilet provided for guests or invitees did not convert him into a mere licensee. The evidence is clear appellant had used the hallway and toilet for a number of years and that it was used by everybody.

Can we say, as a matter of law, in view of the record in this particular case, appellant had no implied invitation to use the toilet simply because he had not made an actual purchase before he was injured? Assuming for the moment that it might be necessary under some circumstances for a regular customer of long standing to be an actual purchaser on the particular occasion of his injury to constitute him an implied invitee to use the toilet, does the evidence in the instant case compel such a ruling on the demurrer? We think it does not.~

The writer cannot subscribe to the theory that a regular customer of long standing is not an invitee to use toilet facilities required by law to be provided by the operator of a restaurant, simply because the customer had not actually made a purchase on the particular occasion of his injury, prior to his injury. It would seem doubtful whether such a doctrine could be applied justly to regular customers of a business which the law does not specifically require to be supplied with toilet facilities, but which does so for the convenience or accommodation of its guests. Women do a great deal of shopping. They sometimes shop all day in their favorite stores and fail to make a single purchase. Shall courts say, as a matter of law, they were not invitees of the business simply because on a particular occasion they had not yet made a purchase? No business concern would contend they were not invitees unless perchance an injury had occurred. Men frequently, during spare moments, step into a place of business, which they patronize regularly, where drinks, cigars and lunches are sold. They may not have intended definitely to presently make a purchase. They may, nevertheless, become interested, for example, in a new brand of cigars on display which they may purchase then or on some future occasion. Would the owner or operator of the business contend they were not invitees? We do not think so. Then why should courts arbitrarily say so, as a matter of law? It is common knowledge that business concerns invest huge sums of money in newspaper, radio and other mediums of

advertising in order to induce regular and prospective customers to frequent their place of business and to examine their stocks of merchandise. They do not contemplate a sale to every invitee. They do hope to interest regular customers and cultivate prospective customers. It is common knowledge that business concerns invest huge sums of money in newspaper, radio and other mediums of advertising in order to induce regular and prospective customers to frequent their place of business and to examine their stocks of merchandise. They do not contemplate a sale to every invitee. They do hope to interest regular customers and cultivate prospective customers. It is common knowledge that an open door of a business place, without special invitation by advertisement or otherwise, constitutes an invitation to the public generally to enter.~ In the case of *Kinsman v. Barton & Company*, 141 Wash. 311, that court had occasion to determine what constituted an invitee, and said:

“An invitee is one who is either expressly or impliedly invited onto the premises of another in connection with the business carried on by that other. ... If one goes into a store with the view of then, or at some other time, doing some business with the store, he is an invitee.”

[In] *MacDonough v. Woolworth Co.*, 91 N.J.L. 677~ it was held:

“The implied invitation of the storekeeper is broad enough to include one who enters a general store with a vague purpose of buying if she sees anything that strikes her fancy.”

Of course, if it appears a person had no intention of presently or in the future becoming a customer he could not be held to be an invitee, as there would be no basis for any thought of mutual benefit.~

Did the lessee violate any duty to appellant, an invitee? The specific negligence alleged was:



1. That they caused an opening to be made in the middle of the dimly lighted hallway leading to the toilet, knowing that the said hallway was used by customers, employees and the general public.
2. That they negligently failed to warn this plaintiff of the hole in the said floor and of the dangerous condition caused by the hole being left open in the floor.
3. That they negligently failed to warn this plaintiff of the insufficiently lighted and darkened condition caused by the defendants in the said hall. At the time the plaintiff entered into the said hall, the defendants and their agents knew well that the hole was not properly lighted and that there was no lid on the hole that this plaintiff stepped into, and that they, the defendants, and their agents, negligently failed to warn this plaintiff of the condition of the said floor.

It was also alleged the foregoing acts of negligence were directly responsible for the injury sustained.

The trap door in the hallway was opened on the day before the accident. It was opened in order to obtain ventilation underneath the floor and in order to get relief from dampness and the muddy ground, preparatory to reenforcing the floor. It was left open on Sunday, the day of the accident, at the suggestion of the lessee. The hallway was very narrow, only 29 or 31 inches in width. The trap door covered enough of the floor so as to make it impossible or highly inconvenient for persons to pass between the east side of the hole and the east wall without walking sideways. That distance was between six and eight inches, or perhaps one foot. On the morning of the accident the hallway was dark or dimly lighted. There was an electric light suspended from the ceiling, but it was not lighted at the time of the injury. It appears, if appellant stated he was going to the toilet, no one

heard the statement. Appellant did not know the trap door was open. He saw no signs to warn him it was open and no one in person advised him concerning it. The lessee previously had been expressly warned by one of his own employees that he had almost fallen into the hole and that it should be closed or someone would be injured and sue him. The employee thought the lessee advised him to leave the hole open. At any rate it was left open. It was the custom to clean up on Sunday mornings and to throw trash into the hallway. After appellant started for the toilet he passed the porter, who had a broom in his hand. Owing to the lack of light, appellant could see only the image of a pasteboard box on the floor of the hallway. The hole could not be seen by reason of the box. It has been held upon good authority that a storekeeper who places racks of merchandise about a railing around a stairway to a basement so as to obstruct the view of customers is negligent. There was not sufficient room between the box and the east wall to pass around the box. Appellant stepped over the box, "very easily" and in doing so stepped into the hole, broke his right arm and possibly sustained some other injuries. The pasteboard box was variously described as 20 inches in height, 16 to 18 inches in height, and approximately 14 to 16 inches wide. In the case of *Bass v. Hunt*, 151 Kan. 740, the trial court sustained a demurrer to plaintiff's evidence in a case very similar in principle. This court reversed the ruling, and held:

"It is the duty of a *restaurant keeper* to keep in a reasonably safe condition the portions of his establishment where his guests *may be expected to come and go*, including a necessary water closet *and the passage thereto*, and it cannot be said as a matter of law there was no actionable negligence in his failure to sufficiently light the passageway or to warn a guest of an unguarded stairway covered by a trap door which was not closed." (Emphasis supplied.)

We are unable to distinguish the *Bass* case from the instant case, in principle.

The lessee also contends the pasteboard box constituted a warning. Certainly we cannot say, as a matter of law, appellant should have interpreted the existence of a pasteboard box of the size mentioned, in view of other circumstances, as constituting a barricade to an open hole in the floor immediately on the other side of the box. Nor is there any evidence in the record the box was intended to constitute a barricade.

The order sustaining the demurrer of the lessee is reversed.

### **Questions to Ponder About *Campbell v. Weathers***

**A.** Do you think the ruling in this case will function to help business patrons in the long run? On the plus side, it may encourage business owners to make their premises safer. Business owners would likely argue that the decision will hurt patrons in the long run, because it will cause fewer restrooms to be made available. Which perspective do you think is right? Or is it possible that businesses will not apprise themselves of developments in the law of torts regarding dangerous conditions, and thus the *Campbell* case will have no effect other than to make it easier for injured patrons to recover?

**B.** One defense to negligence – which is discussed in a later chapter – is assumption of the risk. Suppose the business proprietor posted the following sign:

**Going to the restroom may be  
dangerous. Patrons who choose to use  
the restroom assume all risk of doing so.**

What effect do you think this should have, if any? Assuming such a sign could relieve all liability, would it be a good business decision to post it?

**C.** Recall the discussion of gender and the reasonable person standard above. In discussing women's shopping and men's drinking and cigar smoking, does the *Campbell* opinion reveal sexist stereotyping among 20th Century judges? Do you think a judge

would write the same things today? If not, do you think a judge might think the same things today? Either way, do you think it matters to the outcome of the case or the doctrine announced?

### **Some Problems About Duties of Land Owners/Occupiers**

**A.** Addison's mother-in-law, Yelena, is beginning to descend the stairs into Addison's cellar. "Watch out, Yelena," Addison calls. "There is a pipe that sticks out of the wall on the right around the middle of the stairs, down near your feet." Yelena, in a hurry, does not try to crowd to the left. She hits the pipe, trips, and falls down the remainder of the stairs, sustaining injuries. It turns out that Addison, who is a licensed plumber, could have easily fixed the pipe with about a 20 minute's work and \$20 worth of supplies. But she never bothered. Can Yelena recover from Addison in negligence?

**B.** Jayla owns and operates an independent hardware store downtown. Sawyer, a customer, browses the decorative drawer pulls. When he notices Jayla disappear into the back, Sawyer sneaks through a door marked "No Admittance." Sawyer, an amateur sleuth who has been turned down several times for a private investigator's license because of a record of criminal convictions, is looking for evidence of a price-fixing conspiracy he is convinced exists with other hardware stores in town. He finds a shelf containing banker's boxes of documents. He starts to pull one out, and the entire shelf collapses on top of him, injuring him badly. It turns out the kid Jayla hired on a subminimum youth-training wage did not follow directions putting the shelves together, leaving out several bolts and bracket-supports. Can Sawyer recover from Jayla in negligence? Does it matter whether the shelves are permanently affixed to the wall or in a movable freestanding shelving unit?

**C.** Gareth owns a 20,000-acre ranch out west where herds of buffalo roam through a maze of badlands. Badlands are areas unsuitable for agriculture and difficult to travel through that are characterized by ravines, gullies, hoodoos, cliffs, and canyons. Gareth knows that hunters often trek through his land to hunt deer and pheasants. One geological formation, which Gareth and his ranch hands have come

to call Dead Man's Drop, is a steep, narrow ravine in an otherwise flat plain overgrown with tall prairie grass. At certain times of day, the opening is all but invisible. It's already injured 15 trespassers, two fatally. Nonetheless, Gareth has posted no warning signs or done anything else to remedy the danger. Twyla, a bow hunter looking for bucks, is stalking through the grass silently while aiming and looking to her side when – WHOOSH – she falls into the gap, sustaining multiple bone fractures, torn ligaments, and other injuries. Can Twyla recover from Gareth in negligence?

**Case: Rowland v. Christian**

Not all jurisdictions follow the special rules for owner/occupier negligence for conditions of real property. In this case, California's high court expresses considerable contempt for the traditional rules and decides to discard them in favor of the flexible and portable reasonable-person standard.

*Rowland v. Christian*

Supreme Court of California

August 8, 1968

69 Cal. 2d 108. JAMES DAVIS ROWLAND, JR., Plaintiff and Appellant, v. NANCY CHRISTIAN, Defendant and Respondent. S. F. No. 22583. In Bank. Peters, J. Traynor, C. J., Tobriner, J., Mosk, J., and Sullivan, J., concurred. Burke, J., dissents. McComb, J., concurred.

**Justice RAYMOND E. PETERS:**

Plaintiff appeals from a summary judgment for defendant Nancy Christian in this personal injury action.

In his complaint plaintiff alleged that about November 1, 1963, Miss Christian told the lessors of her apartment that the knob of the cold water faucet on the bathroom basin was cracked and should be replaced; that on November 30, 1963, plaintiff entered the apartment at the invitation of Miss Christian; that he was injured while using the bathroom fixtures, suffering severed tendons and nerves of his right hand; and that he has incurred medical and hospital expenses.

He further alleged that the bathroom fixtures were dangerous, that Miss Christian was aware of the dangerous condition, and that his injuries were proximately caused by the negligence of Miss Christian. Plaintiff sought recovery of his medical and hospital expenses, loss of wages, damage to his clothing, and \$100,000 general damages. It does not appear from the complaint whether the crack in the faucet handle was obvious to an ordinary inspection or was concealed.

Miss Christian filed an answer containing a general denial except that she alleged that plaintiff was a social guest and admitted the allegations that she had told the lessors that the faucet was defective and that it should be replaced. Miss Christian also alleged contributory negligence and assumption of the risk. In connection with the defenses, she alleged that plaintiff had failed to use his "eyesight" and knew of the condition of the premises. Apart from these allegations, Miss Christian did not allege whether the crack in the faucet handle was obvious or concealed.

Miss Christian's affidavit in support of the motion for summary judgment alleged facts showing that plaintiff was a social guest in her apartment when, as he was using the bathroom, the porcelain handle of one of the water faucets broke in his hand causing injuries to his hand and that plaintiff had used the bathroom on a prior occasion. In opposition to the motion for summary judgment, plaintiff filed an affidavit stating that immediately prior to the accident he told Miss Christian that he was going to use the bathroom facilities, that she had known for two weeks prior to the accident that the faucet handle that caused injury was cracked, that she warned the manager of the building of the condition, that nothing was done to repair the condition of the handle, that she did not say anything to plaintiff as to the condition of the handle, and that when plaintiff turned off the faucet the handle broke in his hands severing the tendons and medial nerve in his right hand.

The summary judgment procedure is drastic and should be used with caution so that it does not become a substitute for an open trial.~ A summary judgment for defendant has been held improper where his affidavits were conclusionary and did not show that he was entitled to judgment and where the plaintiff did not file any counteraffidavits.

In the instant case, Miss Christian's affidavit and admissions made by plaintiff show that plaintiff was a social guest and that he suffered injury when the faucet handle broke; they do not show that the faucet handle crack was obvious or even nonconcealed. Without in any way contradicting her affidavit or his own admissions, plaintiff at trial could establish that she was aware of the condition and realized or should have realized that it involved an unreasonable risk of harm to him, that defendant should have expected that he would not discover the danger, that she did not exercise reasonable care to eliminate the danger or warn him of it, and that he did not know or have reason to know of the danger. Plaintiff also could establish, without contradicting Miss Christian's affidavit or his admissions, that the crack was not obvious and was concealed. Under the circumstances, a summary judgment is proper in this case only if, after proof of such facts, a judgment would be required as a matter of law for Miss Christian. The record supports no such conclusion.

Section 1714 of the Civil Code provides:

“Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. ...”

This code section, which has been unchanged in our law since 1872, states a civil law and not a common law principle.

Nevertheless, some common law judges and commentators have urged that the principle embodied in this code section serves as the foundation of our negligence law. Thus in a concurring opinion, Brett, M. R. in *Heaven v. Pender* (1883) 11 Q.B.D. 503, 509, states: “whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.”

California cases have occasionally stated a similar view: “All persons are required to use ordinary care to prevent others being injured as the result of their conduct.” Although it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by § 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy.

A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

One of the areas where this court and other courts have departed from the fundamental concept that a man is liable for injuries caused by his carelessness is with regard to the



liability of a possessor of land for injuries to persons who have entered upon that land. It has been suggested that the special rules regarding liability of the possessor of land are due to historical considerations stemming from the high place which land has traditionally held in English and American thought, the dominance and prestige of the landowning class in England during the formative period of the rules governing the possessor's liability, and the heritage of feudalism.

The departure from the fundamental rule of liability for negligence has been accomplished by classifying the plaintiff either as a trespasser, licensee, or invitee and then adopting special rules as to the duty owed by the possessor to each of the classifications. Generally speaking a trespasser is a person who enters or remains upon land of another without a privilege to do so; a licensee is a person like a social guest who is not an invitee and who is privileged to enter or remain upon land by virtue of the possessor's consent, and an invitee is a business visitor who is invited or permitted to enter or remain on the land for a purpose directly or indirectly connected with business dealings between them.

Although the invitor owes the invitee a duty to exercise ordinary care to avoid injuring him, the general rule is that a trespasser and licensee or social guest are obliged to take the premises as they find them insofar as any alleged defective condition thereon may exist, and that the possessor of the land owes them only the duty of refraining from wanton or willful injury. The ordinary justification for the general rule severely restricting the occupier's liability to social guests is based on the theory that the guest should not expect special precautions to be made on his account and that if the host does not inspect and maintain his property the guest should not expect this to be done on his account.

An increasing regard for human safety has led to a retreat from this position, and an exception to the general rule limiting liability has been made as to active operations where an obligation to exercise reasonable care for the protection of

the licensee has been imposed on the occupier of land. In an apparent attempt to avoid the general rule limiting liability, courts have broadly defined active operations, sometimes giving the term a strained construction in cases involving dangers known to the occupier.

Thus in *Hansen v. Richey*, 237 Cal.App.2d 475, 481, an action for wrongful death of a drowned youth, the court held that liability could be predicated not upon the maintenance of a dangerous swimming pool but upon negligence “in the active conduct of a party for a large number of youthful guests in the light of knowledge of the dangerous pool.”<sup>6</sup> Rather than characterizing the finding of active negligence in *Hansen v. Richey*, *supra*, 237 Cal.App.2d 475, 481, as a strained construction of that term perhaps the opinion should be characterized as “an ingenious process of finding active negligence in addition to the known dangerous condition, ...” (See, Witkin, Summary of Cal. Law (1967 Supp.) Torts, § 255, pp. 535-536.)<sup>7</sup> In *Howard v. Howard*, 186 Cal.App.2d 622, 625, where plaintiff was injured by slipping on spilled grease, active negligence was found on the ground that the defendant requested the plaintiff to enter the kitchen by a route which he knew would be dangerous and defective and that the defendant failed to warn her of the dangerous condition. In *Newman v. Fox West Coast Theatres*, 86 Cal.App.2d 428, 431-433, the plaintiff suffered injuries when she slipped and fell on a dirty washroom floor, and active negligence was found on the ground that there was no water or foreign substances on the washroom floor when plaintiff entered the theater, that the manager of the theater was aware that a dangerous condition was created after plaintiff’s entry, that the manager had time to clean up the condition after learning of it, and that he did not do so or warn plaintiff of the condition.

Another exception to the general rule limiting liability has been recognized for cases where the occupier is aware of the dangerous condition, the condition amounts to a concealed trap, and the guest is unaware of the trap. In none of these

cases, however, did the court impose liability on the basis of a concealed trap; in some liability was found on another theory, and in others the court concluded that there was no trap. A trap has been defined as a “concealed” danger, a danger with a deceptive appearance of safety. It has also been defined as something akin to a spring gun or steel trap. In the latter case it is pointed out that the lack of definiteness in the application of the term “trap” to any other situation makes its use argumentative and unsatisfactory.

The cases dealing with the active negligence and the trap exceptions are indicative of the subtleties and confusion which have resulted from application of the common law principles governing the liability of the possessor of land. Similar confusion and complexity exist as to the definitions of trespasser, licensee, and invitee.

In refusing to adopt the rules relating to the liability of a possessor of land for the law of admiralty, the United States Supreme Court stated:

“The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this

semantic morass the common law has moved, unevenly and with hesitation, towards “imposing on owners and occupiers a single duty of reasonable care in all the circumstances.”

The courts of this state have also recognized the failings of the common law rules relating to the liability of the owner and occupier of land. In refusing to apply the law of invitees, licensees, and trespassers to determine the liability of an independent contractor hired by the occupier, we pointed out that application of those rules was difficult and often arbitrary. In refusing to apply the common law rules to a known trespasser on an automobile, the common law rules were characterized as “unrealistic, arbitrary, and inelastic,” and it was pointed out that exceedingly fine distinctions had been developed resulting in confusion and that many recent cases have in fact applied the general doctrine of negligence embodied in § 1714 of the Civil Code rather than the rigid common law categories test.

There is another fundamental objection to the approach to the question of the possessor’s liability on the basis of the common law distinctions based upon the status of the injured party as a trespasser, licensee, or invitee. Complexity can be borne and confusion remedied where the underlying principles governing liability are based upon proper considerations. Whatever may have been the historical justifications for the common law distinctions, it is clear that those distinctions are not justified in the light of our modern society and that the complexity and confusion which has arisen is not due to difficulty in applying the original common law rules – they are all too easy to apply in their original formulation – but is due to the attempts to apply just rules in our modern society within the ancient terminology.

A man’s life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another

without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.

It bears repetition that the basic policy of this state set forth by the Legislature in § 1714 of the Civil Code is that everyone is responsible for an injury caused to another by his want of ordinary care or skill in the management of his property. The factors which may in particular cases warrant departure from this fundamental principle do not warrant the wholesale immunities resulting from the common law classifications, and we are satisfied that continued adherence to the common law distinctions can only lead to injustice or, if we are to avoid injustice, further fictions with the resulting complexity and confusion. We decline to follow and perpetuate such rigid classifications. The proper test to be applied to the liability of the possessor of land in accordance with § 1714 of the Civil Code is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative.

Once the ancient concepts as to the liability of the occupier of land are stripped away, the status of the plaintiff relegated to its proper place in determining such liability, and ordinary principles of negligence applied, the result in the instant case presents no substantial difficulties. As we have seen, when we view the matters presented on the motion for summary judgment as we must, we must assume defendant Miss Christian was aware that the faucet handle was defective and

dangerous, that the defect was not obvious, and that plaintiff was about to come in contact with the defective condition, and under the undisputed facts she neither remedied the condition nor warned plaintiff of it. Where the occupier of land is aware of a concealed condition involving in the absence of precautions an unreasonable risk of harm to those coming in contact with it and is aware that a person on the premises is about to come in contact with it, the trier of fact can reasonably conclude that a failure to warn or to repair the condition constitutes negligence. Whether or not a guest has a right to expect that his host will remedy dangerous conditions on his account, he should reasonably be entitled to rely upon a warning of the dangerous condition so that he, like the host, will be in a position to take special precautions when he comes in contact with it.

It may be noted that by carving further exceptions out of the traditional rules relating to the liability to licensees or social guests, other jurisdictions reach the same result, that by continuing to adhere to the strained construction of active negligence or possibly, by applying the trap doctrine the result would be reached on the basis of some California precedents. However, to approach the problem in these manners would only add to the confusion, complexity, and fictions which have resulted from the common law distinctions.

The judgment is reversed.

**Justice LOUIS H. BURKE, dissenting:**

I dissent. In determining the liability of the occupier or owner of land for injuries, the distinctions between trespassers, licensees and invitees have been developed and applied by the courts over a period of many years. They supply a reasonable and workable approach to the problems involved, and one which provides the degree of stability and predictability so highly prized in the law. The unfortunate alternative, it appears to me, is the route taken by the majority in their

opinion in this case; that such issues are to be decided on a case by case basis under the application of the basic law of negligence, bereft of the guiding principles and precedent which the law has heretofore attached by virtue of the relationship of the parties to one another.~

In my view, it is not a proper function of this court to overturn the learning, wisdom and experience of the past in this field. Sweeping modifications of tort liability law fall more suitably within the domain of the Legislature, before which all affected interests can be heard and which can enact statutes providing uniform standards and guidelines for the future.

I would affirm the judgment for defendant.

### **Some Questions to Ponder About *Rowland v. Christian***

**A.** Is the flexibility of the reasonable person standard a strength? Or is it a necessary evil for the great universe of situations for which we cannot hope to create specific rules, such as those traditionally used for conditions on real property?

**B.** Justice Burke's dissent suggests that such changes in the law are better made by the legislature so that "all affected interests can be heard" and so that the law can "uniform standards and guidelines for the future." But note that the "learning, wisdom, and experience of the past" that Justice Burke salutes – what he says is reflected in the traditional rules – are the product of judicial, not legislative, effort. Perhaps the dissent can be characterized as saying, in essence, that the judiciary has done such a great job developing these special rules, only the legislature should be trusted to change them. Is that a fair characterization? Is there any way to resolve the apparent tension in Justice Burke's reasoning?

**Statute: California Civil Code § 847**

*California Civil Code § 847*

Added by Stats. 1985, c. 1541 § 1.

**The CALIFORNIA CODE:**

(a) An owner, including, but not limited to, a public entity, as defined in Section 811.2 of the Government Code, of any estate or any other interest in real property, whether possessory or nonpossessory, shall not be liable to any person for any injury or death that occurs upon that property during the course of or after the commission of any of the felonies set forth in subdivision (b) by the injured or deceased person.

(b) The felonies to which the provisions of this section apply are the following: (1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, or threat of great bodily harm; (5) oral copulation by force, violence, duress, menace, or threat of great bodily harm; (6) lewd acts on a child under the age of 14 years; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any other felony in which the defendant inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a noninmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing great bodily injury; (17) exploding a destructive device or any explosive with intent to murder; (18) burglary; (19) robbery; (20) kidnapping; (21) taking of a hostage by an inmate of a state prison; (22) any felony in which the defendant personally used a dangerous or deadly weapon; (23) selling, furnishing, administering, or providing heroin, cocaine, or phencyclidine (PCP) to a minor; (24) grand theft as defined in Sections 487 and 487a of the



Penal Code; and (25) any attempt to commit a crime listed in this subdivision other than an assault.

(c) The limitation on liability conferred by this section arises at the moment the injured or deceased person commences the felony or attempted felony and extends to the moment the injured or deceased person is no longer upon the property.

(d) The limitation on liability conferred by this section applies only when the injured or deceased person's conduct in furtherance of the commission of a felony specified in subdivision (b) proximately or legally causes the injury or death.

(e) The limitation on liability conferred by this section arises only upon the charge of a felony listed in subdivision (b) and the subsequent conviction of that felony or a lesser included felony or misdemeanor arising from a charge of a felony listed in subdivision (b). During the pendency of any such criminal action, a civil action alleging this liability shall be abated and the statute of limitations on the civil cause of action shall be tolled.

(f) This section does not limit the liability of an owner or an owner's agent which otherwise exists for willful, wanton, or criminal conduct, or for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

(g) The limitation on liability provided by this section shall be in addition to any other available defense.

**A COMMENTARY on the statute by the Supreme Court of California:**

[From *Calvillo-Silva v. Home Grocery*, 19 Cal. 4th 714 (Cal. 1998):]

Section 847 of the Civil Code provides that in certain circumstances an owner of any estate or other interest in real property shall not be liable for injuries that occur upon the

property during or after the injured person's commission of any one of 25 felonies listed in the statute.

The general policy of California with respect to tort liability is set forth in § 1714. For well over 100 years, § 1714 has provided in relevant part: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself."

Three decades ago, *Rowland v. Christian* (1968) 69 Cal. 2d 108 relied upon the basic policy articulated in § 1714 to hold that a possessor of land generally owes a duty of care to all persons who enter the possessor's premises, whether the person is an invitee (business visitor), a licensee (social guest), or a trespasser.

When the Legislature considered enactment of § 847 in 1985, it heard arguments from proponents of the measure that immunity was needed "to address the increasing number of attempts by criminals injured in the course of their crimes to demand compensation from their intended victims" and to provide a means to "facilitate the early dismissal of lawsuits of this type." In evaluating the matter, the Legislature specifically considered two controversial cases in which plaintiffs had sought substantial sums for injuries they incurred while trespassing on the property of others. In one case involving public property, a plaintiff sued a school district for \$3 million after he fell through a skylight during an attempt to illegally remove floodlights from the roof of a school gymnasium. The plaintiff, who was rendered a quadriplegic from the fall, obtained a settlement of \$260,000 plus monthly payments of \$1,200 for life. In another case, a motorcycle thief who trespassed and went joyriding across a farmer's field received nearly \$500,000 in damages from the farmer for injuries he sustained after hitting a pothole in the field. The bill to enact § 847 was viewed as proposing a

partial reversal of *Rowland v. Christian*, which in effect had permitted such lawsuits to be maintained. As noted by various legislative committees, the sentiment providing the impetus for the legislation was reflected in the following statements of the bill's author: "[W]hatever may be said in defense of the alleged right of a trespasser to sue a landowner for the trespasser's injuries sustained while trespassing, there is almost nothing to be said on behalf of the thief, a cattle rustler or other felon who is injured in the course of his felony. Such a wrongdoer should not be allowed by the law to add still more injury to insult."

### **Some Questions to Ponder About California Civil Code § 847**

- A.** What effect would § 847 have on a plaintiff who was injured while on property committing attempted voluntary manslaughter, which is a crime in California. Look at subsection (b) and consider provisions (1), (9) and (25) together. Is a person convicted of attempted voluntary manslaughter disallowed recovery in negligence? What do you think the legislature intended? Why do think they included (1), (9), and (25) as they did? Given (1) and (25), what would be the point of (9)?
- B.** Why do you think the legislature stopped short of completely overturning *Rowland* by reinstating the traditional common law rules that disallow any recovery in negligence for an unknown trespasser?
- C.** How do you think it came to pass that the would-be thief who fell through a skylight received a settlement for more than a quarter million dollars? Notice that this was not a court-entered judgment, but was instead a settlement. What circumstances can you think of that might have led to this result?

## 7. Actual Causation

“If we could fly out of that window hand in hand, hover over this great city, gently remove the roofs, and peep in at the queer things which are going on, the strange coincidences, the plannings, the cross-purposes, the wonderful chains of events, working through generations, and leading to the most *outré* results, it would make all fiction with its conventionalities and foreseen conclusions most stale and unprofitable.”  
– Sherlock Holmes, “A Case of Identity,” by Arthur Conan Doyle, 1892

### A. Introduction

The chapter does double duty. Actual causation is not just an element of negligence, it is an issue in torts generally, including with strict liability, battery, trespass to land, etc. So you will learn the concepts here, in the context of negligence, but keep in mind that they are generally applicable throughout the landscape of tort law. (Your introductory course in criminal law may cover actual causation as well. The essential concept there is the same, although the ramifications can be quite distinct.)

You may find that actual causation is the simplest element to understand. And, in many cases, it is also the easiest to prove at trial. In other cases, however, showing actual causation can be the most perplexing challenge the plaintiff will face.

The requirement of actual causation is simply that there must be a cause-and-effect relationship between the defendant’s conduct and the plaintiff’s injury. The concept of breaching a duty of care is an almost endless jurisprudential puzzle. It requires real wrangling. Actual causation, by contrast, is almost self-explanatory. As we will see in this chapter, however, there are a few complications – some of them quite surprising – that bear some scrutiny. Nonetheless, the

relative simplicity of the concept means that there is considerably less to say about it.

When actual causation presents a live issue in a case, it is usually a factual matter rather than a legal one. That is, the issue is usually something to be resolved with evidence, witnesses, and logical thinking rather than arguments about doctrine and precedent.

The first case in this chapter, *Beswick v. CareStat*, presents a fascinating vehicle for thinking about issues of proving actual causation by a preponderance of the evidence. Next are some complications, considered under the label of “multiplicity issues,” that come about when there are multiple parties that could be said to be responsible, yet who could slip out of liability because of some seemingly paradoxical results that come from strict application of the actual-causation requirement.

### **B. The But-For Test**

Here is 95% of the law of actual causation: If the injury would not have occurred but for the defendant’s breach of the duty of care, then actual causation is satisfied; if not, then not. That is called the “but for” test. You simply ask, “But for the defendant’s breach of the duty of care, would the injury have occurred?”

Now, you can ask same the question without using the words “but for.” (E.g., “Absent the defendant’s accused conduct, would the injury have occurred anyway?”) But the words used by all the courts and all the learned treatises are “but for.” Law, in general, is filled with long phrases, big words, counterintuitive terms, and numerical code provisions – not to mention a heavy helping of Latin. So it may come as something of a surprise that the lynchpin of actual causation comes down to a test named with two words of three letters each that mean exactly what they sound like they mean: “but for.” Moreover, the term is universal. Everyone calls it the “but for” test, even a law-school-dean-turned-justice writing for a unanimous U.S. Supreme Court. *See Fox v. Vice*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 2205, 2215 (2011) (Justice Kagan, discussing the “but-for test” in the context of civil rights claims under 42 U.S.C. § 1988).

### C. Actual Causation vs. Proximate Causation

There are two distinct concepts within the umbrella of “causation” in torts. One is actual causation, the subject of this chapter. The other is proximate causation, the subject of the next. Since actual causation and proximate causation are conceptually distinct, this book treats them as separate elements. But many writers will lump them together as “causation.” Thus, distinguishing the concepts from one another is the first step in understanding either one.

Actual causation is a matter of strict, logical, cause-and-effect relationships. Proximate causation – where proximate means “close” – is a judgment call about how direct or attenuated the cause-and-effect relationship is, and whether it is close enough for liability.

This example will help you see the difference. Suppose you drive a car carelessly and run over your neighbor’s mailbox. Your neighbor, sitting on her front porch, has seen the whole thing. Bursting out of the car, you put your hands on your hips and say, with indignity, “My mother and father caused this to happen.” Your neighbor screws up her eyebrows. “What on earth are you talking about?” she says. You answer, “My mother and father got together and they, you know, caused me to exist. So they caused this to happen to your mailbox. I’m so sorry.”

In such a case it would be absolutely undeniably true that, as a strict matter of the logic of cause-and-effect, you mother and father caused the accident. But, of course, offering this as some kind of explanation for what happened to the mailbox is silly. The tension here is the difference between actual causation and proximate causation. It is true that your mother and father caused the accident in the sense of *actual causation*. But your mother and father did not cause the accident in the sense of *proximate causation*.

In everyday, non-legal English, when we use the word “caused,” we are talking about some combination of actual causation and proximate causation. Most of the time, there is no need to separate out the concepts. But when it comes to legal analysis in torts, we need to specify exactly what we are talking about because, as you will see, the two concepts implicate entirely different sets of concerns.

## **D. How to Talk About Actual Causation**

A key stumbling block in learning actual causation is the vocabulary used to talk about it. Ironically, while the test for actual causation is easy, and while it is represented by a pithy, descriptive label with consistent usage – “but for” – the same cannot be said for the terminology used to talk about actual causation itself, or that of its neighboring prima facie element, proximate causation. Be on guard. The labels are myriad, confusing, and used inconsistently by lawyers and judges alike.

### **Actual Causation’s Other Labels: Causation-in-Fact, Factual Causation, and More**

What we are calling “actual causation” in this book goes by different names.

It is not enough to tell you that we will use the term “actual causation” in this book, and leave it at that. You have to learn the other terms, and how they are potentially confusing, so that you will be able to read and understand cases, briefs, and other legal documents no matter whom they are written by.

“Actual causation” is also called “causation-in-fact,” “factual causation,” and “direct causation.” The term “causation-in-fact” actually appears to be the most commonly used term, with “actual causation,” being the second most common.

We are using “actual causation” in this book, even though it comes in second place in frequency, because it is the most apt and least confusing term of those in common use. The potential problem with calling the requirement “causation-in-fact” or “factual causation” is that it makes it sound like it is not a legal concept, but is instead just something for the jury to decide based only on factual evidence. That perception would be mistaken, however. Actual causation is a judge-rendered legal doctrine, and the law of actual causation is applied, clarified, and evolved by judges and appellate courts. So “factual causation” is actually quite “legal.”

No doubt the commonality of the term “causation-in-fact” owes to the fact that, in practice, that the actual causation element of the

plaintiff's case often presents only fact issues for the jury and leaves no questions that need to be decided by the judge. But that is not because actual causation is not legal, it is only because the legal doctrine on actual causation is crystal clear in nearly all cases. That is to say, in the garden variety negligence case, all open questions with regard to actual causation will turn on how facts are interpreted and how the factfinder perceives the credibility of witnesses. The parties will not typically present the judge with conflicting interpretations of the law of actual causation, but will instead agree to use standard jury instructions on actual causation.

While we are on the subject of the tendency to call actual causation "factual causation," we should note that proximate causation is sometimes called "legal causation." The reasons for this are corollary to the prevalence of "factual causation" and "causation-in-fact" for actual causation. If you put the terms together, calling actual causation "factual causation" and proximate causation "legal causation," it sounds as if they are the factual and legal sides to a unified question of "causation." But that's not accurate. Actual causation and proximate causation are two conceptually separate requirements of the prima facie case for negligence, both of which involve the application of law to facts. Both implicate legal questions and both implicate factual issues. So, to avoid headscratchers like talking about the "law of causation-in-fact" or the "facts needed to show legal causation," we will stick to the terms "actual causation" and "proximate causation."

Now, there is another label for actual causation that is more confusing than any of the others by an order of magnitude. Sometimes, reported opinions will use the label "proximate causation" to refer to actual causation. Courts frequently say that the plaintiff cannot prove that something is the "proximate cause" of something else, when what they are talking about is failure to show actual causation. You will find an example in the *Beswick* case immediately below. Courts probably do this because they are lumping the concepts of actual causation and proximate causation together, but then instead of calling the amalgam "causation," they refer to it as "proximate causation." In such cases, you can mentally translate the



phrase as “causation, which includes a requirement that the causation be proximate.”

These complications over terminology seem like needless headaches. You might think that a better casebook would have gone through all the cases and used bracketed insertions to make all the terms consistent. Yet that would be doing students a serious disservice. In the real world, the terminology is all over the place. So you might as well learn your way around it now.

For good or for bad, these sorts of lexicological tangles are part and parcel of our common law system. Using any of these terms – including “proximate causation” – to discuss actual causation cannot be called “wrong.” These usages lead to confusion, yes, but they are not actually incorrect. Because court opinions are built by using various other court opinions as precedent, the body of common law exists as a web of interconnected nodes unorganized by any centralized authority. Some courts see one element of causation where other courts see two. Among the courts, different names spring up, and differences persist both out of a kind of linguistic drift and because of stubborn disagreement about which terms are best.

### **Check-Your-Understanding Questions About Causation Terminology**

**A.** A court says, “The plaintiff cannot prove causation, in fact, because the plaintiff’s injury is only tenuously and indirectly connected with the defendant’s action.” What concept of causation is the court talking about?

**B.** A court says, “The plaintiff’s case fails for want of proximate causation since the plaintiff’s injuries would have happened regardless of the alleged negligent conduct of the defendant.” What concept of causation is the court talking about?

### **Think “A” Not “The”**

The most important conceptual aspect of the law of causation for you to understand is that an injury can have more than one actual cause. Do not think in terms of whether some action is “the cause”

of an injury, instead ask whether the action is “a cause.” This applies both to actual causation and proximate causation.

There is a tendency – perhaps endemic to human cognition – to want to find *the* factor or *the* person who is to blame. This is reflected in the question, “Who *really* is to blame?” (That phrase, in quotes, gets 299,000 hits on Google.) Clearly many people think this way when considering issues of responsibility. Tort law, however, does not. In reality, there are a nearly limitless number of causes for every event. And every event may have a nearly limitless number of effects. Tort law recognizes this, and thus actual causation doctrine only requires that there be a logical, actual cause-and-effect relationship between the alleged breach of the duty of care and the plaintiff’s injury. If more than one breach of the duty of care was an actual cause of the plaintiff’s injury, then the plaintiff can separately establish the element of actual causation as to each and every such breach, including against an unlimited number of defendants.

*Example: Leadfoot to Liver Lobe* – A leadfoot driver shoots through a suburban intersection at 90 miles per hour. She hits a driver making a left turn who is texting instead of looking ahead. The vectors of the colliding masses of automobile wreckage converge to eject a spray of debris at a gasoline tanker parked nearby. The tank is structurally weak because of improper welds – welds that would have been fixed except that they were missed by a safety inspector. The welds burst and the spilling mass of gasoline erupts into flames near the plaintiff. While not seriously hurt, the plaintiff is nonetheless whisked to the hospital for observation where he is x-rayed. The radiologist misreads the film and counsels an unnecessary surgery. During that surgery, an unwashed scalpel, supplied by the hospital, is handed to an unobservant surgeon by an unobservant nurse. Either the surgeon or the nurse could have seen with a mere glance that the scalpel was covered with blood before it got anywhere near the patient’s skin. Upon incision, the dirty scalpel transmits a flotilla of microbial pathogens to the plaintiff. Those pathogens precipitate a case of sepsis, eventually resulting in the plaintiff

losing the left lobe of his liver. Who actually caused the accident? We apply the but-for test, and we must conclude that the harm befalling the plaintiff would not have occurred but for the negligent conduct of the leadfoot, the texter, the welder, the inspector, the radiologist, the hospital, the nurse, and the surgeon. The actions of each represents a but-for cause. And if the other elements of a negligence case can be proven, then every single one of these parties can be held liable. The plaintiff can sue one, some, or all – it will be entirely the plaintiff’s choice.

So when you are analyzing a tort problem, don’t stop after you’ve found one person against whom a complete prima facie case can be made out. Keep asking if there are additional actors whose actions are but-for causes of the plaintiff’s injury. If there is an actor who had a duty and breached that duty, and if that breach was a but-for cause and a proximate cause of the injury, then that is another party who can be made liable.

### **E. The Need for Causal Linkage – From Breach to Injury**

What must cause what? The alleged breach must cause the alleged injury. Causation – both actual and proximate – must link the breach to the injury for a complete prima facie case. Thus, it is not enough for the plaintiff to plead and prove various facts that, by themselves, could constitute elements of a negligence case. Instead, the plaintiff must prove all the elements of a prima facie case that works together as a coherent whole.

If an automotive analogy is helpful, then breach is the engine and the injury is the wheels. Causation is the transmission that links the engine to the wheels. To make a car go, you don’t just need a full set of car parts, you need them correctly hooked up to one another.

One context that seems to be ripe for confusion along these lines is negligence per se. (Chapter 6 discusses this in a section titled “Negligence Per Se and Causation.”) But the necessity of causal linkage applies generally. If the plaintiff comes to court with an injury and can prove a breach of the duty of due care on the part of the

defendant, it remains to be proved that the particular breach alleged actually and proximately caused the alleged injury. In essence, that's what causation is all about – linking the breach to the injury.

### **F. Proof and Preponderance**

Like all elements of the prima facie case, the element of actual causation must be proved by a preponderance of the evidence. That is, it must be shown that it was more likely than not that the injury would not have occurred but for the defendant's breach of the duty of care. Where actual causation is an issue in a case, it is meeting this burden through the presentation of evidence to the jury that often poses the biggest challenge to the plaintiff.

#### **Case: Beswick v. CareStat**

The following case provides a rich set of facts to consider issues of actual causation. Note that the court in this case uses the phrase "proximate causation" to denote its discussion of actual causation questions. (See "Some Notes on the Terminology of Actual Causation," above.)

#### *Beswick v. CareStat*

United States District Court for the Eastern District of Pennsylvania  
December 6, 2001

185 F.Supp.2d 418. No. 00-1304. Reported as "Beswick v. City of Philadelphia." Ralph Raymond BESWICK, et al. v. CITY OF PHILADELPHIA, et al. Civil Action No. 00-1304.

**Chief Judge JAMES T. GILES:**

#### *I. INTRODUCTION*

Ralph Raymond Beswick, Jr. and Rose Wiegand, Co-Administrators of the Estate of Ralph Richard Beswick, Sr., bring a constitutional claim pursuant to 42 U.S.C. § 1983 against the City of Philadelphia ("City") and its former 911 call-taker, Julie Rodriguez, and, asserting pendent jurisdiction, bring state law negligence claims against Julie Rodriguez, and Father and Son Transport Leasing Inc., d/b/a CareStat Ambulance and Invalid Coach Transportation, Inc.

“CareStat”), a private ambulance service, its record owner, Slawomir Cieloszyk, a purported owner and manager, Gregory Sverdlev, and two CareStat employees, Ruslan Ilehuk and Ivan Tkach (collectively “CareStat defendants”).

Before the court are four Motions for Summary Judgment filed by: the CareStat defendants, for alleged failure to establish proximate cause; and Tkach and Ilehuk, on the grounds that there is no competent evidence supporting the claim of Tkach and Ilehuk’s employee negligence.

For the reasons that follow, the City’s motion is granted, the CareStat defendants’ motions are denied, and the motions of Sverdlev, Tkach, and Ilehuk are denied.

## *II. FACTUAL BACKGROUND*

Plaintiffs’ claims all arise from the death of Ralph Richard Beswick, Sr. on February 11, 2000.

Consistent with the review standards applicable to motions for summary judgment, Fed.R.Civ.P. 56(c), the alleged facts, viewed in the light most favorable to the plaintiffs, follow.

### *The Events of February 11, 2000*

On the evening of February 11, 2000, Ralph Richard Beswick, Sr. collapsed on the dining room floor of the South Kensington home that he and Wiegand had shared for 23 years. From the living room where she had been watching television, Wiegand heard the “thump” of Beswick falling and went to him. There is some discrepancy in the record as to whether Wiegand went to Beswick immediately after he had fallen, or if some minutes had passed before she realized he had fallen. For the purposes of summary judgment, this court must assume that Wiegand went to him straightaway, as she indicated in her police statement taken eleven days after Beswick’s death. Upon entering the kitchen and finding Beswick lying prone on the floor, Wiegand immediately dialed the City’s medical emergency response number, 911, and told the answering call-taker, Julie Rodriguez, that

Beswick had fallen and needed urgent assistance, and requested an ambulance. Rodriguez asked if Beswick was breathing. Wiegand responded that he was. Without obtaining any further information, Rodriguez told Wiegand that “somebody” was “on the way.”

Fire Department regulations require 911 operators to refer all emergency medical calls to the Fire Department, which then dispatches Fire Rescue Units appropriately equipped and staffed to respond to medical emergencies. The mechanical protocol of the job of 911 call-taker requires that the call be transferred immediately to the dispatcher upon termination of the emergency call. The last step of the mechanical protocol of the call-taker job is to punch a sequential button on a console to connect the dispatcher and transmit the acquired information from the caller. The dispatcher forwards the call to the Rescue Unit closest to the response site.

Instead of following established procedure, which would have continued the process to trigger the Rescue Unit’s response, Rodriguez abandoned protocol and used a telephone located next to her console to call a private ambulance company, CareStat, to see if it could respond to the Wiegand call. Rodriguez, without the knowledge of the City, had recently begun working for CareStat as a dispatcher in her off hours, and had a secret deal with CareStat to refer to it all calls received in her City 911 capacity that she believed CareStat could handle. Under the City’s protocol, Rodriguez was required to treat all 911 calls as emergencies requiring the City’s Rescue Unit response. She had no discretion to act otherwise.

Immediately after speaking with Wiegand, Rodriguez telephoned Slawomir Cieloszcyk (also known as “Slavik”), the owner and dispatcher of CareStat. Upon telling Cieloszcyk that Ralph Beswick, Sr. was age 65 and unconscious from a fall, Rodriguez asked how long it would take CareStat to get to the Beswick home. Neither Rodriguez nor Cieloszcyk

knew that the 911 call was, in fact, a situation other than an emergency, such as a heart attack or other serious medical event. Cieloszyk estimated a response time of fifteen minutes. He ended the conversation by saying, “We’re on the way.”

Arguably, corruptly, in violation of Pennsylvania’s statutory requirements applicable to private ambulances, Cieloszyk undertook a response to a medical situation to which CareStat was not authorized to respond. All 911 calls are assumed to be medical emergencies unless and until actual response and evaluation by the City Fire Department might determine otherwise. CareStat had no permission from the City to use 911 call-taker Rodriguez to refer calls to it and knew that the 911 call was being diverted from the City’s established response system. Under these circumstances, Cieloszyk nevertheless gave the Beswick response assignment to employees Ilehuk and Tkach, neither of whom had completed the requisite training to become a licensed EMT or paramedic. Ilehuk and Tkach, having the same knowledge as Cieloszyk, including the deal with Rodriguez to compromise her City 911 job responsibilities, accepted the call and set out for the Beswick residence.

Ten minutes after the first 911 call had been made, because there was yet no emergency vehicle at the Beswick home, Wiegand’s sister placed another 911 call at 8:02 p.m. to make sure that the City’s rescue services had already been dispatched. This call also happened to have been received and handled by Rodriguez. Despite this second urgent call, Rodriguez did not punch it over to the City’s emergency dispatch system. She called CareStat again, seeking assurance that its ambulance dispatched would arrive soon. Cieloszyk assured Rodriguez that the CareStat ambulance was on the way as he had promised her.

Because an emergency equipped unit still had not arrived, Wiegand called 911 a third time. The third call came to a call-taker other than Rodriguez. He followed all Fire Department

procedures and within a very short time period a City Fire Department Rescue Unit arrived at the Beswick home. Rodriguez became aware of the third Wiegand call. She promptly called Cieloszyk at CareStat and told him that a City paramedic unit was responding to the Beswick home, and requested that he hide her involvement in the misdirecting of the 911 calls. By the time that the CareStat ambulance arrived, the Fire Rescue Unit had already removed Beswick from the home. It was then that the Beswick family realized that the 911 call-taker had caused a private ambulance to attempt to respond to their emergency call, and that it was ill-equipped to have dealt with the Beswick medical emergency had it arrived earlier.

*The Delay in Response to Beswick because of Defendants' Actions*

The first emergency telephone call concerning Beswick was received by Rodriguez at the Fire Command Center ("FCC") at 19:53:41. The second call, placed by Wiegand's sister, was received by Rodriguez at 20:02:54. The third Wiegand call was received at the FCC by dispatcher Jose Zayes at 20:04:57, and the City Fire Department response was immediately dispatched.

Fire Battalion Chief William C. Schweizer confirmed that at the time Rodriguez received the first call at 19:53:41, Medic Unit No. 2 would have been available to respond from its base at Kensington and Castor, which was within several minutes of the Beswick home. Medic Unit No. 2, like other City Medic Units, was staffed with paramedics, who have more training than EMTs. However, at 20:04:57, when Zayes received the third call, Medic Unit No. 2 was no longer available. Nor was the next closest Medic Unit, No. 8, based at Boudinot and Hart Streets. In response to the 20:04:47 call, Medic Unit 31, the third closest of the City's Medic Units, was dispatched from Second Street, and Fire Department Engine No. 7 was dispatched from Kensington and Castor. However, Engine No. 7 is staffed only with EMTs, and EMTs are not permitted to administer epinephrine or



atropine to patients. Medic unit 31 took 8 minutes and 34 seconds to arrive at 959 East Schiller Street. Engine No. 7 took 3 minutes and 34 seconds to arrive. Engine No. 7 and Medic Unit No. 2 – which was available for the first call but was never contacted by Rodriguez – were both based at Kensington and Castor, and would have had to travel the same distance to get to the Beswick residence. Based upon this information, the total delay in getting a Medic Unit to respond to Beswick has been estimated by Battalion Chief Schweizer to be 16 minutes and 16 seconds. “It is undisputed that Beswick died of a heart attack upon his arrival at the hospital. He was cremated two days later without an autopsy, so the exact magnitude of his heart attack can never be known.”

Plaintiffs have introduced evidence that this 16 minute, 16 second delay caused or contributed to the cause of Beswick’s death, through the deposition testimony of Kale Etchberger and Joanne Przeworski, the two Fire Department paramedics who arrived on the scene as part of Medic Unit 31. Both testified that when they arrived, Engine No. 7’s EMTs were already tending to Beswick. However, those EMTs, unlike paramedics, cannot administer medications. As indicated in these paramedics’ depositions, Engine No. 7’s Lifepack 500 defibrillator machine received a “shock advised” message at 20:07:48, which suggests that at the time, Beswick was either in a state of v-fib or v-tack; in other words, his heartbeat was not totally flat. Additionally, upon the administration of medications by Etchberger and Przeworski, Beswick’s heart rate was temporarily restored. Both paramedics testified that they believed he had a chance to be saved when they first came to the scene. Plaintiffs’ expert, Dr. Norman Makous, a cardiologist, would opine to a reasonable degree of medical certainty that based on established medical literature regarding observed cardiac arrests due to ventricular fibrillation, and assuming that Beswick was still breathing at the time of the first 911 call, that had Medic Unit No. 2

arrived after the first call, Beswick’s chance of survival would have equaled, if not exceeded, thirty-four (34) percent.

### III. DISCUSSION

Summary judgment under Federal Rule of Civil Procedure 56(c) is appropriate only if, drawing all inferences in favor of the non-moving party, “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.”

*[Sections A and B omitted. – ed.]*

#### C. *Loss of a Chance Theory of Proximate Cause*

CareStat defendants argue that on its face, a statistical survival rate of 34 percent, which plaintiffs’ medical expert concludes is the chance for survival Beswick would have had if a City ambulance had been appropriately dispatched, is insufficient as a matter of law to establish proximate cause. In the alternative, CareStat defendants argue that additional factors unique to Beswick, such as preexisting heart and stroke conditions, as well as chronic obstructive pulmonary disease, necessarily served to reduce his chances of survival well below 34 percent; further, they contend that Wiegand’s deposition testimony indicates that she waited “five or ten minutes” before responding to Beswick’s collapse, therefore Dr. Makous’ conclusions, which are based on observed cardiac arrests, are inadmissible. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (holding that when expert testimony’s factual basis, data, principles, methods or their application are called sufficiently into question, the trial court must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline).

1. *For Purposes of Summary Judgment, Beswick’s Chance of Survival, Absent Defendants’ Negligence, was 34 Percent.*

Addressing defendants' alternative argument first, for summary judgment purposes, this court must accept plaintiffs' allegation that Wiegand heard Beswick collapse and responded immediately, as she stated in the police report taken eleven days after Beswick's death. Further, Dr. Makous' conclusions are predicated upon an article from the *New England Journal of Medicine*, which states that "the rate of survival to hospital discharge for patients with a witnessed collapse who are found to be in ventricular fibrillation is 34 percent." Mickey S. Eisenberg, M.D., Ph.D., & Terry J. Mengert, M.D., "Cardiac Resuscitation," *N. Eng. J. Med.*, vol. 344, no. 17, at 1304 (April 26, 2001). The article further states that "[w]hen cardiopulmonary resuscitation is started within four minutes after collapse, the likelihood of survival to hospital discharge doubles." *Id.* at 1305. Viewing all facts of record in the light most favorable to plaintiffs, this court must assume that Wiegand called 911 immediately after Beswick's collapse, and that at that time, Medic Unit No. 2, with licensed paramedics, was available for dispatch and 3 minutes and 34 seconds from the Beswick residence. "The article does not specify whether the start of CPR within four minutes after cardiac arrest doubles the 34 percent chance of survival, or if it refers to some other statistic." Thus, a jury could conclude that Beswick's chances for survival were at least 34 percent, if not more, had the 911 call not been diverted to CareStat. Moreover, the 34 percent survival rate noted in the article and in Dr. Makous' conclusions does not assume only patients who are experiencing their first cardiac arrest, or patients without other pre-existing conditions. Thus, for the purposes of summary judgment, the court must assume that the factors surrounding the cardiac arrest of an individual with Beswick's medical history were taken into account by both the article and Dr. Makous.

The court finds Dr. Makous, a licensed physician who has spent more than fifty years practicing cardiology, is basing his opinions upon established modern medicine, stated, inter

loci, in the New England Journal of Medicine, and thus is scientifically reliable. The 34 percent probability that Dr. Makous cites should not be confused with the degree of his medical certainty as to the accuracy of that opinion.

## 2. *Loss of a Chance*

Pennsylvania tort law follows the Restatement Second of Torts, § 323, which provides:

§ 323. Negligent Performance of Undertaking to Render Services. One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) *his failure to exercise such care increases the risk of such harm*, or (b) the harm is suffered because of the other's reliance upon the undertaking.

(emphasis added). See *Hamil v. Bashline*, 481 Pa. 256 (1978). In *Hamil*, plaintiff's husband, who was suffering from severe chest pains, was brought to the defendant hospital. Due to a faulty electrical outlet, the EKG machine failed to function. A second EKG machine could not be found and, upon receiving no further aid or treatment, *Hamil* transported her husband to a private doctor's office, where he died of cardiac arrest while an EKG was being taken. Plaintiff's expert witness estimated that the decedent would have had a 75 percent chance of surviving the attack had he been appropriately treated upon his arrival at the hospital. Following the introduction of all evidence, the trial court determined that plaintiff's medical expert had failed to establish, with the required degree of medical certainty, that the alleged negligence of the defendant was the proximate cause of plaintiff's harm, and directed a verdict for the defendant. The Supreme Court reversed, finding that cases

such as this “by their very nature elude the degree of certainty one would prefer and upon which the law normally insists before a person may be held liable.” The court interpreted the effect of § 323(a) of the Restatement as to address these situations, and relaxed the degree of evidentiary proof normally required for plaintiff to make a case for the jury as to whether a defendant may be held liable for the plaintiff’s injuries. Accordingly, the court adopted the following standard:

Once a plaintiff has introduced evidence that a defendant’s negligent act or omission increased the risk of harm to a person in plaintiff’s position, and that the harm was in fact sustained, it becomes a question for the jury as to whether or not that increased risk was a substantial factor in producing the harm. Such a conclusion follows from an analysis of the function of § 323(a).

In determining the burden of proof required ultimately to warrant a jury verdict for the plaintiff, the *Hamil* court again relied on the Restatement Second of Torts, which reflected the state of the law at the time of its adoption in 1965; namely that the quantum of proof, or “substantial factor,” necessary is a preponderance of the evidence.

↳ Comment (a) of § 433B states:

a. Subsection (1) states the general rule as to the burden of proof on the issue of causation. As on other issues in civil cases, the plaintiff is required to produce evidence that the conduct of the defendant has been a substantial factor in bringing about the harm he has suffered, and to sustain his burden of proof by a preponderance of the evidence. This means that he must make it appear that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the harm. A mere possibility of such

causation is not enough; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.”

Accordingly, this court will permit Dr. Makous’ testimony regarding the increased risk of harm to Beswick of 34 percent, and will allow the jury to determine, by a preponderance of the evidence, whether this increased risk brought about Beswick’s death.

#### *D. Negligence of Ilehuk and Tkach*

The CareStat defendants seek dismissal of Tkach and Ilehuk on the grounds that any negligence on their part could not have been a proximate cause of the death of Beswick because they arrived after the Fire Department, and thus never participated in the care of Beswick. Plaintiffs argue that it is not the lack of qualifications of these defendants that caused the delay in Beswick’s treatment. Rather, they claim that these defendants should have turned down the assignment because of their lack of qualifications, which contributed to the delay in medical attention. Plaintiffs assert, and defendants do not dispute, that Ilehuk and Tkach had not yet completed their training as paramedics. Thus, plaintiffs contend, those defendants’ acceptance of the 911 call was improper as a matter of Pennsylvania statutory law. Because of the breach of their duty to refuse a call for a residential transport, defendants caused a delay which allegedly was the proximate cause of Beswick losing all chance of survival.

#### *IV. CONCLUSION*

For the foregoing reasons, the CareStat defendants’ Motions are denied, and Tkach, and Ilehuk’s Motion is denied.

An appropriate order follows.

### **Some Historical Notes on *Beswick***

**A.** Perception of corruption and incompetence with the 911 system goes back well before *Beswick*. Rap group Public Enemy included “911 Is a Joke” on their seminal *Fear of a Black Planet* album in 1990. Flava Flav rapped:

“Now I dialed 911 a long time ago  
Don’t you see how late they’re reactin’  
They only come and they come when they wanna  
So get the morgue, embalm the goner~  
You better wake up and smell the real flavor  
Cause 911 is a fake life saver”

**B.** Even though Julia Rodriguez knew that Ralph R. Beswick, Sr. died on February 11, 2000, according to newspaper accounts she again diverted calls to CareStat two days later on February 13. The Beswick call was one of eight allegedly diverted to CareStat on February 11 and 13, 2000. The others included a 34-week pregnant woman who was “leaking water,” a man asking for an ambulance to transport his 78-year-old grandfather to the hospital, a person who was having blood-pressure problems following a dental procedure, a woman asking for transport to the hospital for her 77-year-old father after his feeding tube popped out, and two different women requesting assistance for their mothers who had fallen.

On March 21, 2000, between four and six in the morning, police arrested Julia Rodriguez, Slawomir Cieloszczyk, Ruslan Ilchuk, and Ivan Tkach. Rodriguez pled guilty to a series of charges. Cieloszczyk, Ilchuk and Tkach were convicted of various counts of conspiracy, theft of services, and recklessly endangering another person. In April 2001, the four were sentenced. Rodriguez received a one to two year prison sentence plus four years of probation and 100 hours of community service. Cieloszczyk received six to 23 months in prison plus three years of probation. Ilchuk and Tkach, each received six to 23 months of house arrest plus two years of probation and 200 hours of community service.

The CareStat ambulance company went out of business and the Philadelphia Fire Department severed its relationship with the private paramedic school where Rodriguez first met Ilchuk and Tkach.

### **Note on Loss of a Chance and Some Questions to Ponder**

There are difficult philosophical questions brewing in *Beswick*.

The plaintiff's expert says that had Ralph Beswick gotten to the hospital without the CareStat-instigated delay, then he would have had a 34 percent chance of surviving. In other words, the odds are that Beswick would have died even if he had received the emergency services blocked by the defendants. So, bearing that in mind, did the defendants' actions kill Beswick? Or is it even possible to say?

Here we have what is called a "loss of a chance" situation, a recurrent problem in a great variety of torts lawsuits, especially those involving expert testimony that offers statistical probabilities.

There are two ways of conceiving of the loss-of-a-chance problem – as a question of causation, or as a question of whether or not there is an injury sufficient for a prima facie case. The distinction between these two modes of thought begins with understanding what, exactly, is the injury being sued upon.

If the injury is *the loss of a chance to survive*, then we encounter the difficult question of whether losing a "a chance" counts as a personal injury.

If, however, the injury being sued upon is *death*, then we have the difficult causation question of whether one can say that causing a decreased probability of survival is the same as causing death.

The loss-of-a-chance question is dealt with in a deeper way in the case of *Herskovits v. Group Health*, which appears later on in Chapter 9 as part of a discussion of the injury requirement of the prima facie case for negligence. *Herskovits* presents both ways of conceiving of the problem – as a question of causation, and as a question of the existence of an injury.



For now, however, in the case of *Beswick*, the injury being sued on is Beswick's death. That means we are confronted with the causation question. So, some questions to ponder:

**A.** The preponderance standard requires that the plaintiff prove that it is more likely than not (>50%) that the injury – death in this case – was actually caused by the defendant's negligent action. Can we say that we are more than 50% sure that Beswick's death was caused by the defendants' negligence when Beswick had a greater than 50% chance of dying anyway?

**B.** Consider the following from the court's opinion:

“[T]his court will permit Dr. Makous' testimony regarding the increased risk of harm to Beswick of 34 percent, and will allow the jury to determine, by a preponderance of the evidence, whether this increased risk brought about Beswick's death.”

Does this question make sense? How can an “increased risk” of death bring about someone's death? That is, how can someone be killed by an increased risk of being killed by something, as opposed to being killed by the something itself? And if this question is so conceptually vexed, then what is the point of putting it to a jury?

#### **Note on “Substantial Factor”**

In seeking a way to resolve the thorny loss-of-a-chance causation questions presented in this case, the *Beswick* court follows the lead of Pennsylvania state courts in looking to the “substantial factor” requirement of the Restatement Second of Torts. The court quotes from Comment (a) of § 433B, “[T]he plaintiff is required to produce evidence that the conduct of the defendant has been a substantial factor in bringing about the harm he has suffered.”

It is not clear, however, that engaging in a “substantial factor” inquiry does much to help. In fact, it is hard even to know what the “substantial factor test” is supposed to be. A team of torts scholars has noted that the substantial factor test is surrounded by ambiguity and uncertainty. They write, “[T]he test gives no clear guidance to the factfinder about how one should approach the causal problem. It also

permits courts to engage in fuzzy-headed thinking about what sort of causal requirement should be imposed on plaintiffs, especially in cases that present complications in the availability of causal evidence.” Joseph Sanders, William C. Powers, Jr., Michael D. Green, *The Insubstantiality of the “Substantial Factor” Test for Causation*, 73 MO. L. REV. 399, 430 (2008).

### **G. Multiplicity Issues**

In any given case, trying to untangle the facts to determine but-for causation can be difficult. Conceptually, however, the but-for test itself is simple. And, as we discussed earlier, the but-for test is most of actual causation doctrine. When we do have to venture beyond the but-for test, actual causation doctrine gets considerably more complex.

The situations in which actual causation doctrine moves beyond the but-for test all have to do with concurrent negligent conduct by multiple actors – what we are calling in this book “multiplicity” issues. As you will see, once multiple negligent actors enter the mix, it is possible to create scenarios where the strict application of the but-for test will allow some or all of them to escape liability, even in situations where that seems at odds with our intuitions of fairness.

The multiplicity exceptions to the but-for test all apply when the but-for test *is not* satisfied – that is, when a defendant’s negligent action cannot be shown by a preponderance of the evidence to be a but-for cause of the plaintiff’s injury. In other words, the exceptions to the but-for test are for holding defendants liable even when the conduct of those defendants was not a but-for cause of the plaintiff’s injury. Stated still another way, the multiplicity exceptions to the but-for test help plaintiffs, not defendants. (To be entirely candid, this is not universally true. Some highly complex cases involving things like environmental damage have employed but-for exceptions against plaintiffs, but those cases are rare, involve exotic facts, tend to be idiosyncratic, and are arguably erroneously decided. We won’t be covering them here.)

Also, keep in mind that just because there are multiple actors in a case, it does not follow that we need to look at exceptions to the but-

for doctrine. In the vast majority of situations in the real world that involve multiple negligent defendants, the but-for test will indicate that each one of them is an actual cause of the plaintiff's injury.

### **Multiple Necessary Causes**

In situations where there are multiple necessary causes – more than one action that had to occur in order for the plaintiff to be injured – then there is no need to look for an exception to but-for causation, because all such action satisfy the but-for test.

Let's go back to the basic rule: If a plaintiff would not have suffered the complained-of injury but for the negligent conduct of the defendant, then actual causation is satisfied. Stated in this positive form, the but-for rule has no exceptions. That is, it is true with no caveats that if a defendant is a but-for cause of the plaintiff's injury, then actual causation is satisfied.

Everything else in actual causation law is directed at expanding the range of defendants who will be deemed an actual cause of the plaintiff's injuries. That is, in rare circumstances, the law sometimes will allow the actual causation requirement to be satisfied against a defendant who cannot, because of strict logic or a lack of proof, be found to be a but-for cause of the plaintiff's injury. Those situations are exemplified in the cases found further below in this chapter: *Kingston v. Chicago & Northwestern Railway*, *Summers v. Tice*, and *Sindell v. Abbott Labs*.

But first, let's cement our understanding of how the but-for test works with multiple parties. Any and all defendants whose conduct is a but-for cause of the sued-upon injury has the actual-causation element satisfied against them. No such defendant can point to any other defendant and say, "That defendant is *really* to blame, so I should not be held liable." (You might want to re-review the *Leadfoot to Liver Lobe* example above.)

When we study damages later on, we will find out that it may be possible for one of multiple defendants to escape responsibility for a portion of the damages. Whether this is possible depends on the jurisdiction and the circumstances. Sometimes, one of many

responsible defendants can, at plaintiff's election, be made to pay all the damages (joint and several liability), other times less culpable defendants can shrug off a part of the financial hit (such as through apportionment, indemnity, or contribution). But none of this changes the analysis with regard to the actual-causation element: But-for causation satisfies the element actual causation.

The situation where there is more than one but-for cause is sometimes called **multiple necessary causes**. We can state a rule for this situation as follows: **Where multiple causes are necessary to produce the harm, then each such cause is an actual cause.** Now, you can regard this as a rule. It's reliably accurate. But, in reality, calling it a "rule" is unnecessary. The only good that comes of stating this as a rule is to dispel an instinctual misapprehension that, in the ordinary case, there is only one true cause of a plaintiff's harm. All you need to do is apply the but-for test: If the defendant is a but-for cause, then the actual-causation element is met. Other defendants are simply irrelevant to the actual causation question.

**Case: Jarvis v. J.I. Case Co.**

The following case illustrates how any defendant who is a but-for cause is helpless to escape the actual causation element. Note that the court – continuing our cavalcade of motley terminology – uses the terms "legal cause" and "cause in fact" to refer to actual causation.

*Jarvis v. J.I. Case Co.*

Court of Appeal of Louisiana, First Circuit

October 11, 1989

551 So.2d 61. Harry Jarvis & Dorothy Jarvis v. J.I. Case Co., Teledyne Wisconsin Motor, Louisiana Municipal Risk Management Agency, Certainteed Corp., Koppers, Inc., and William D. Cook d/b/a Billy's Equipment Repair, a/k/a B&L Group, Inc. Nos. 88 CA 0700, 88 CA 1579 and 88 CA 1288. Before WATKINS, CRAIN and ALFORD, JJ.

**Judge J. LOUIS WATKINS, JR.:**

From a series of summary judgments dismissing all defendants, plaintiffs Harry and Dorothy Jarvis have appealed.

In their petition plaintiffs claimed damages for severe personal injury, alleging negligence and strict products liability on the part of the following defendants: Certainteed Corporation, Koppers Company, Inc., J.I. Case Corporation (Case), Teledyne Wisconsin Motor, and B&L Group, Inc.

Mr. Jarvis was an experienced foreman of a repair crew for the City of Baker. On December 10, 1984, his crew was sent out to repair a natural gas leak. Mr. Jarvis was operating a backhoe powered by a gasoline powered internal combustion engine. Before the gas to the leaking line was cut off by the supervisor and a co-worker, Mr. Jarvis positioned the backhoe over the area of the gas leak. Plaintiffs allege that the backhoe backfired, causing the gas to ignite and explode. Mr. Jarvis was rescued from the fire, but he received severe burns to much of his body.

Several weeks prior to the accident city employees performed some maintenance work on the particular gas vein, which was constructed of PVC pipe designed, manufactured, and sold by defendant Certainteed. The workers used a solvent, Bitumastic No. 50, which was designed, manufactured, and distributed by defendant Koppers. The solvent was used at a coupling to facilitate that procedure, but in the process some of the solvent came into contact with the PVC pipe. The solvent allegedly caused the pipe to soften and eventually rupture.

Plaintiffs' cause of action against the remaining defendants focuses on the backhoe. At some undisclosed time prior to the accident, the backhoe, designed and manufactured by defendant Case, was taken to defendant B&L for an engine replacement. Defendant Teledyne designed and manufactured the engine which the repairman installed.

Thus, plaintiffs claim the use of four instrumentalities – the pipe, the solvent, the backhoe, and the engine – combined to cause the explosion and the resulting personal injury. The defenses available to the four manufacturers are identical. [A]ll defendants claim that they cannot be liable because Mr. Jarvis was the sole cause of his own injury when he knowingly placed the backhoe in contact with the leaking gas. The fallacy of defendants’ argument is their failure to acknowledge the concept that there can be several causes in fact which combine, result in injury, and become legal cause.

Plaintiffs contend that the trial court erred in granting the motions because the defendants are not entitled to judgment as a matter of law. We agree. In oral reasons for judgment the trial judge appeared to focus on the nature of an internal combustion engine: that the substitution of a natural gas mixture in lieu of an oxygen mixture into the carburetor will result in a “very spectacular combustion.” However, the laws of physics do not resolve the question of legal cause. Although the trial judge stated he was basing his decision to grant the summary judgments on a duty-risk analysis of the facts, our own analysis leads to a different result.

[I]n this case there is an obvious ease of association between injury by explosion and the duty of manufacturers and repairmen to provide pipe, solvent, a backhoe and an engine that are not unreasonably dangerous, whether the danger arises from poor design, failure to warn, or from traditional negligence.

Furthermore, causation is clearly a question for the trier of fact. Any causal connection between the harm and a defendant mover's act, however slight when compared with other causes in fact, presents a jury question.

Accordingly, we reverse the judgments of the trial court and remand the case for further proceedings. Costs of appeal are to be borne by the five appellees-defendants.

REVERSED AND REMANDED.

### Multiple Sufficient Causes

Here we come to the first kind of case in which actual causation can be established against a defendant despite the fact that the plaintiff would have suffered the injury even if the defendant had not acted negligently – that is, even where the defendant is not a but-for cause. The occasion is where there are **multiple sufficient causes**, that is where there was more than one negligent act – i.e., breach of the duty of care – that would have caused the harm.

The doctrine is best explained with an example that drove the doctrine's development: twin fires. In fact, multiple-sufficient-cause doctrine might well be called the "twin-fires doctrine," since it is so closely associated with this particular circumstance: Defendant A negligently sets a fire that spreads through the countryside. Not far away, Defendant B negligently sets a fire that spreads through the countryside. Soon, the A fire and the B fire merge. The merged fire proceeds along a path that leads to the plaintiff's property, burning it down. Neither defendant represents a but-for cause of plaintiff's injuries. Why not? Ask the but-for question. Would the plaintiff have been uninjured but for the actions of A? No – the plaintiff would have been injured anyway, since the fire set by B was sufficient to cause a conflagration to move across the countryside to plaintiff's property. That is, if A had been careful and not set any fire, the plaintiff's house still would have burned down. So A is not a but-for cause of the plaintiff's injuries. The exact same can be said of B. If B had been non-negligent and never set the fire, the plaintiff's property still would have burned, since A's ignition of the countryside was sufficient to burn the path to the plaintiff.

If but-for causation were the only way to establish the element of actual causation against a defendant, then in a twin-fires case, the plaintiff would lose. Courts found this result unpalatable: The only reason the plaintiff winds up empty handed is that there was *more* carelessness. So the courts fashioned doctrine that allows actual causation to be satisfied even where the but-for test is not. We can state a rule for these situations like this: **Where each of multiple discrete events, not committed by the same actor, would have**

**been sufficient each in itself to cause the harm, then each act is deemed an actual cause, despite not being a but-for cause.**

Our twin-fire example had two negligent actors, each contributing a sufficient cause. But in its purest form, the doctrine does not require multiple negligent actors. One cause could have been set in motion nonnegligently – for instance, by someone who caused the fire despite exercising all due care, or even by natural causes. Not all courts would go so far – as the *Kingston* case indicates, below. Nonetheless, the application of the doctrine focuses on whomever the plaintiff has sued. If that defendant’s actions were sufficient to cause the plaintiff’s injury, then actual causation can be deemed satisfied despite the fact that the defendant’s actions are not a but-for cause.

**Case: Kingston v. Chicago & Northwestern Railway**

The following is a classic twin-fires case that illustrates the doctrine.

*Kingston v. Chicago & Northwestern Railway*

Supreme Court of Wisconsin

January 11, 1927

191 Wis. 610, KINGSTON, Respondent, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

**The FACTS in the OFFICIAL REPORTER:**

Action to recover damages caused by a fire. One main line of defendant’s railroad extends in a general north-and-south direction from Gillett, Wisconsin, to Saunders, Michigan, through Bonita. A branch line extends westerly from Bonita to Oconto Company’s logging road. The branch runs generally in an east-and-west direction and is about ten miles in length. LaFortune’s spur is on the branch about two miles west of Bonita. The spur consists of a sidetrack on the south side of and parallel with the branch track. Plaintiff’s property was located on a landing, known as Kingston’s landing, and as the cedar yard, adjacent to and south of the spur track.



On April 29, 1925, a forest fire was burning about one half to one mile northwesterly, nearly west, of this landing. On the same date another fire was burning about four miles northeast of the landing. On April 30th these two fires united in a region about 940 feet north of the railroad track. The line of fire thus formed after the union was about forty or fifty rods east and west. It then traveled south and burned plaintiff's property, consisting of logs, timber, and poles on this landing or in the cedar yard. The plaintiff claims that both fires which united were set by the railroad company, one by a locomotive on its main line running north of Bonita, the other by a locomotive on the branch about three miles west of Bonita and about a mile in a westerly direction from the spur.

The jury found that both fires were set by locomotives belonging to the defendant company and that both fires constituted a proximate cause of the damage.

Judgment was rendered for the plaintiff for the amount of the damages as found by the jury, and the defendant brings this appeal.

**Justice WALTER C. OWEN:**

The jury found that both fires were set by sparks emitted from locomotives on and over defendant's right of way. Appellant contends that there is no evidence to support the finding that either fire was so set. We have carefully examined the record and have come to the conclusion that the evidence does support the finding that the northeast fire was set by sparks emitted from a locomotive then being run on and over the right of way of defendant's main line. We conclude, however, that the evidence does not support the finding that the northwest fire was set by sparks emitted from defendant's locomotives or that the defendant had any connection with its origin. A review of the evidence to justify these conclusions would seem to serve no good purpose, and we

content ourselves by a simple statement of the conclusions thus reached.

We therefore have this situation: The northeast fire was set by sparks emitted from defendant's locomotive. This fire, according to the finding of the jury, constituted a proximate cause of the destruction of plaintiff's property. This finding we find to be well supported by the evidence. We have the northwest fire, of unknown origin. This fire, according to the finding of the jury, also constituted a proximate cause of the destruction of the plaintiff's property. This finding we also find to be well supported by the evidence. We have a union of these two fires 940 feet north of plaintiff's property, from which point the united fire bore down upon and destroyed the property. We therefore have two separate, independent, and distinct agencies, each of which constituted the proximate cause of plaintiff's damage, and either of which, in the absence of the other, would have accomplished such result.

It is settled in the law of negligence that any one of two or more joint tortfeasors, or one of two or more wrongdoers whose concurring acts of negligence result in injury, are each individually responsible for the entire damage resulting from their joint or concurrent acts of negligence. This rule also obtains "where two causes, each attributable to the negligence of a responsible person, concur in producing an injury to another, either of which causes would produce it regardless of the other, ... because, whether the concurrence be intentional, actual, or constructive, each wrongdoer, in effect, adopts the conduct of his co-actor, and for the further reason that it is impossible to apportion the damage or to say that either perpetrated any distinct injury that can be separated from the whole. The whole loss must necessarily be considered and treated as an entirety."

From our present consideration of the subject we are not disposed to criticise the doctrine which exempts from liability a wrongdoer who sets a fire which unites with a fire

originating from natural causes, such as lightning, not attributable to any human agency, resulting in damage. It is also conceivable that a fire so set might unite with a fire of so much greater proportions, such as a raging forest fire, as to be enveloped or swallowed up by the greater holocaust, and its identity destroyed, so that the greater fire could be said to be an intervening or superseding cause. But we have no such situation here. These fires were of comparatively equal rank. If there was any difference in their magnitude or threatening aspect, the record indicates that the northeast fire was the larger fire and was really regarded as the menacing agency. At any rate there is no intimation or suggestion that the northeast fire was enveloped and swallowed up by the northwest fire. We will err on the side of the defendant if we regard the two fires as of equal rank.~

Now the question is whether the railroad company, which is found to have been responsible for the origin of the northeast fire, escapes liability because the origin of the northwest fire is not identified, although there is no reason to believe that it had any other than human origin. An affirmative answer to that question would certainly make a wrongdoer a favorite of the law at the expense of an innocent sufferer. The injustice of such a doctrine sufficiently impeaches the logic upon which it is founded. Where one who has suffered damage by fire proves the origin of a fire and the course of that fire up to the point of the destruction of his property, one has certainly established liability on the part of the originator of the fire. Granting that the union of that fire with another of natural origin, or with another of much greater proportions, is available as a defense, the burden is on the defendant to show that by reason of such union with a fire of such character the fire set by him was not the proximate cause of the damage. No principle of justice requires that the plaintiff be placed under the burden of specifically identifying the origin of both fires in order to

recover the damages for which either or both fires are responsible.~

*By the Court.* – Judgment affirmed.

### **Twin-Fires Cases and the “Substantial Factor Test” in the Multiplicity Context**

The “substantial factor” inquiry – which we discussed in relation to the *Beswick* case – often comes up when courts confront situations – like that in *Kingston v. Chicago & Northwestern Railway* – where there are multiple sufficient causes for a single injury. The idea is that if there are multiple sufficient causes, then to count as an actual cause, the conduct need not be a but-for cause, but must at least be a “substantial factor” in causing the plaintiff’s injury.

Although courts frequently refer to this as a “test,” it does not tend to function like one. Professor David A. Fischer has written, “The test offers no real guidance for determining when a factor is substantial or even a ‘factor.’ Courts and juries must rely on intuition to decide the issue.” See Fischer, *Insufficient Causes*, 94 KY. L.J. 277, 280-81 (2005).

At any rate, courts have now gone on to use the “substantial factor” inquiry far beyond situations involving multiple sufficient causes. Fisher notes, “Over the years, courts used the substantial factor test to do an increasing variety of things it was never intended to do and for which it is not appropriate. As a result, the test now creates unnecessary confusion in the law and has outlived its usefulness.” *Id.* at 277 (footnote omitted).

About the best that can be said about the “substantial factor” requirement is that it seems to function as a placeholder for a given court’s intuitive sense of fairness – one that, while defying crisp logical specification, provides a path to a more comfortable result.

### **The *Summers v. Tice* Doctrine**

Another situation in which the courts will permit actual causation to be satisfied despite the failure of the but-for test is the situation in *Summers v. Tice*: Multiple actors do something negligent, and while only one of them logically could be responsible for the plaintiff’s

injury, because of the circumstances, it is impossible to tell which one is. In such a case, the *Summers v. Tice* doctrine allows the plaintiff a presumption that each of the multiple actors is an actual cause; thus the burden of proof is shifted, leaving it to the defendants to disprove causation – if they can – on an individual basis.

This doctrine has been called “double fault and alternative liability” by treatise writers Prosser & Keeton, and “alternative causes and the shifted burden of proof” by the Dan B. Dobbs treatise. But in this casebook, we will simply call it “*Summers v. Tice* doctrine,” which is probably the most common shorthand, referring as it does to the bizarre case that gave the doctrine its birth.

### **Case: *Summers v. Tice***

The seminal case on *Summers v. Tice* doctrine is also its most vivid exemplar.

#### *Summers v. Tice*

Supreme Court of California

November 17, 1948

33 Cal. 2d 80. CHARLES A. SUMMERS, Respondent, v. HAROLD W. TICE et al., Appellants. L. A. Nos. 20650, 20651. In Bank. Carter, J. Gibson, C. J., Shenk, J., Edmonds, J., Traynor, J., Schauer, J., and Spence, J., concurred.

#### **Justice JESSE W. CARTER:**

Each of the two defendants appeals from a judgment against them in an action for personal injuries. Pursuant to stipulation the appeals have been consolidated.

Plaintiff's action was against both defendants for an injury to his right eye and face as the result of being struck by bird shot discharged from a shotgun. The case was tried by the court without a jury and the court found that on November 20, 1945, plaintiff and the two defendants were hunting quail on the open range. Each of the defendants was armed with a 12 gauge shotgun loaded with shells containing 7 1/2 size shot. Prior to going hunting plaintiff discussed the hunting

procedure with defendants, indicating that they were to exercise care when shooting and to “keep in line.” In the course of hunting plaintiff proceeded up a hill, thus placing the hunters at the points of a triangle. The view of defendants with reference to plaintiff was unobstructed and they knew his location. Defendant Tice flushed a quail which rose in flight to a 10-foot elevation and flew between plaintiff and defendants. Both defendants shot at the quail, shooting in plaintiff’s direction. At that time defendants were 75 yards from plaintiff. One shot struck plaintiff in his eye and another in his upper lip. Finally it was found by the court that as the direct result of the shooting by defendants the shots struck plaintiff as above mentioned and that defendants were negligent in so shooting and plaintiff was not contributorily negligent.

First, on the subject of negligence, defendant Simonson contends that the evidence is insufficient to sustain the finding on that score, but he does not point out wherein it is lacking. There is evidence that both defendants, at about the same time or one immediately after the other, shot at a quail and in so doing shot toward plaintiff who was uphill from them, and that they knew his location. That is sufficient from which the trial court could conclude that they acted with respect to plaintiff other than as persons of ordinary prudence. The issue was one of fact for the trial court.

The problem presented in this case is whether the judgment against both defendants may stand. It is argued by defendants that they are not joint tort feasons, and thus jointly and severally liable, as they were not acting in concert, and that there is not sufficient evidence to show which defendant was guilty of the negligence which caused the injuries – the shooting by Tice or that by Simonson. Tice argues that there is evidence to show that the shot which struck plaintiff came from Simonson’s gun because of admissions allegedly made by him to third persons and no evidence that they came from his gun. Further in connection with the latter contention, the

court failed to find on plaintiff's allegation in his complaint that he did not know which one was at fault – did not find which defendant was guilty of the negligence which caused the injuries to plaintiff.

Considering the last argument first, we believe it is clear that the court sufficiently found on the issue that defendants were jointly liable and that thus the negligence of both was the cause of the injury or to that legal effect. It found that both defendants were negligent and “That as a direct and proximate result of the shots fired by *defendants, and each of them*, a birdshot pellet was caused to and did lodge in plaintiff's right eye and that another birdshot pellet was caused to and did lodge in plaintiff's upper lip.” In so doing the court evidently did not give credence to the admissions of Simonson to third persons that he fired the shots, which it was justified in doing. It thus determined that the negligence of both defendants was the legal cause of the injury – or that both were responsible. Implicit in such finding is the assumption that the court was unable to ascertain whether the shots were from the gun of one defendant or the other or one shot from each of them. The one shot that entered plaintiff's eye was the major factor in assessing damages and that shot could not have come from the gun of both defendants. It was from one or the other only.~

When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers – both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is

remediless. Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury.~

In addition to that, however, it should be pointed out that the same reasons of policy and justice shift the burden to each of defendants to absolve himself if he can – relieving the wronged person of the duty of apportioning the injury to a particular defendant, apply here where we are concerned with whether plaintiff is required to supply evidence for the apportionment of damages. If defendants are independent tort feasons and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. The wrongdoers should be left to work out between themselves any apportionment.~

The judgment is affirmed.

#### **Check-Your-Understanding Questions About *Summers***

- A.** Could Summers have proved by a preponderance of the evidence that he would not have suffered his injury but for the negligent action of Tice?
- B.** Could Summers have proved by a preponderance of the evidence that he would not have suffered his injury but for the negligent action of Simonson?
- C.** Suppose, instead of things happening the way they did, Summers’s eye was injured in the following manner: Tice doesn’t shoot his gun at all. Instead, Tice tries to help Simonson by shouting, “Quail! Right there!” while pointing in Summers’s direction. Tice does this despite the fact that Summers is fully visible, standing in the open. Based on Tice’s directive, Simonson takes the shot – even though, had Simonson simply looked, he would have noticed Summers standing in the line of fire. Under these tweaked facts: Is the doctrine announced in *Summers v. Tice* necessary for Summers to show actual causation against Tice and Simonson for the eye injury? Or do the actions of both Simonson and Tice individually satisfy the but-for test?



### Market-Share Liability

The final situation we will cover in which a court will allow actual causation to be established notwithstanding a lack of but-for causation is that of market-share liability. This doctrine is applicable in situations that are similar to *Summers v. Tice*, where it is unknown who among multiple negligent actors caused the harm. But market-share liability can be used in situations where courts have been reluctant to extend *Summers*, in particular, where there is a large number of defendants and where those defendants are not quantitatively equal participants in the conduct that is alleged to have harmed the plaintiff.

Just as the multiple-sufficient-cause doctrine is closely associated with the twin-fires situation and the *Summers* doctrine is associated with simultaneously discharged shotguns, the market-share liability doctrine is closely associated with a particular set of facts: cancer caused by diethylstilbesterol – called “DES” – a drug given to pregnant women primarily in the 1940s, 50s, and 60s. It turns out that an expectant mother’s ingestion of DES can cause changes in a female fetus that eventually manifest as adenosis and cancer when the female child reaches at least the age of 10 or 12 years. Sometimes these problems do not manifest until adulthood. Many different drug companies manufactured DES, and because of the passage of time and the erosion of memory and destruction of records, it became impossible to determine who among them manufactured the particular tablets taken by any given plaintiff’s mother.

As with *Summers*, in the DES cases multiple parties engaged in negligent or otherwise culpable conduct, and as with *Summers*, it was impossible for the injured plaintiff to show but-for causation against any single defendant. But the DES situation was unlike *Summers* in that some drug companies manufactured a large portion of the DES sold, while others manufactured only a very small sliver. There was also a very large number of manufacturers – upwards of 200. By contrast, in *Summers*, there were only two defendants, each of whom discharged similar shotgun shells at the same time with equal likelihood of injuring the plaintiff. Holding any one DES defendant responsible for all of plaintiff’s damages – as *Summers v. Tice* would

have allowed – seemed unfair to courts. But so did not providing plaintiffs any path to recovery. The solution was market-share liability, in which each defendant could be made liable for a portion of the plaintiff's damages corresponding to the defendant's share of the DES market.

**Case: Sindell v. Abbott Labs**

The following is the seminal case on market-share liability. It also demonstrates the potential influence of a student law-review note.

*Sindell v. Abbott Labs*

Supreme Court of California

March 20, 1980

26 Cal. 3d 588. JUDITH SINDELL, Plaintiff and Appellant, v. ABBOTT LABORATORIES et al., Defendants and Respondents. MAUREEN ROGERS, Plaintiff and Appellant, v. REXALL DRUG COMPANY et al., Defendants and Respondents. Defendant-appellees: Abbott Laboratories, Eli Lilly and Company, E.R. Squibb and Sons, the Upjohn Company, and Rexall Drug Company. Opinion by Mosk, J., with Bird, C.J., Newman, J., and White, J., concurring. Separate dissenting opinion by Richardson, J., with Clark and Manuel, JJ., concurring. White, J., assigned by the Chairperson of the Judicial Council.

**Justice STANLEY MOSK:**

This case involves a complex problem both timely and significant: may a plaintiff, injured as the result of a drug administered to her mother during pregnancy, who knows the type of drug involved but cannot identify the manufacturer of the precise product, hold liable for her injuries a maker of a drug produced from an identical formula?

Plaintiff Judith Sindell brought an action against eleven drug companies and Does 1 through 100, on behalf of herself and other women similarly situated. The complaint alleges as follows:

Between 1941 and 1971, defendants were engaged in the business of manufacturing, promoting, and marketing diethylstilbesterol (DES), a drug which is a synthetic compound of the female hormone estrogen. The drug was administered to plaintiff's mother and the mothers of the class she represents, for the purpose of preventing miscarriage. The plaintiff class alleged consists of "girls and women who are residents of California and who have been exposed to DES before birth and who may or may not know that fact or the dangers" to which they were exposed. Defendants are also sued as representatives of a class of drug manufacturers which sold DES after 1941.

In 1947, the Food and Drug Administration authorized the marketing of DES as a miscarriage preventative, but only on an experimental basis, with a requirement that the drug contain a warning label to that effect.

DES may cause cancerous vaginal and cervical growths in the daughters exposed to it before birth, because their mothers took the drug during pregnancy. The form of cancer from which these daughters suffer is known as adenocarcinoma, and it manifests itself after a minimum latent period of 10 or 12 years. It is a fast-spreading and deadly disease, and radical surgery is required to prevent it from spreading. DES also causes adenosis, precancerous vaginal and cervical growths which may spread to other areas of the body. The treatment for adenosis is cauterization, surgery, or cryosurgery. Women who suffer from this condition must be monitored by biopsy or colposcopic examination twice a year, a painful and expensive procedure. Thousands of women whose mothers received DES during pregnancy are unaware of the effects of the drug.

In 1971, the Food and Drug Administration ordered defendants to cease marketing and promoting DES for the purpose of preventing miscarriages, and to warn physicians and the public that the drug should not be used by pregnant women because of the danger to their unborn children.

During the period defendants marketed DES, they knew or should have known that it was a carcinogenic substance, that there was a grave danger after varying periods of latency it would cause cancerous and precancerous growths in the daughters of the mothers who took it, and that it was ineffective to prevent miscarriage. Nevertheless, defendants continued to advertise and market the drug as a miscarriage preventative. They failed to test DES for efficacy and safety; the tests performed by others, upon which they relied, indicated that it was not safe or effective. In violation of the authorization of the Food and Drug Administration, defendants marketed DES on an unlimited basis rather than as an experimental drug, and they failed to warn of its potential danger. It is alleged also that defendants failed to determine if there was any means to avoid or treat the effects of DES upon the daughters of women exposed to it during pregnancy, and failed to monitor the carcinogenic effects of the drug.

Because of defendants' advertised assurances that DES was safe and effective to prevent miscarriage, plaintiff was exposed to the drug prior to her birth. She became aware of the danger from such exposure within one year of the time she filed her complaint. As a result of the DES ingested by her mother, plaintiff developed a malignant bladder tumor which was removed by surgery. She suffers from adenosis and must constantly be monitored by biopsy or colposcopy to insure early warning of further malignancy.

The first cause of action alleges that defendants were jointly and individually negligent in that they manufactured, marketed and promoted DES as a safe and efficacious drug to prevent miscarriage, without adequate testing or warning, and without monitoring or reporting its effects.

A separate cause of action alleges that defendants are jointly liable regardless of which particular brand of DES was ingested by plaintiff's mother because defendants collaborated in marketing, promoting and testing the drug,

relied upon each other's tests, and adhered to an industry-wide safety standard. DES was produced from a common and mutually agreed upon formula as a fungible drug interchangeable with other brands of the same product; defendants knew or should have known that it was customary for doctors to prescribe the drug by its generic rather than its brand name and that pharmacists filled prescriptions from whatever brand of the drug happened to be in stock.

Other causes of action are based upon theories of strict liability, violation of express and implied warranties, false and fraudulent representations, misbranding of drugs in violation of federal law, conspiracy and "lack of consent."

Each cause of action alleges that defendants are jointly liable because they acted in concert, on the basis of express and implied agreements, and in reliance upon and ratification and exploitation of each other's testing and marketing methods.

Plaintiff seeks compensatory damages of \$1 million and punitive damages of \$10 million for herself. For the members of her class, she prays for equitable relief in the form of an order that defendants warn physicians and others of the danger of DES and the necessity of performing certain tests to determine the presence of disease caused by the drug, and that they establish free clinics in California to perform such tests.

Defendants demurred to the complaint. While the complaint did not expressly allege that plaintiff could not identify the manufacturer of the precise drug ingested by her mother, she stated in her points and authorities in opposition to the demurrers filed by some of the defendants that she was unable to make the identification, and the trial court sustained the demurrers of these defendants without leave to amend on the ground that plaintiff did not and stated she could not identify which defendant had manufactured the drug responsible for her injuries. Thereupon, the court dismissed the action.~

This case is but one of a number filed throughout the country seeking to hold drug manufacturers liable for injuries allegedly resulting from DES prescribed to the plaintiffs' mothers since 1947. According to a note in the *Fordham Law Review*, estimates of the number of women who took the drug during pregnancy range from 1 1/2 million to 3 million. Hundreds, perhaps thousands, of the daughters of these women suffer from adenocarcinoma, and the incidence of vaginal adenosis among them is 30 to 90 percent. ([Naomi Sheiner] Comment, *DES and a Proposed Theory of Enterprise Liability* (1978) 46 *FORDHAM L. REV.* 963, 964-967 [hereafter *Fordham Comment*].) Most of the cases are still pending. With two exceptions, those that have been decided resulted in judgments in favor of the drug company defendants because of the failure of the plaintiffs to identify the manufacturer of the DES prescribed to their mothers. The same result was reached in a recent California case. The present action is another attempt to overcome this obstacle to recovery.

We begin with the proposition that, as a general rule, the imposition of liability depends upon a showing by the plaintiff that his or her injuries were caused by the act of the defendant or by an instrumentality under the defendant's control. The rule applies whether the injury resulted from an accidental event or from the use of a defective product.

There are, however, exceptions to this rule. Plaintiff's complaint suggests several bases upon which defendants may be held liable for her injuries even though she cannot demonstrate the name of the manufacturer which produced the DES actually taken by her mother. The first of these theories, classically illustrated by *Summers v. Tice* (1948) 33 Cal.2d 80, places the burden of proof of causation upon tortious defendants in certain circumstances. The second basis of liability emerging from the complaint is that defendants acted in concert to cause injury to plaintiff. There is a third and novel approach to the problem, sometimes called the theory of "enterprise liability," but which we prefer

to designate by the more accurate term of “industry-wide” liability, which might obviate the necessity for identifying the manufacturer of the injury-causing drug. We shall conclude that these doctrines, as previously interpreted, may not be applied to hold defendants liable under the allegations of this complaint. However, we shall propose and adopt a fourth basis for permitting the action to be tried, grounded upon an extension of the *Summers* doctrine.

## I

Plaintiff places primary reliance upon cases which hold that if a party cannot identify which of two or more defendants caused an injury, the burden of proof may shift to the defendants to show that they were not responsible for the harm. This principle is sometimes referred to as the “alternative liability” theory.

The celebrated case of *Summers v. Tice, supra*, 33 Cal.2d 80, a unanimous opinion of this court, best exemplifies the rule. In *Summers*, the plaintiff was injured when two hunters negligently shot in his direction. It could not be determined which of them had fired the shot that actually caused the injury to the plaintiff's eye, but both defendants were nevertheless held jointly and severally liable for the whole of the damages. We reasoned that both were wrongdoers, both were negligent toward the plaintiff, and that it would be unfair to require plaintiff to isolate the defendant responsible, because if the one pointed out were to escape liability, the other might also, and the plaintiff-victim would be shorn of any remedy. In these circumstances, we held, the burden of proof shifted to the defendants, “each to absolve himself if he can.” We stated that under these or similar circumstances a defendant is ordinarily in a “far better position” to offer evidence to determine whether he or another defendant caused the injury.

In *Summers*, we relied upon *Ybarra v. Spangard* (1944) 25 Cal.2d 486. There, the plaintiff was injured while he was

unconscious during the course of surgery. He sought damages against several doctors and a nurse who attended him while he was unconscious. We held that it would be unreasonable to require him to identify the particular defendant who had performed the alleged negligent act because he was unconscious at the time of the injury and the defendants exercised control over the instrumentalities which caused the harm. Therefore, under the doctrine of *res ipsa loquitur*, an inference of negligence arose that defendants were required to meet by explaining their conduct.

The rule developed in *Summers* has been embodied in the Restatement of Torts. (Rest.2d Torts, § 433B, subd. (3).) Indeed, the *Summers* facts are used as an illustration.

Defendants assert that these principles are inapplicable here. First, they insist that a predicate to shifting the burden of proof under *Summers-Ybarra* is that the defendants must have greater access to information regarding the cause of the injuries than the plaintiff, whereas in the present case the reverse appears.

Plaintiff does not claim that defendants are in a better position than she to identify the manufacturer of the drug taken by her mother or, indeed, that they have the ability to do so at all, but argues, rather, that *Summers* does not impose such a requirement as a condition to the shifting of the burden of proof. In this respect we believe plaintiff is correct.

In *Summers*, the circumstances of the accident themselves precluded an explanation of its cause. To be sure, *Summers* states that defendants are “[ordinarily] ... in a far better position to offer evidence to determine which one caused the injury” than a plaintiff, but the decision does not determine that this “ordinary” situation was present. Neither the facts nor the language of the opinion indicate that the two defendants, simultaneously shooting in the same direction, were in a better position than the plaintiff to ascertain whose shot caused the injury. As the opinion acknowledges, it was



impossible for the trial court to determine whether the shot which entered the plaintiff's eye came from the gun of one defendant or the other. Nevertheless, burden of proof was shifted to the defendants.

Here, as in *Summers*, the circumstances of the injury appear to render identification of the manufacturer of the drug ingested by plaintiff's mother impossible by either plaintiff or defendants, and it cannot reasonably be said that one is in a better position than the other to make the identification. Because many years elapsed between the time the drug was taken and the manifestation of plaintiff's injuries she, and many other daughters of mothers who took DES, are unable to make such identification. Certainly there can be no implication that plaintiff is at fault in failing to do so – the event occurred while plaintiff was *in utero*, a generation ago.

On the other hand, it cannot be said with assurance that defendants have the means to make the identification. In this connection, they point out that drug manufacturers ordinarily have no direct contact with the patients who take a drug prescribed by their doctors. Defendants sell to wholesalers, who in turn supply the product to physicians and pharmacies. Manufacturers do not maintain records of the persons who take the drugs they produce, and the selection of the medication is made by the physician rather than the manufacturer. Nor do we conclude that the absence of evidence on this subject is due to the fault of defendants. While it is alleged that they produced a defective product with delayed effects and without adequate warnings, the difficulty or impossibility of identification results primarily from the passage of time rather than from their allegedly negligent acts of failing to provide adequate warnings.

It is important to observe, however, that while defendants do not have means superior to plaintiff to identify the maker of the precise drug taken by her mother, they may in some instances be able to prove that they did not manufacture the injury-causing substance. In the present case, for example,

one of the original defendants was dismissed from the action upon proof that it did not manufacture DES until after plaintiff was born.

Thus we conclude the fact defendants do not have greater access to information that might establish the identity of the manufacturer of the DES which injured plaintiff does not per se prevent application of the *Summers* rule.

Nevertheless, plaintiff may not prevail in her claim that the *Summers* rationale should be employed to fix the whole liability for her injuries upon defendants, at least as those principles have previously been applied. There is an important difference between the situation involved in *Summers* and the present case. There, all the parties who were or could have been responsible for the harm to the plaintiff were joined as defendants. Here, by contrast, there are approximately 200 drug companies which made DES, any of which might have manufactured the injury-producing drug.

Defendants maintain that, while in *Summers* there was a 50 percent chance that one of the two defendants was responsible for the plaintiff's injuries, here since any one of 200 companies which manufactured DES might have made the product that harmed plaintiff, there is no rational basis upon which to infer that any defendant in this action caused plaintiff's injuries, nor even a reasonable possibility that they were responsible.

These arguments are persuasive if we measure the chance that any one of the defendants supplied the injury-causing drug by the number of possible tortfeasors. In such a context, the possibility that any of the five defendants supplied the DES to plaintiff's mother is so remote that it would be unfair to require each defendant to exonerate itself. There may be a substantial likelihood that none of the five defendants joined in the action made the DES which caused the injury, and that the offending producer not named would escape liability altogether. While we propose, *infra*, an adaptation of the rule

in *Summers* which will substantially overcome these difficulties, defendants appear to be correct that the rule, as previously applied, cannot relieve plaintiff of the burden of proving the identity of the manufacturer which made the drug causing her injuries.

## II

The second principle upon which plaintiff relies is the so-called “concert of action” theory.~ The gravamen of the charge of concert is that defendants failed to adequately test the drug or to give sufficient warning of its dangers and that they relied upon the tests performed by one another and took advantage of each others’ promotional and marketing techniques. These allegations do not amount to a charge that there was a tacit understanding or a common plan among defendants to fail to conduct adequate tests or give sufficient warnings, and that they substantially aided and encouraged one another in these omissions.

## III

A third theory upon which plaintiff relies is the concept of industry-wide liability, or according to the terminology of the parties, “enterprise liability.” This theory was suggested in *Hall v. E. I. Du Pont de Nemours & Co., Inc.* (E.D.N.Y. 1972) 345 F. Supp. 353. In that case, plaintiffs were 13 children injured by the explosion of blasting caps in 12 separate incidents which occurred in 10 different states between 1955 and 1959. The defendants were six blasting cap manufacturers, comprising virtually the entire blasting cap industry in the United States, and their trade association.~ The gravamen of the complaint was that the practice of the industry of omitting a warning on individual blasting caps and of failing to take other safety measures created an unreasonable risk of harm, resulting in the plaintiffs’ injuries. The complaint did not identify a particular manufacturer of a cap which caused a particular injury.

The court reasoned as follows: there was evidence that defendants, acting independently, had adhered to an industry-wide standard with regard to the safety features of blasting caps, that they had in effect delegated some functions of safety investigation and design, such as labelling, to their trade association, and that there was industry-wide cooperation in the manufacture and design of blasting caps. In these circumstances, the evidence supported a conclusion that all the defendants jointly controlled the risk. Thus, if plaintiffs could establish by a preponderance of the evidence that the caps were manufactured by one of the defendants, the burden of proof as to causation would shift to all the defendants. The court noted that this theory of liability applied to industries composed of a small number of units, and that what would be fair and reasonable with regard to an industry of five or ten producers might be manifestly unreasonable if applied to a decentralized industry composed of countless small producers.

Plaintiff attempts to state a cause of action under the rationale of *Hall*. She alleges joint enterprise and collaboration among defendants in the production, marketing, promotion and testing of DES, and “concerted promulgation and adherence to industry-wide testing, safety, warning and efficacy standards” for the drug. We have concluded above that allegations that defendants relied upon one another’s testing and promotion methods do not state a cause of action for concerted conduct to commit a tortious act. Under the theory of industry-wide liability, however, each manufacturer could be liable for all injuries caused by DES by virtue of adherence to an industry-wide standard of safety.

We decline to apply this theory in the present case. At least 200 manufacturers produced DES; *Hall*, which involved 6 manufacturers representing the entire blasting cap industry in the United States, cautioned against application of the doctrine espoused therein to a large number of producers. Moreover, in *Hall*, the conclusion that the defendants jointly

controlled the risk was based upon allegations that they had delegated some functions relating to safety to a trade association. There are no such allegations here, and we have concluded above that plaintiff has failed to allege liability on a concert of action theory.

Equally important, the drug industry is closely regulated by the Food and Drug Administration, which actively controls the testing and manufacture of drugs and the method by which they are marketed, including the contents of warning labels. To a considerable degree, therefore, the standards followed by drug manufacturers are suggested or compelled by the government. Adherence to those standards cannot, of course, absolve a manufacturer of liability to which it would otherwise be subject. But since the government plays such a pervasive role in formulating the criteria for the testing and marketing of drugs, it would be unfair to impose upon a manufacturer liability for injuries resulting from the use of a drug which it did not supply simply because it followed the standards of the industry.

#### IV

If we were confined to the theories of *Summers* and *Hall*, we would be constrained to hold that the judgment must be sustained. Should we require that plaintiff identify the manufacturer which supplied the DES used by her mother or that all DES manufacturers be joined in the action, she would effectively be precluded from any recovery. As defendants candidly admit, there is little likelihood that all the manufacturers who made DES at the time in question are still in business or that they are subject to the jurisdiction of the California courts. There are, however, forceful arguments in favor of holding that plaintiff has a cause of action.

In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere

rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs. Just as Justice Traynor in his landmark concurring opinion in *Escola v. Coca Cola Bottling Co.* (1944) 24 Cal.2d 453, recognized that in an era of mass production and complex marketing methods the traditional standard of negligence was insufficient to govern the obligations of manufacturer to consumer, so should we acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances. The Restatement comments that modification of the *Summers* rule may be necessary in a situation like that before us.

The most persuasive reason for finding plaintiff states a cause of action is that advanced in *Summers*: as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury. Here, as in *Summers*, plaintiff is not at fault in failing to provide evidence of causation, and although the absence of such evidence is not attributable to the defendants either, their conduct in marketing a drug the effects of which are delayed for many years played a significant role in creating the unavailability of proof.

From a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product. As was said by Justice Traynor in *Escola*, “[the] cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.” The manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety. These considerations are particularly significant where medication is involved, for the consumer is virtually helpless to protect himself from serious, sometimes

permanent, sometimes fatal, injuries caused by deleterious drugs.

Where, as here, all defendants produced a drug from an identical formula and the manufacturer of the DES which caused plaintiff's injuries cannot be identified through no fault of plaintiff, a modification of the rule of *Summers* is warranted. As we have seen, an undiluted *Summers* rationale is inappropriate to shift the burden of proof of causation to defendants because if we measure the chance that any particular manufacturer supplied the injury-causing product by the number of producers of DES, there is a possibility that none of the five defendants in this case produced the offending substance and that the responsible manufacturer, not named in the action, will escape liability.

But we approach the issue of causation from a different perspective: we hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose. Plaintiff asserts in her briefs that Eli Lilly and Company and five or six other companies produced 90 percent of the DES marketed. If at trial this is established to be the fact, then there is a corresponding likelihood that this comparative handful of producers manufactured the DES which caused plaintiff's injuries, and only a 10 percent likelihood that the offending producer would escape liability.

The Fordham Comment explains the connection between percentage of market share and liability as follows: "[If] X Manufacturer sold one-fifth of all the DES prescribed for pregnancy and identification could be made in all cases, X would be the sole defendant in approximately one-fifth of all cases and liable for all the damages in those cases. Under alternative liability, X would be joined in all cases in which identification could not be made, but liable for only one-fifth

of the total damages in these cases. X would pay the same amount either way. Although the correlation is not, in practice, perfect, it is close enough so that defendants' objections on the ground of fairness lose their value." (Fordham Comment, *supra*, at p. 994.)

If plaintiff joins in the action the manufacturers of a substantial share of the DES which her mother might have taken, the injustice of shifting the burden of proof to defendants to demonstrate that they could not have made the substance which injured plaintiff is significantly diminished. While 75 to 80 percent of the market is suggested as the requirement by the Fordham Comment, we hold only that a substantial percentage is required.

The presence in the action of a substantial share of the appropriate market also provides a ready means to apportion damages among the defendants. Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries. In the present case, as we have seen, one DES manufacturer was dismissed from the action upon filing a declaration that it had not manufactured DES until after plaintiff was born. Once plaintiff has met her burden of joining the required defendants, they in turn may cross-complain against other DES manufacturers, not joined in the action, which they can allege might have supplied the injury-causing product.

Under this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products. Some minor discrepancy in the correlation between market share and liability is inevitable; therefore, a defendant may be held liable for a somewhat different percentage of the damage than its share of the appropriate market would justify. It is probably impossible, with the passage of time, to determine market share with mathematical exactitude. But just as a jury cannot be expected to determine the precise relationship between fault and liability in applying



the doctrine of comparative fault or partial indemnity, the difficulty of apportioning damages among the defendant producers in exact relation to their market share does not seriously militate against the rule we adopt. As we said in *Summers* with regard to the liability of independent tortfeasors, where a correct division of liability cannot be made “the trier of fact may make it the best it can.”

We are not unmindful of the practical problems involved in defining the market and determining market share, but these are largely matters of proof which properly cannot be determined at the pleading stage of these proceedings. Defendants urge that it would be both unfair and contrary to public policy to hold them liable for plaintiff’s injuries in the absence of proof that one of them supplied the drug responsible for the damage. Most of their arguments, however, are based upon the assumption that one manufacturer would be held responsible for the products of another or for those of all other manufacturers if plaintiff ultimately prevails. But under the rule we adopt, each manufacturer’s liability for an injury would be approximately equivalent to the damage caused by the DES it manufactured.

The judgments are reversed.

#### **Questions to Ponder About *Sindell v. Abbott Labs***

**A.** The court says that under *Sindell*’s market-share liability, “each manufacturer’s liability would approximate its responsibility for the injuries caused by its own products.” But is this the case? Suppose a manufacturer only manufactured 0.01% of the DES sold in the relevant market. Would it be worth it for a plaintiff to sue such a manufacturer at all? If not, how might such a manufacturer end up “be[ing] held liable for the proportion of the judgment represented by its share of that market”?

**B.** *Sindell* allows recovery despite an absence of strict actual causation. What, if anything, does the *Sindell* court require in its absence?

C. Considering how the actual causation requirement has been relaxed in *Sindell* (as well as in *Kingston* and *Summers*), perhaps we should consider a deeper question: Why bother having actual causation as a general requirement in negligence cases? If the plaintiff can prove an injury deserving of compensation and prove culpable conduct on the part of the defendant deserving liability, then why not allow a cause of action on those bases alone?

**Problem: Nighttime Hit and Run**

Suppose a pedestrian is walking at night, legally crossing the road. The pedestrian is hit by a speeding taxicab, which then leaves the scene without stopping or even slowing down. Both an eyewitness and the pedestrian were able to see that the car was a taxicab, but neither were able to see the name of the taxicab company on the side. Investigation and discovery discloses that there are three cab companies in the town. On the night the pedestrian was hit, Ace Taxi Service was operating 41% of the cabs, Bravo Taxi Service was operating 34%, and Crystal Taxi Service was operating 25%. The pedestrian sues Ace, Bravo, and Crystal. Is this the kind of situation in which the plaintiff can use market-share liability as announced under *Sindell*? Why or why not?

## 8. Proximate Causation

“For the want of a nail the shoe was lost,  
For the want of a shoe the horse was lost,  
For the want of a horse the rider was lost,  
For the want of a rider the battle was lost,  
For the want of a battle the kingdom was lost,  
And all for the want of a horseshoe-nail.”

– Benjamin Franklin, 1758

### A. Introduction

This chapter – like the one on actual causation – will do double duty. Proximate causation is not only an element of negligence, it is also a requirement of other torts – including strict liability, for instance. For now, we will be talking about proximate causation in the context of negligence. But when you move on to considering other tort causes of action, the same doctrine of proximate causation will apply. (And, once again, you may find that your criminal law course covers proximate causation as well. The concept, at root, is essentially the same for torts and crimes, although the implications and applications diverge.)

To meet the requirement of proximate causation, the plaintiff must show that the causal chain from the defendant’s breach of duty to the injury suffered was not too attenuated or indirect. The point of proximate causation is that it places some outer bound on the scope of a defendant’s liability for any given tortious act.

Generally, the touchstone is some version of foreseeability. If the plaintiff’s injury is foreseeable at the time of the defendant’s duty-breaching conduct, then proximate causation is usually satisfied – although the details of the doctrine get considerably more complex.

## **B. The Place of Proximate Causation**

Actual causation is a matter of strict, logical, cause-and-effect relationships. The element of proximate causation, on the other hand, is a judgment call about how long or attenuated the cause-and-effect relationship is. “Proximate” means “close.” The label gets at the question of how close the breach of duty and injury are. The breach and injury need not be close in space or close in time. In fact, they could take place oceans away from one another and many years apart. But, in an abstract conceptual sense, the breach and injury must be somehow close along the chain of causation that links one to the other.

The element of proximate causation is an outgrowth of the common-sense meaning of the word “cause.” As we saw in the last chapter, there is a bewilderingly large number of events that are actual causes of an injury.

Suppose a pedestrian is injured when struck by a car. The car was being driven by a minister who was headed up a lonely stretch of mountain road to officiate at a small wedding ceremony. The bride and groom met a couple years ago when the groom was taken to the hospital after being injured by a negligently maintained lighting fixture, which dropped on him from the ceiling of a department store. The bride-to-be was the groom-to-be’s treating physician, and after they met, they fell in love.

Now, can we say the department store’s negligence caused the car accident on the mountain road? A good response might be: “Yes, but only if you are being silly about it.” In terms of strict cause-and-effect, there is no question that the department store’s negligence caused the car accident. So the element of actual causation is met. But it still seems ridiculous to say that the department store “caused” the car accident. That’s where proximate causation comes in. In the language of tort law, we would say that the department store’s negligence was not a proximate cause of the automobile accident.

Thus, one way of defining proximate causation could be to say that it is a certain lack of silliness in saying that one thing is the “cause” of another. Put differently, proximate causation is one aspect of what

we mean in everyday language when we talk about one thing being the cause of another thing, with actual causation being the other. The point of separating them out for legal analysis is so that we can speak of the concepts more carefully and thoroughly, which should ultimately allow us to get at more fair results in litigation.

### **C. The Label for Proximate Causation**

Just as actual causation goes by many names (see “Some Notes About the Terminology of Causation” in the previous chapter), proximate causation is also cursed by having multiple labels. It is worth spending a little bit of time on the terminology question to avoid confusion later on.

Proximate cause is sometimes called “legal cause” and sometimes “scope of liability.” The different labels have developed largely because many commentators believe “proximate causation” is a confusing misnomer.

Some critics of the label say that “proximate causation” is misleading because geographical proximity of the incident and injury is not required under the doctrine. Neither is proximity in time. Point taken. But “proximate” is apropos if you think not in terms of a physical closeness but instead in terms of a kind of metaphysical closeness – that is, closeness along the chain of causation that links the incident to the injury.

Others criticize the label “proximate causation” because, they say, the doctrine has nothing to do with causation. That, however, depends on how you define “causation.” If you define “causation” as the strict logical relationship between cause and effect – that is to say, if you define proximate causation as actual causation, then sure, proximate causation isn’t “causation.” But when we say “cause” in everyday speech, there is ordinarily both a proximate and an actual sense in which we are talking: We mean that there is a relatively direct cause-and-effect relationship. If the word “cause” in everyday speech did not include a kernel of the proximate causation concept, then it would not be absurd to say the Norman invasion of England caused you to be late to class.

Ultimately, whether it's a good label or not, you should think of "proximate causation" as a term of art. And like many other legal terms of art, you must learn the concept behind it without trying to derive its meaning from its constituent words.

Let's look at the other labels that are used for the proximate causation concept.

"Legal causation" is one. The "legal causation" label was championed by the authors of the Second Restatement of Torts. The term gets at the idea that the doctrine is an artificial limitation on the natural causal chain – a limitation that is construed to exist *by law*. The downside of "legal causation" as a label is that it sounds like it is the legal side of "factual causation." And that is not the case at all. The term "legal causation" also makes it sound like the doctrine is in the hands of the judge, as a "legal question," rather than in the hands of the jury, as a "factual issue." In fact, generally the opposite is true. Proximate causation is frequently taken to be mostly a factual issue for resolution by the jury.

"Scope of liability" is another label. This label has been championed by the authors of the Third Restatement of Torts. As a term of art, "scope of liability" seems to avoid many of the problems people have with "proximate causation" and "legal causation." Unfortunately, however, "scope of liability" does not sound like a term of art. Indeed, "scope of liability" is commonly used in a non-term-of-art sense. For instance, a lawyer might accurately say, as a way of talking about the statute of limitations, "Injuries that were suffered 10 years ago are outside the company's scope of liability." Such a statement has nothing to do with the proximate-causation concept. One might also talk about the "scope of liability" for patent infringement in a way that has nothing to do with tort law, much less proximate causation. At the end of the day, however, the biggest problem with "scope of liability" is simply that it has not caught on, the efforts of the Restatement authors notwithstanding. When you see "scope of liability," be aware that the term may or may not be a synonym for proximate causation.

Having considered these different labels, the bottom line for you as a budding lawyer is that you need to be cognizant that when a court or commentator is talking about the concept of proximate causation, those words might not appear in the text.

Perhaps even more frustrating, you must be aware of the opposite problem: Courts often use the words “proximate causation” to refer to actual causation. This happens because court will sometimes say “proximate causation” to mean causation in general – with the actual and proximate varieties lumped together. And in many of these instances, the court will go on to speak exclusively of problems of actual causation. This leads to some confusing statements, such as, “To prove proximate cause a plaintiff must show that the result would not have occurred ‘but for’ defendant’s action.” *Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 532 (Del. 1998).

These complications can be extremely frustrating to new law students. But keep reading and thinking actively. You will soon become adroit enough with the concepts that you can see through to what the court is talking about no matter what labels are being thrown around.

#### **D. The Relationship Between Proximate Causation and Duty of Care**

Viewing all of the elements of a prima facie case for negligence together, you will find considerable practical and conceptual overlap between the duty-of-care element and the proximate causation element. Both proximate causation and duty of care function to circumscribe in a somewhat arbitrary way the range of situations where a plaintiff can recover from a defendant. In accomplishing this, both elements largely revolve around the idea of foreseeability. This may lead you ask: Why bother having both the elements of duty and proximate causation within the cause of action of negligence? What distinguishes the two?

These are good questions to ask. Conceivably, the elements of duty of care and proximate causation could be combined, or one absorbed into the other. But for whatever historical reasons there might be,

negligence law developed the way it did, and we have the two elements.

Regardless of whether it is ideal to have duty of care and proximate cause separated, it is possible to articulate some helpful distinctions between the elements as they exist in modern negligence law.

First, the elements of duty of care and proximate causation can be distinguished in that they look at the injury-producing incident from different perspectives. The duty of care element gets at the question, “When must you be careful?” Proximate causation asks the question, “Assuming you weren’t careful, just how much are you going to be on the hook for?”

This difference in perspective has driven the development of one element or the other when novel questions have arisen. For instance, the question in *Tarasoff v. University of California*, of whether a psychotherapist should be held liable for failing to warn third parties of a patient’s dangerous propensities, was a question that was answered by an evolution of duty-of-care doctrine.

There is also a distinction between the duty-of-care element and the proximate-causation element in how and to what extent they are the province of the judge or the jury. It is sometimes said that duty of care is a question of law to be decided by a judge, while proximate causation is an issue of fact to be decided by the jury. This is fair as a broad generalization, but it is not categorically true. Both elements comprise judge-made legal doctrine that requires judicial interpretation, and both elements require factual evidence to prove. Nonetheless, as a functional matter in many cases, the duty-of-care element is a way for judges to limit the scope of negligence liability, while proximate causation is a way for juries to do the same.

Ultimately, the most important difference between the duty-of-care element and the proximate-causation element is that the duty-of-care element is particular to the negligence cause of action, while the concept of proximate causation finds applicability across tort law, showing up as a general requirement for recovering compensatory damages. Proximate causation is also a *prima facie* element of other causes of action (e.g., strict liability). This difference is probably the



most convincing reason for keeping the two elements doctrinally separate. The requirement of proximate causation is needed for the other tort causes of action to prevent silly results. Suppose a vandal throws paint on a fence – actionable as trespass to land. After washing off the paint, the fence-owner plaintiff realizes she likes the color, so she decides to use it to repaint her living room. While on her way to a fourth paint store in a vain attempt to match the vandal’s hue in an interior latex enamel, her car is struck by the getaway vehicle of a bank robber who is being chased by police. Proximate causation prevents the fence owner from successfully suing the vandal for personal injuries sustained in the crash. Without proximate causation, we might have a very silly result. Bear in mind that duty of care cannot be a barrier to this trespass-to-land claim, because there is no duty-of-care element in a cause of action for trespass to land.

Meanwhile, we need the duty-of-care element to stop certain would-be negligence suits. Suppose a burglar breaks into an office building at night and is injured when leaning on a negligently installed railing. Proximate causation probably cannot put a stop to this suit, since the causal relation is entirely unattenuated, and under most tests for proximate causation, the burglar plaintiff will be able to prove the proximate-causation element. But the duty-of-care element is likely to be a showstopper for the burglar plaintiff, because under the traditional rule, the burglar, as a trespasser, was owed no duty of care with regard to artificial hazards.

In truth, the duty-of-care element is more important than just stopping unwanted negligence suits. The duty-of-care concept is the very essence of the negligence cause of action. The duty concept, and the inquiry of whether the defendant’s duty was breached, is what distinguishes negligence from strict liability and the intentional torts. Strict liability has no element of breach of duty whatsoever, being limited in extent by the tightly circumscribed situations in which it is applicable. And the intentional torts are limited by the intent concept rather than duty.

Thus, while duty of care and proximate causation have a great deal of overlap, neither can be done away with without completely restructuring our entire system of tort doctrine from the ground up.

**Case: Palsgraf v. Long Island Railroad**

As discussed, there are some situations that present a duty-of-care issue, yet do not involve any question of proximate causation. Other situations do the opposite. Many cases, however, implicate both. The following case implicates both concepts, and in so doing it provides a vehicle for discussing each and their relation to one another. It is such a good vehicle for considering these issues that it has become the most famous case in American tort law. It may even be the most famous case in the entire American common-law canon. In it, Judge Benjamin N. Cardozo and Judge William Shankland Andrews provide two very different views of the place of proximate causation.

*Palsgraf v. Long Island Railroad*

Court of Appeals of New York

May 29, 1928

248 N.Y. 339. Helen Palsgraf, Respondent, v. The Long Island Railroad Company, Appellant. Cardozo, Ch.J. Pound, Lehman and Kellogg, JJ., concur with Cardozo, Ch.J.; Andrews, J., dissents in opinion in which Crane and O'Brien, JJ., concur.

**Chief Judge BENJAMIN N. CARDOZO:**

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and

was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues.

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. "Proof of negligence in the air, so to speak, will not do" (Pollock, Torts [11th ed.], p. 455; *Martin v. Herzog*, 228 N.Y. 164, 170). "Negligence is the absence of care, according to the circumstances" (Willes, J., in *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679, 688). The plaintiff as she stood upon the platform of the station might claim to be protected against intentional invasion of her bodily security. Such invasion is not charged. She might claim to be protected against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue. These, from the point of view of the law, were the bounds of her immunity, with perhaps some rare exceptions, survivals for the most part of ancient forms of liability, where conduct is held to be at the peril of the actor (*Sullivan v. Dunham*, 161 N.Y. 290). If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to some one else. "In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have

averted or avoided the injury” (McSherry, C.J., in *W. Va. Central R. Co. v. State*, 96 Md. 652, 666). “The ideas of negligence and duty are strictly correlative” (Bowen, L.J., in *Thomas v. Quartermaine*, 18 Q. B. D. 685, 694). The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.

A different conclusion will involve us, and swiftly too, in a maze of contradictions. A guard stumbles over a package which has been left upon a platform. It seems to be a bundle of newspapers. It turns out to be a can of dynamite. To the eye of ordinary vigilance, the bundle is abandoned waste, which may be kicked or trod on with impunity. Is a passenger at the other end of the platform protected by the law against the unsuspected hazard concealed beneath the waste? If not, is the result to be any different, so far as the distant passenger is concerned, when the guard stumbles over a valise which a truckman or a porter has left upon the walk? The passenger far away, if the victim of a wrong at all, has a cause of action, not derivative, but original and primary. His claim to be protected against invasion of his bodily security is neither greater nor less because the act resulting in the invasion is a wrong to another far removed. In this case, the rights that are said to have been violated, the interests said to have been invaded, are not even of the same order. The man was not injured in his person nor even put in danger. The purpose of the act, as well as its effect, was to make his person safe. If there was a wrong to him at all, which may very well be doubted, it was a wrong to a property interest only, the safety of his package. Out of this wrong to property, which threatened injury to nothing else, there has passed, we are told, to the plaintiff by derivation or succession a right of action for the invasion of an interest of another order, the right to bodily security. The diversity of interests emphasizes the futility of the effort to build the plaintiff's right upon the basis of a wrong to some one else. The gain is one of emphasis, for a like result would follow if the interests were

the same. Even then, the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty. One who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger. Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform.

The argument for the plaintiff is built upon the shifting meanings of such words as "wrong" and "wrongful," and shares their instability. What the plaintiff must show is "a wrong" to herself, *i.e.*, a violation of her own right, and not merely a wrong to some one else, nor conduct "wrongful" because unsocial, but not "a wrong" to any one. We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act and, therefore, of a wrongful one irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension (Seavey, *Negligence, Subjective or Objective*, 41 H. L. Rv. 6; *Boronkay v. Robinson & Carpenter*, 247 N.Y. 365). This does not mean, of course, that one who launches a destructive force is always relieved of liability if the force, though known to be destructive, pursues an unexpected path. "It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye" (*Munsey v. Webb*, 231 U.S. 150, 156). Some acts, such as

shooting, are so imminently dangerous to any one who may come within reach of the missile, however unexpectedly, as to impose a duty of prevision not far from that of an insurer. Even today, and much oftener in earlier stages of the law, one acts sometimes at one's peril (Jeremiah Smith, Tort and Absolute Liability, 30 H. L. Rv. 328; Street, Foundations of Legal Liability, vol. 1, pp. 77, 78). Under this head, it may be, fall certain cases of what is known as transferred intent, an act willfully dangerous to A resulting by misadventure in injury to B (*Talmage v. Smith*, 101 Mich. 370, 374) These cases aside, wrong is defined in terms of the natural or probable, at least when unintentional. The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury. Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him. His conduct would not have involved, even then, an unreasonable probability of invasion of her bodily security. Liability can be no greater where the act is inadvertent.

Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all (Bowen, L.J., in *Thomas v. Quartermaine*, 18 Q.B.D. 685, 694). Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be

protected against the doing of it though the harm was unintended. Affront to personality is still the keynote of the wrong. Confirmation of this view will be found in the history and development of the action on the case. Negligence as a basis of civil liability was unknown to mediaeval law. For damage to the person, the sole remedy was trespass, and trespass did not lie in the absence of aggression, and that direct and personal. Liability for other damage, as where a servant without orders from the master does or omits something to the damage of another, is a plant of later growth. When it emerged out of the legal soil, it was thought of as a variant of trespass, an offshoot of the parent stock. This appears in the form of action, which was known as trespass on the case. The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another. Thus to view his cause of action is to ignore the fundamental difference between tort and crime. He sues for breach of a duty owing to himself.

The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a finding of a tort. We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary. There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as, *e. g.*, one of bodily security. Perhaps other distinctions may be necessary. We do not go into the question now. The consequences to be followed must first be rooted in a wrong.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and the complaint dismissed, with costs in all courts.

**Judge WILLIAM SHANKLAND ANDREWS, dissenting:**

Assisting a passenger to board a train, the defendant's servant negligently knocked a package from his arms. It fell between the platform and the cars. Of its contents the servant knew and could know nothing. A violent explosion followed. The concussion broke some scales standing a considerable distance away. In falling they injured the plaintiff, an intending passenger.

Upon these facts may she recover the damages she has suffered in an action brought against the master? The result we shall reach depends upon our theory as to the nature of negligence. Is it a relative concept – the breach of some duty owing to a particular person or to particular persons? Or where there is an act which unreasonably threatens the safety of others, is the doer liable for all its proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger? This is not a mere dispute as to words. We might not believe that to the average mind the dropping of the bundle would seem to involve the probability of harm to the plaintiff standing many feet away whatever might be the case as to the owner or to one so near as to be likely to be struck by its fall. If, however, we adopt the second hypothesis we have to inquire only as to the relation between cause and effect. We deal in terms of proximate cause, not of negligence.

Negligence may be defined roughly as an act or omission which unreasonably does or may affect the rights of others, or which unreasonably fails to protect oneself from the dangers resulting from such acts. Here I confine myself to the first branch of the definition. Nor do I comment on the word



“unreasonable.” For present purposes it sufficiently describes that average of conduct that society requires of its members.

There must be both the act or the omission, and the right. It is the act itself, not the intent of the actor, that is important. In criminal law both the intent and the result are to be considered. Intent again is material in tort actions, where punitive damages are sought, dependent on actual malice – not on merely reckless conduct. But here neither insanity nor infancy lessens responsibility.

As has been said, except in cases of contributory negligence, there must be rights which are or may be affected. Often though injury has occurred, no rights of him who suffers have been touched. A licensee or trespasser upon my land has no claim to affirmative care on my part that the land be made safe. Where a railroad is required to fence its tracks against cattle, no man’s rights are injured should he wander upon the road because such fence is absent. An unborn child may not demand immunity from personal harm.

But we are told that “there is no negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the plaintiff himself and not merely to others.” (Salmond Torts [6th ed.], 24.) This, I think too narrow a conception. Where there is the unreasonable act, and some right that may be affected there is negligence whether damage does or does not result. That is immaterial. Should we drive down Broadway at a reckless speed, we are negligent whether we strike an approaching car or miss it by an inch. The act itself is wrongful. It is a wrong not only to those who happen to be within the radius of danger but to all who might have been there – a wrong to the public at large. Such is the language of the street. Such the language of the courts when speaking of contributory negligence. Such again and again their language in speaking of the duty of some defendant and discussing proximate cause in cases where such a discussion is wholly irrelevant on any other theory. As was said by Mr. Justice Holmes many years ago, “the measure

of the defendant's duty in determining whether a wrong has been committed is one thing, the measure of liability when a wrong has been committed is another." (*Spade v. Lynn & Boston R. R. Co.*, 172 Mass. 488.) Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B or C alone.

It may well be that there is no such thing as negligence in the abstract. "Proof of negligence in the air, so to speak, will not do." In an empty world negligence would not exist. It does involve a relationship between man and his fellows. But not merely a relationship between man and those whom he might reasonably expect his act would injure. Rather, a relationship between him and those whom he does in fact injure. If his act has a tendency to harm some one, it harms him a mile away as surely as it does those on the scene. We now permit children to recover for the negligent killing of the father. It was never prevented on the theory that no duty was owing to them. A husband may be compensated for the loss of his wife's services. To say that the wrongdoer was negligent as to the husband as well as to the wife is merely an attempt to fit facts to theory. An insurance company paying a fire loss recovers its payment of the negligent incendiary. We speak of subrogation – of suing in the right of the insured. Behind the cloud of words is the fact they hide, that the act, wrongful as to the insured, has also injured the company. Even if it be true that the fault of father, wife or insured will prevent recovery, it is because we consider the original negligence not the proximate cause of the injury. (Pollock, *Torts* [12th ed.], 463.)

In the well-known *Polemis Case* (1921, 3 K. B. 560), Scrutton, L. J., said that the dropping of a plank was negligent for it might injure "workman or cargo or ship." Because of either possibility the owner of the vessel was to be made good for his loss. The act being wrongful the doer was liable for its proximate results. Criticized and explained as this statement

may have been, I think it states the law as it should be and as it is.

The proposition is this. Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain. We have never, I think, held otherwise. Indeed in the *Di Caprio* case we said that a breach of a general ordinance defining the degree of care to be exercised in one's calling is evidence of negligence as to every one. We did not limit this statement to those who might be expected to be exposed to danger. Unreasonable risk being taken, its consequences are not confined to those who might probably be hurt.

If this be so, we do not have a plaintiff suing by "derivation or succession." Her action is original and primary. Her claim is for a breach of duty to herself – not that she is subrogated to any right of action of the owner of the parcel or of a passenger standing at the scene of the explosion.

The right to recover damages rests on additional considerations. The plaintiff's rights must be injured, and this injury must be caused by the negligence. We build a dam, but are negligent as to its foundations. Breaking, it injures property down stream. We are not liable if all this happened because of some reason other than the insecure foundation. But when injuries do result from our unlawful act we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen and unforeseeable. But there is one limitation. The damages must be so connected with the

negligence that the latter may be said to be the proximate cause of the former.

These two words have never been given an inclusive definition. What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations, as does the existence of negligence itself. Any philosophical doctrine of causation does not help us. A boy throws a stone into a pond. The ripples spread. The water level rises. The history of that pond is altered to all eternity. It will be altered by other causes also. Yet it will be forever the resultant of all causes combined. Each one will have an influence. How great only omniscience can say. You may speak of a chain, or if you please, a net. An analogy is of little aid. Each cause brings about future events. Without each the future would not be the same. Each is proximate in the sense it is essential. But that is not what we mean by the word. Nor on the other hand do we mean sole cause. There is no such thing.

Should analogy be thought helpful, however, I prefer that of a stream. The spring, starting on its journey, is joined by tributary after tributary. The river, reaching the ocean, comes from a hundred sources. No man may say whence any drop of water is derived. Yet for a time distinction may be possible. Into the clear creek, brown swamp water flows from the left. Later, from the right comes water stained by its clay bed. The three may remain for a space, sharply divided. But at last, inevitably no trace of separation remains. They are so commingled that all distinction is lost.

As we have said, we cannot trace the effect of an act to the end, if end there is. Again, however, we may trace it part of the way. A murder at Serajevo may be the necessary antecedent to an assassination in London twenty years hence. An overturned lantern may burn all Chicago. We may follow the fire from the shed to the last building. We rightly say the fire started by the lantern caused its destruction.

A cause, but not the proximate cause. What we do mean by the word “proximate” is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. Take our rule as to fires. Sparks from my burning haystack set on fire my house and my neighbor’s. I may recover from a negligent railroad. He may not. Yet the wrongful act as directly harmed the one as the other. We may regret that the line was drawn just where it was, but drawn somewhere it had to be. We said the act of the railroad was not the proximate cause of our neighbor’s fire. Cause it surely was. The words we used were simply indicative of our notions of public policy. Other courts think differently. But somewhere they reach the point where they cannot say the stream comes from any one source.

Take the illustration given in an unpublished manuscript by a distinguished and helpful writer on the law of torts. A chauffeur negligently collides with another car which is filled with dynamite, although he could not know it. An explosion follows. A, walking on the sidewalk nearby, is killed. B, sitting in a window of a building opposite, is cut by flying glass. C, likewise sitting in a window a block away, is similarly injured. And a further illustration. A nursemaid, ten blocks away, startled by the noise, involuntarily drops a baby from her arms to the walk. We are told that C may not recover while A may. As to B it is a question for court or jury. We will all agree that the baby might not. Because, we are again told, the chauffeur had no reason to believe his conduct involved any risk of injuring either C or the baby. As to them he was not negligent.

But the chauffeur, being negligent in risking the collision, his belief that the scope of the harm he might do would be limited is immaterial. His act unreasonably jeopardized the safety of any one who might be affected by it. C’s injury and that of the baby were directly traceable to the collision.

Without that, the injury would not have happened. C had the right to sit in his office, secure from such dangers. The baby was entitled to use the sidewalk with reasonable safety.

The true theory is, it seems to me, that the injury to C, if in truth he is to be denied recovery, and the injury to the baby is that their several injuries were not the proximate result of the negligence. And here not what the chauffeur had reason to believe would be the result of his conduct, but what the prudent would foresee, may have a bearing. May have some bearing, for the problem of proximate cause is not to be solved by any one consideration.

It is all a question of expediency. There are no fixed rules to govern our judgment. There are simply matters of which we may take account. We have in a somewhat different connection spoken of “the stream of events.” We have asked whether that stream was deflected – whether it was forced into new and unexpected channels. This is rather rhetoric than law. There is in truth little to guide us other than common sense.

There are some hints that may help us. The proximate cause, involved as it may be with many other causes, must be, at the least, something without which the event would not happen. The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or by the exercise of prudent foresight could the result be foreseen? Is the result too remote from the cause, and here we consider remoteness in time and space. (*Bird v. St. Paul F. & M. Ins. Co.*, 224 N.Y. 47, where we passed upon the construction of a contract – but something was also said on this subject.) Clearly we must so consider, for the greater the distance either in time or space, the more surely do other causes intervene to affect the result.

When a lantern is overturned the firing of a shed is a fairly direct consequence. Many things contribute to the spread of the conflagration – the force of the wind, the direction and width of streets, the character of intervening structures, other factors. We draw an uncertain and wavering line, but draw it we must as best we can.

Once again, it is all a question of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.

Here another question must be answered. In the case supposed it is said, and said correctly, that the chauffeur is liable for the direct effect of the explosion although he had no reason to suppose it would follow a collision. “The fact that the injury occurred in a different manner than that which might have been expected does not prevent the chauffeur’s negligence from being in law the cause of the injury.” But the natural results of a negligent act – the results which a prudent man would or should foresee – do have a bearing upon the decision as to proximate cause. We have said so repeatedly. What should be foreseen? No human foresight would suggest that a collision itself might injure one a block away. On the contrary, given an explosion, such a possibility might be reasonably expected. I think the direct connection, the foresight of which the courts speak, assumes prevision of the explosion, for the immediate results of which, at least, the chauffeur is responsible.

It may be said this is unjust. Why? In fairness he should make good every injury flowing from his negligence. Not because of tenderness toward him we say he need not answer for all that follows his wrong. We look back to the catastrophe, the fire kindled by the spark, or the explosion. We trace the consequences – not indefinitely, but to a certain point. And to aid us in fixing that point we ask what might ordinarily be expected to follow the fire or the explosion.

This last suggestion is the factor which must determine the case before us. The act upon which defendant's liability rests is knocking an apparently harmless package onto the platform. The act was negligent. For its proximate consequences the defendant is liable. If its contents were broken, to the owner; if it fell upon and crushed a passenger's foot, then to him. If it exploded and injured one in the immediate vicinity, to him also as to A in the illustration. Mrs. Palsgraf was standing some distance away. How far cannot be told from the record – apparently twenty-five or thirty feet. Perhaps less. Except for the explosion, she would not have been injured. We are told by the appellant in his brief “it cannot be denied that the explosion was the direct cause of the plaintiff's injuries.” So it was a substantial factor in producing the result – there was here a natural and continuous sequence – direct connection. The only intervening cause was that instead of blowing her to the ground the concussion smashed the weighing machine which in turn fell upon her. There was no remoteness in time, little in space. And surely, given such an explosion as here it needed no great foresight to predict that the natural result would be to injure one on the platform at no greater distance from its scene than was the plaintiff. Just how no one might be able to predict. Whether by flying fragments, by broken glass, by wreckage of machines or structures no one could say. But injury in some form was most probable.

Under these circumstances I cannot say as a matter of law that the plaintiff's injuries were not the proximate result of the negligence. That is all we have before us. The court refused to so charge. No request was made to submit the matter to the jury as a question of fact, even would that have been proper upon the record before us.

The judgment appealed from should be affirmed, with costs.

### **Questions to Ponder About *Palsgraf***

**A.** Who do you think is right? Judge Cardozo or Judge Andrews?



**B.** Putting legal doctrine aside for a moment, do you think that it would be fair for Palsgraf to recover from the L.I.R.R.? What goes into your thinking?

**C.** If Judge Andrews had carried the day, what do you think would have happened on remand? That is, assuming the breach of duty was established and the case had gone to a jury on the issue of proximate causation, do you think the jury would have found that the guard's negligent action was a proximate cause of Palsgraf's injuries? If you were on the jury, would you find proximate causation?

### **A Different Version of the *Palsgraf* Case**

The event that injured Helen Palsgraf was covered by many papers, including on the front pages of *The New York Times*, *The New York World*, and *The New York Herald Tribune*. The story that comes out of these reports paints something of a different picture than what is found in Judge Cardozo's opinion.

On Sunday, August 24, 1924, three men were carrying bundles on the crowded platform at East New York Station. One of them dropped a large, unwieldy package. The package may have been closely similar to an unexploded package later found at the scene; that bundle contained six firework/explosive devices, each of which was four inches in diameter and a foot and a half long. The package that caused the explosion fell between the car and the platform and detonated with tremendous force, knocking over 30 or 40 people and setting off a stampede. "There was a terrific roar, followed by several milder explosions, and a short lived pyrotechnic display," according to the *Long Island Daily Press*.

The *New York Times* report said that "pieces of the big salute bomb shot up to the platform." The blast, which could be heard several blocks away, according to the paper, damaged the roadbed, ripped away part of the passenger platform, and overthrew a penny scale more than 10 feet away.

The damage to the scale, which included its glass smashed and its mechanism wrecked, was reported by three newspapers. According

to the *New York Times* and the *Long Island Daily Press*, the distance from the detonation site to the scale was more than 10 feet.

Thirteen people were reported injured, with three sent to the hospital. Injuries included cuts and burns. Helen Palsgraf was reported in the list of injured as suffering from shock.

All of these details and more are compiled in a wonderful law review article: William H. Manz, *Palsgraf: Cardozo's Urban Legend?*, 107 DICK. L. REV. 785 (2003).

### **More Questions to Ponder About *Palsgraf***

**A.** Does the version of facts reported in the newspapers change your view of whether there was a breach of the duty of care?

**B.** Do the newspaper accounts change your mind as to whether you would be inclined to find proximate causation? Do you think this view of the facts would make a difference to the jury? In what way?

**C.** To the extent that Judge Cardozo's recitation of the facts differs from that in the newspapers, why do you think that is? Here are two possibilities out of many: Perhaps Judge Cardozo cut the story down to its essentials, omitting irrelevant detail. Alternatively, perhaps the story in the record that came before the Court of Appeals lacked the detail found in the papers. What other explanations could there be?

**D.** One seemingly significant fact is how far away Palsgraf was from the detonation point. Judge Cardozo describes the distance by saying, "at the other end of the platform, many feet away." Judge Andrews describes it as being "some distance away ... apparently twenty-five or thirty feet." The papers said more than 10 feet. Are these descriptions consistent? If all of them are plausibly interchangeable, to what extent do they create different mental pictures?

**E.** If you could develop some additional detail about the facts that would help illuminate the breach and/or proximate cause issues in this case, what would you want to find out?

### **E. Various Tests for Proximate Causation**

Trying to pin down blackletter rules for proximate causation is a frustrating task, because there is tremendous variability in how courts

approach proximate causation. Various tests have been articulated, but it is not easy to say when a certain test applies. The different formulations are applied in a haphazard fashion in different cases – frequently even within the same jurisdiction. Thus, it is not always possible to say that a given state follows a certain test in a certain kind of case. Nonetheless, it is worth reviewing the different tests, because doing so will give you a feel for the different ways courts articulate their analysis of proximate causation questions.

### **The Direct Test and Intervening Causes**

An older test for proximate causation, now largely disused, is the **direct test**. Despite its obsolescence, the direct test is helpful to know, because the concepts and terms it introduces help define more modern tests.

Today, the touchstone for proximate causation is foreseeability. The direct test, however, is not concerned with foreseeability at all. With the direct test, you ask whether the accused act led directly to the injury without there being an “intervening cause” between the two. An **intervening cause** is some additional force or conduct that is necessary in order to complete the chain of causation between the breaching conduct and the injury. The intervening cause could be the actions of a third party, or it could be some natural event. A good way to conceptualize the direct test is to start at the harm, and then work backward to see if there are any forces that served as a more immediate cause of the harm than the defendant’s conduct.

*Example: Cash from Above I* – Suppose an elderly man is proceeding down a sidewalk in the city. On a balcony above, an obnoxious rich woman decides to start throwing \$20 bills into the air. The flutter of gently descending cash causes a mad rush on the street, and the man is trampled. He sues the profligate boor on the balcony who touched off the stampede. Were the woman’s actions a proximate cause of the man’s injuries? Under the direct test, the answer is no. The man will be unable to show proximate causation under the direct test because the money-grabbers represent an intervening cause.

*Example: Cash from Above II* – Same facts as in the previous paragraph, except that this time, no one else was on the street, and instead of being trampled, the man was injured when he slipped on slick piles of banknotes that had accumulated on the sidewalk. Is proximate causation satisfied under the direct test? Yes. There is no intervening cause between the negligent action and the injury, so the direct test for proximate causation is satisfied.

The leading example of the direct test is *In re Polemis & Furness Withy & Company Ltd.*, 3 K.B. 560 (Court of Appeal of England 1921). The freighter *Polemis* was being unloaded in the port of Casablanca. A worker dropped a wooden plank into the ship's hold. The friction of the plank striking inside the hold caused a spark that ignited a cloud of accumulated fuel vapor. The ensuing fire completely destroyed the *Polemis*. In the case, it was stipulated as unforeseeable that a falling plank of wood could cause a fire. But there was no question that dropping the plank was a negligent act – i.e., a breach of the duty of care. After all, it was easily foreseeable that the falling plank could have struck and damaged something below by mechanical force. The court analyzed whether the dropping of the plank was a proximate cause of the unforeseeable fire. The *Polemis* court used the direct test. Under the direct test, proximate causation was satisfied. Lord Justice Bankes wrote: “The fire appears to me to have been directly caused by the falling of the plank. Under these circumstances I consider that it is immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated.”

Suppose that, instead of the facts unfolding as they did in the case, the plank fell so as to awkwardly wedge itself across a walkway in the hold. And suppose that another worker came along, tripped over the plank, and dropped a lantern – igniting a fire. Under those facts, the direct test would not be satisfied.

There is a philosophical problem with the direct test that is hard to ignore: Every cause and effect relationship in real-world experience can be said, at some level, to involve intervening causes. Maybe on the *Polemis* it was the wafting of the fuel vapor through the air and the travel of air molecules around the plank that allowed it to hit at the

perfect angle to make the spark. Clearly, for the direct test to work, many such would-be intervening causes must be ignored. Selecting what counts as an intervening cause thus requires some artificial characterization. One way to state the direct test so that it does not rely on the troublesome concept of intervening causes, is to use the concept of a “set stage.” The formulation works like this: If it can be said that the defendant was acting on a “set stage” – where everything was lined up and waiting for the defendant’s conduct to touch off the sequence of events that led to the plaintiff’s injury – then proximate causation is established under the direct test.

But keep in mind, the direct test is mostly obsolete at this point.

### **Foreseeability and Harm-Within-the-Risk**

Today, foreseeability is the touchstone for proximate causation analysis. To apply the **foreseeability test**, you take an imaginary trip back in time to the point at which the defendant is about to breach the duty of care. You then look forward and ask, “What might go wrong here?”

In the foreseeability view of proximate causation, intervening causes are not a problem. Consider the *Cash From Above I* example. Is it foreseeable that throwing cash off a balcony could cause a stampede? Yes, it is. Therefore, the foreseeability test for proximate causation is satisfied.

Perhaps the leading case on using foreseeability to determine proximate causation is *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co*, [1961] A.C. 388 (Privy Counsel 1961) – a case which is better known as “*Wagon Mound No. 1*.” This case famously rejected the direct-causation test of *Polemis*. In *Wagon Mound No. 1*, the steam ship *Wagon Mound* was docked in the Port of Sydney, Australia. Owned by Caltex – a venture of what is today Chevron – the *Wagon Mound* was discharging its cargo of gasoline and taking on oil to use as fuel for its engines. During this operation, the *Wagon Mound* spilled a large amount of fuel oil into the water. Caltex made no attempt to disperse the oil, and the *Wagon Mound* soon unberthed and went on its way. Within a few hours, the *Wagon Mound*’s oil had spread over a substantial portion of the bay and had become thickly concentrated

near the property of Morts Dock, a ship-repairing business that was doing welding that day on the *Corrimal*. Some bits of molten metal from the welding operation fell into the water and ignited some cotton waste that was floating on top of the oil. (Sydney is one of the main ports for Australia's cotton exports.) The burning cotton waste in turn ignited the oil. The ensuing fire burned a large portion of Morts Dock and the *Corrimal*.

The court made the finding that "the defendant did not know and could not reasonably be expected to have known that [fuel oil] was capable of being set afire when spread on water." While this seems unbelievable, the court took pains to note that this finding was based on "a wealth of evidence" including testimony of one Professor Hunter, "a distinguished scientist."

The court discussed *Polemis* extensively and rejected its direct-test view of proximate causation, positing instead that foreseeability is key. Viscount Simonds wrote for the court, "[T]he essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. It is a departure from this sovereign principle if liability is made to depend solely on the damage being the 'direct' or 'natural' consequence of the precedent act. Who knows or can be assumed to know all the processes of nature? But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was 'direct' or 'natural', equally it would be wrong that he should escape liability, however 'indirect' the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done. Thus foreseeability becomes the effective test."

Since it was held unforeseeable that spilling a large quantity of fuel oil could lead to a destructive fire, Caltex won for want of proximate causation.

Another, related test that can be applied is the **harm-within-the-risk test**. Here, proximate cause is a question of germaneness: Is the kind of harm suffered by the plaintiff the kind that made the defendant's action negligent in the first place? The harm-within-the-risk test can

be thought of as a way of focusing and re-articulating the foreseeability test.

The *Polemis* case illustrates how the foreseeability test and the harm-within-the-risk test can reach a different result than the direct test. The fire aboard the *Polemis* was not foreseeable. Likewise, an inferno is not the kind of harm that makes it risky to drop a wooden plank into a cargo hold. Thus, in the *Polemis* case, the plaintiff could show proximate causation under the direct test, but would not have been able to under the foreseeability test or the harm-within-the-risk test. Under the *Polemis* facts, the direct test is more generous for plaintiffs than the foreseeability test or the harm-within-the-risk test.

The *Cash From Above I* example shows that, under different facts, the opposite may be true – the foreseeability test and harm-within-the-risk test can be more generous for plaintiffs than the direct test. It is foreseeable that throwing money into the air will cause a stampede, and the risk of stampede is what makes such boorish behavior risky. Thus the foreseeability test is satisfied. The direct test is not satisfied, however, since the people rushing in represent intervening causes.

As you can see, the foreseeability test and the harm-within-the-risk test are both quite different from the direct test. But, you may be wondering, is there any practical difference between the foreseeability test and harm-within-the-risk test? That is, will the two tests ever produce different results? The answer is yes, although rarely.

Most of the time, the foreseeability test and the harm-within-the-risk test will yield the same results. A worker spills a bucket of soapy water onto a public sidewalk. A pedestrian comes along and slips, suffering a broken wrist. Is it foreseeable that a person would slip on a puddle of soapy water? Yes. Is slipping the kind of harm that makes it dangerous to spill soapy water? Yes.

To illustrate the potential difference between the foreseeability test considered alone and its harm-within-the-risk elaboration, let's take the facts from *Berry v. Sugar Notch Borough*, 191 Pa. 345 (Pa. 1899). On a violently windy day, a trolley was speeding down the street. Suddenly a large chestnut tree fell on the trolley. The plaintiff, a trolley passenger, was injured. The tree – probably already weak with

disease – fell when it did on account of the wind. The trolley, meanwhile, was under the tree at the moment it fell because of the speed the trolley was travelling. (The case does not say exactly how fast the trolley was travelling, except that it was considerably in excess of the modest speed limit of eight miles per hour. And while this rate of speed does not shock the conscience from a 21st Century perspective, we can stipulate that it was negligently fast for a trolley in the late 1800s.) The question is whether the trolley's speeding was a proximate cause of the injury suffered by the plaintiff. Now, it is clear that the speeding did not cause the tree to fall. The tree was going to fall when it did, regardless of what the trolley was doing. On the other hand, there is no question that if the trolley had been going at a slower, safer speed, it would not have been hit by the tree. After all, if the trolley had been going slower, it would not have gotten to the place where the tree fell at the time it fell.

In trying to decide the issue of proximate causation here, we see that we get different results depending on whether we use the foreseeability test or the harm-within-the-risk test.

For the foreseeability test, we ask the foreseeability question: Was the harm foreseeable? In this case, we must ask whether it was foreseeable that a tree would fall on the trolley if it drove too fast. This is a hard question to answer. In some sense it is foreseeable. Certainly it is *imaginable*. Trees do fall in windstorms. So the foreseeability test is arguably passed, but not in way that feels satisfying.

Now let's ask the harm-within question: Is the possibility of getting hit by a falling tree the sort of thing that makes it risky to drive a trolley too fast? Certainly not.

So in the *Sugar Notch* case, the foreseeability test provides a halting yes or is equivocal. The harm-within-the-risk test, however, provides a clear answer of no.

### **Objects of Foreseeability**

The foreseeability concept does a lot to illuminate what is meant with the doctrine of proximate causation. But foreseeability needs some



additional elaboration. In particular, we need to scrutinize exactly what is being focused on in the foreseeability inquiry. Is proximate causation wanting if the plaintiff is unforeseeable? Or what if it is the type, manner, or extent of harm that is unforeseeable?

### **Unforeseeable Plaintiffs**

The general rule is that if the plaintiff is unforeseeable, then proximate causation will not be satisfied. That is, if it was unforeseeable that the plaintiff could have been injured by the accused conduct, then the defendant wins because proximate causation fails.

### **Unforeseeable Type of Harm**

Now, let us assume we have a foreseeable plaintiff – meaning a plaintiff who could be foreseeably harmed by the defendant’s conduct, but let’s suppose that the *type* of harm suffered is a surprise. Does the unforeseeability of the type of harm cause a failure of proximate causation? Probably the best that can be said about this is that there is really no general rule; instead, courts look at this on a case-by-case basis.

*Example: Gun Splinters* – Suppose the defendant negligently leaves an old rifle, loaded and with the safety off, lying in the backyard of her house with a group of three-year-old children. When one kid plays with it, banging it against a rock, the wooden stock comes apart and drives splinters deep into another child’s hand, causing nerve damage. Some harm in such a scenario is foreseeable – in particular, a gunshot wound. But nerve damage caused by splinters? That is not foreseeable. So, is there proximate causation? Courts would differ.

### **Unforeseeable Manner of Harm**

Let’s now assume that we have a foreseeable plaintiff, injured by a foreseeable type of harm, but the manner of the harm is somehow surprising and unforeseeable. The general rule in such cases is that an unforeseeable manner of harm does not preclude recovery on the basis of proximate causation. There is, however, some give in the

doctrine. If the manner of harm is truly extraordinary then the proximate causation limitation might be engaged.

*Example: The Lucky/Unlucky Motorist* – The defendant's negligent driving causes the plaintiff's car to skid off the road. Luckily, the plaintiff is fine. But the car is stuck in the mud. Although the car is undamaged, the plaintiff cannot drive it out and will need to seek help. Walking to a nearby town to get help, the plaintiff is struck by a car driven by a third person. In a suit by the plaintiff against the driver who rode the plaintiff's car off the road, is proximate causation satisfied? The plaintiff was clearly foreseeable, since driving a car negligently exposes nearby motorists and pedestrians to danger. The type of harm – getting struck by a car – is perfectly foreseeable. The manner of harm, however, is unforeseeable. Who would have guessed that the plaintiff would be hurt not by the defendant's car, but by someone else's car? Yet a court could find proximate causation to be established. Since the plaintiff and the type of harm were foreseeable, and since the manner of harm was not truly extraordinary, proximate cause may be satisfied.

### **Unforeseeable Extent of Harm**

What if it is the extent of the harm that is unforeseeable? Suppose someone in the cafeteria, horsing around, throws a small bottled water to a friend. A bystander is struck and killed. Did the thrower proximately cause the bystander's death? The general rule is that an unforeseeable extent of harm will not cause a failure of proximate causation. Alternatively stated, under the eyes of the law, the extent of the harm, no matter how great, is considered to be foreseeable – even if it really is not. This doctrine is called the **eggshell-plaintiff rule**, named for a hypothetical plaintiff who has a skull as thin as an eggshell, for whom a slight rap on the head could cause massive brain damage. This doctrine is quite strictly applied in personal injury cases. With property damage, however, there is some loosening of the rule, so that foreseeability and harm-within-the-risk tests might be applied to provide a proximate-cause limitation on liability – even in cases where the causal connection is tight.

### Superseding Causes

Since the direct test of proximate causation is no longer the prevailing law, intervening causes are generally not a problem. However, a remnant of the direct test remains in the doctrine regarding “superseding causes.” By definition, a **superseding cause** is an intervening cause that breaks the proximate-cause relationship. The term is conclusory – a court does not determine whether or not something is a superseding cause in order to find out whether it breaks the proximate-cause connection. Rather, a court decides whether or not an intervening cause breaks the proximate-cause relationship, and, if it does, then it is dubbed a superseding cause.

The doctrine of superseding cause comes up when, after the defendant has undertaken some negligent conduct, something else comes along that gives the court or jury the sense that the something else is “the” cause of the plaintiff’s injury. Technically, as we discussed with regard to actual causation, there is no such thing as “the” cause. Every event has a virtually infinite number of causes, so no single one can be “the” cause. Nonetheless, the doctrine of superseding cause is invoked when circumstances exist such that it just seems wrong to leave the defendant holding the bag.

A classic example comes from the facts of *Loftus v. Dehail*, 133 Cal. 214 (Cal. 1901). In that case, Isaac and Alice Dehail owned a lot in a busy section of Los Angeles. A house had been standing on the lot, but the Dehails had it demolished, leaving an open cellar. The Dehails left the lot in this condition, making no effort to fence off the open pit. Seven-year-old Bessie May Loftus was injured when she fell in. The court held that the Dehails’ failure to fence in the pit was not “the” proximate cause. Why? It turns out Bessie was pushed. The superseding cause in this instance was Bessie’s four-year-old brother who, “in a fit of temper,” tipped her into the pit. “His act was the proximate cause of the injury,” the court concluded. (It should be noted that while *Loftus* is a good example of the concept, the *Loftus* case itself almost certainly could come out differently today.)

Jurisdictions differ with regard to what kinds of actions can rise to the level of a superseding cause. There are some general observations

that can be made, however. First, negligence is not normally superseded by someone else's negligence. Suppose a careless driver, who has passenger in the car, loses control on a mountain road and skids to a stop such that the car is teetering over the edge of a cliff. A careless trucker, driving too fast, fishtails around the bend and nicks the car, causing it to tip off the cliff. The passenger is injured by the fall. The carelessness the driver of the car will be deemed a proximate cause of the injury, notwithstanding the intervening force of the fishtailing truck.

A particular recurring situation is where injuries are made worse by medical malpractice committed in the course of the treatment of the original injury. The rule on this is quite clear: Medical malpractice is always considered foreseeable. In other words, incompetent medical treatment will not be considered a superseding force. Suppose a careless restaurant worker burned a patron while flambéing cherries tableside for a dessert dish. If the injuries had been treated competently, the patron would have recovered entirely in a couple weeks. Unfortunately the patient received substandard burn care, which led to an infection that necessitated an amputation. The restaurant's carelessness in this case will be considered a proximate cause of the amputation injury. The same applies to ambulance accidents.

On the other hand, criminal interveners are usually superseding causes. If a sociopath breaks into the hospital and puts poison in an IV, the inept flambéer will not be liable for the poisoning. Note that there is an important exception to the rule that criminal intervenors are superseding causes: If an intervening criminal act was foreseeable, or if the defendant otherwise had a duty to protect the plaintiff from a criminal act, then the criminal act will not be considered a superseding cause. If a negligently installed door lock on an apartment in high-crime area allows an assailant to enter a plaintiff's apartment, the criminal act is not considered a superseding cause, and the landlord's negligence will be held a proximate cause of the plaintiff's injury.

### **Case: Ryan v. New York Central Railroad**

The following case provides an additional venue to think about proximate causation issues. It is also a fascinating vehicle for thinking about the interaction of law and industrial progress.

#### *Ryan v. New York Central Railroad*

Court of Appeals of New York

March 1866

35 N.Y. 210. James Ryan v. New York Central Railroad Company. Hunt, J., De Grey, Ch. J.

#### **Judge WARD HUNT:**

On the 15th day of July, 1854, in the city of Syracuse, the defendant, by the careless management, or through the insufficient condition, of one of its engines, set fire to its woodshed, and a large quantity of wood therein. The plaintiff's house, situated at a distance of one hundred and thirty feet from the shed, soon took fire from the heat and sparks, and was entirely consumed, notwithstanding diligent efforts were made to save it. A number of other houses were also burned by the spreading of the fire. The plaintiff brings this action to recover from the railroad company the value of his building thus destroyed. The judge at the Circuit nonsuited the plaintiff, and the General Term of the fifth district affirmed the judgment.

The question may be thus stated: A house in a populous city takes fire, through the negligence of the owner or his servant; the flames extend to and destroy an adjacent building: Is the owner of the first building liable to the second owner for the damage sustained by such burning?

It is a general principle that every person is liable for the consequences of his own acts. He is thus liable in damages for the proximate results of his own acts, but not for remote damages. It is not easy at all times to determine what are proximate and what are remote damages. In *Thomas v. Winchester* (2 Seld., 408) Judge Ruggles defines the damages

for which a party is liable, as those which are the natural or necessary consequences of his acts. Thus, the owner of a loaded gun, who puts it in the hands of a child, by whose indiscretion it is discharged, is liable for the injury sustained by a third person from such discharge (5 Maule & Sel., 198.) The injury is a natural and ordinary result of the folly of placing a loaded gun in the hands of one ignorant of the manner of using it, and incapable of appreciating its effects. The owner of a horse and cart, who leaves them unattended in the street, is liable for an injury done to a person or his property, by the running away of the horse, for the same reason. The injury is the natural result of the negligence. So if an engineer upon a steamboat or locomotive, in passing the house of A., so carelessly manages its machinery that the coals and sparks from its fires fall upon and consume the house of A., the railroad company or the steamboat proprietors are liable to pay the value of the property thus destroyed. Thus far the law is settled and the principle is apparent. If, however, the fire communicates from the house of A. to that of B., and that is destroyed, is the negligent party liable for his loss? And if it spreads thence to the house of C., and thence to the house of D., and thence consecutively through the other houses, until it reaches and consumes the house of Z., is the party liable to pay the damages sustained by these twenty-four sufferers? The counsel for the plaintiff does not distinctly claim this, and I think it would not be seriously insisted that the sufferers could recover in such case. Where, then, is the principle upon which A. recovers and Z. fails?

It has been suggested that an important element exists in the difference between an intentional firing and a negligent firing merely; that when a party designedly fires his own house or his own fallow land, not intending, however, to do any injury to his neighbor, but a damage actually results, that he may be liable for more extended damages than where the fire originated in accident or negligence. It is true that the most of

the cases where the liability was held to exist, were cases of an intentional firing. The case, however, of *Vaughn v. Menlove* (32 Eng. C. L., 613) was that of a spontaneous combustion of a hay-rick. The rick was burned, the owner's buildings were destroyed, and thence the fire spread to the plaintiff's cottage, which was also consumed. The defendant was held liable. Without deciding upon the importance of this distinction, I prefer to place my opinion upon the ground that, in the one case, to wit, the destruction of the building upon which the sparks were thrown by the negligent act of the party sought to be charged, the result was to have been anticipated the moment the fire was communicated to the building; that its destruction was the ordinary and natural result of its being fired. In the second, third or twenty-fourth case, as supposed, the destruction of the building was not a natural and expected result of the first firing. That a building upon which sparks and cinders fall should be destroyed or seriously injured must be expected, but that the fire should spread and other buildings be consumed, is not a necessary or an usual result. That it is possible, and that it is not unfrequent, cannot be denied. The result, however, depends, not upon any necessity of a further communication of the fire, but upon a concurrence of accidental circumstances, such as the degree of the heat, the state of the atmosphere, the condition and materials of the adjoining structures and the direction of the wind. These are accidental and varying circumstances. The party has no control over them, and is not responsible for their effects.

My opinion, therefore, is, that this action cannot be sustained, for the reason that the damages incurred are not the immediate but the remote result of the negligence of the defendants. The immediate result was the destruction of their own wood and sheds; beyond that, it was remote.

Judgment affirmed.

### Thoughts About *Ryan* in Historical Context

The *Ryan* case has never been explicitly overruled by the New York courts, although in 1890 a trial court stated that the authority of *Ryan* had been “considerably shaken by subsequent cases.” *Nary v. New York, O. & W. Ry. Co.*, 55 Hun 612, 9 N.Y.S. 153 (Sup. Ct. 1890). One way of viewing *Ryan* is that it represents a particular historical moment when the industrial revolution was rapidly building wealth for society, and the courts felt an urge to protect firms, such as railroads, that were the engines of progress. Justice Leibson of the Supreme Court of Kentucky wrote in 1984, “It may well be that the 19th century judicial mind perceived of the need for courts to tilt the scales of justice in favor of defendants ‘to keep the liabilities of growing industry within some bounds.’” *Hilen v. Hays*, 673 S.W.2d 713, 718 (Ky.1984), quoting Prosser, *The Law of Torts*.

If courts once regularly bent the law to protect industry, *Palsgraf* may represent a point of transition, when the courts became less solicitous of corporate defendants, who, it might be thought, were capable of fending for themselves.

Some people would say that today’s era is one of renewed judicial deference to corporate interests. Others, of course, have the exact opposite view.



## 9. Existence of an Injury

“No harm, no foul.”

– Chick Hearn, sportscaster for the L.A. Lakers, circa 1960–2000

### A. In General

The existence of an injury is an element of the prima facie case for negligence. Even if a defendant had a duty and breached a duty, there is no negligence claim unless there is some compensable harm. Another way of stating the same idea is that “damages” is an essential element of the prima facie case for negligence.

Not all causes of action require an injury or damages. For instance, the intentional tort of trespass to land has no such requirement. If someone trespasses on your land, you can sue them whether or not they caused you any sort of loss. So, if someone trespasses by walking on your land, and then walks off, having not disturbed even a stalk of grass, you can win a lawsuit against them. In such a lawsuit, you would be entitled to “nominal damages” – meaning damages in name only – commonly a single dollar. So why would anyone pursue such a lawsuit? Except under rare circumstances, there’s no point. Yet, if they want to, they can.

Negligence is not like that. There must be damages in order to form a prima facie case. And the damages must be of a certain kind. Generally speaking, they must be compensatory damages occasioned by physical damage “to person or property,” meaning to a person’s body or a person’s tangible property.

In the context of damages, “compensatory” means damages that compensate someone for an actual loss. It is not possible, for instance, to sue someone for negligence just out of a desire to punish them for being careless. Punitive damages will not suffice to make out a prima facie case for negligence. (Assuming you have compensatory damages, and thus can make out a prima facie case for negligence, you can then argue for punitive damages as a way of

increasing the amount of the award – but that’s a subject for later in this book.)

The requirement that the damages be for physical injury to the person or property excludes many possible claims. Notably, mental anguish, by itself, is not the kind of injury that is sufficient to establish a negligence case. Also, purely economic damages will not suffice. So, if someone’s carelessness causes you to not get a job, then, without more, there is no negligence case. Now, if you lose your job because you are in the hospital, and if you are in the hospital thanks to a car accident for which you can establish all the elements of negligence, then you can recover for both the lost job as well as the hospital bills. But without the physical injury that sends you to the hospital, you have no case in negligence.

The doctrine regarding the existence of a compensable injury in the negligence case is sometimes put under the heading of whether there is a duty of care – that is, the first *prima facie* element of negligence we dealt with in this book. Whether courts look at it as a question of duty or as a separate element of the negligence case, the point is that without proving harm – and harm of the right kind – the plaintiff has not put forth a complete claim.

It should be emphasized that, as a practical matter, almost no one would want to pursue a lawsuit unless there is the prospect of substantial damages. Lawsuits are expensive, after all. The amount of damages, however, is a subject for a later chapter. For now, the question is whether there is an injury sufficient to establish a *prima facie* case.

Bear in mind that most of the time the existence of a compensable injury is a slamdunk in a negligence case. If it’s not, then the only remaining questions are usually factual, not legal. For instance, a plaintiff in an automobile accident case might allege a “soft tissue injury” – one in which no bones were broken. How to prove such an injury can be a thorny problem for plaintiffs’ attorneys in the trial court. But such situations do not present any tricky matters of legal doctrine. This chapter concerns the relatively rare situations in which there is a legal question on the matter of the existence of an injury.

Ahead, we will first look at so-called “loss of a chance” situations, in which there is room to argue whether an injury actually exists. Then we will look briefly at cases of pure economic harm and cases of pure emotional harm.

### **B. Loss-of-a-Chance Situations**

The following case looks at a situation in which the injury inquiry turns into something of a philosophical question – where the injury, if there is one, is a change in the odds.

#### **Case: Herskovits v. Group Health**

The following case looks at an unusual but occasionally recurring situation in which the existence of an injury becomes a philosophically challenging question, one that is not answerable merely by uncovering facts.

#### *Herskovits v. Group Health*

Supreme Court of Washington

May 26, 1983

99 Wn.2d 609. Edith E. Herskovits, as Personal Representative, Appellant, v. Group Health Cooperative of Puget Sound, Respondent. No. 48034-6. En Banc. Dore, J. Rosellini, J., concurs. Pearson, J. (concurring). Williams, C.J., and Stafford and Utter, JJ., concur with Pearson, J. Brachtenbach, J. (dissenting). Dimmick, J., concurs with Brachtenbach, J. Dolliver, J. (dissenting).

#### **Justice FRED H. DORE:**

This appeal raises the issue of whether an estate can maintain an action for professional negligence as a result of failure to timely diagnose lung cancer, where the estate can show probable reduction in statistical chance for survival but cannot show and/or prove that with timely diagnosis and treatment, decedent probably would have lived to normal life expectancy.

Both counsel advised that for the purpose of this appeal we are to *assume* that the respondent Group Health Cooperative

of Puget Sound and its personnel negligently failed to diagnose Herskovits' cancer on his first visit to the hospital and *proximately* caused a 14 percent reduction in his chances of survival. It is undisputed that Herskovits had less than a 50 percent chance of survival at all times herein.~

The complaint alleged that Herskovits came to Group Health Hospital in 1974 with complaints of pain and coughing. In early 1974, chest X-rays revealed infiltrate in the left lung. Rales and coughing were present. In mid-1974, there were chest pains and coughing, which became persistent and chronic by fall of 1974. A December 5, 1974, entry in the medical records confirms the cough problem. Plaintiff contends that Herskovits was treated thereafter only with cough medicine. No further effort or inquiry was made by Group Health concerning his symptoms, other than an occasional chest X-ray. In the early spring of 1975, Mr. and Mrs. Herskovits went south in the hope that the warm weather would help. Upon his return to the Seattle area with no improvement in his health, Herskovits visited Dr. Jonathan Ostrow on a private basis for another medical opinion. Within 3 weeks, Dr. Ostrow's evaluation and direction to Group Health led to the diagnosis of cancer. In July of 1975, Herskovits' lung was removed, but no radiation or chemotherapy treatments were instituted. Herskovits died 20 months later, on March 22, 1977, at the age of 60.~

Other jurisdictions have~ generally [held] that unless the plaintiff is able to show that it was *more likely than not* that the harm was caused by the defendant's negligence, proof of a decreased chance of survival is not enough to take the proximate cause question to the jury. These courts have concluded that the defendant should not be liable where the decedent more than likely would have died anyway.

The ultimate question raised here is whether the relationship between the increased risk of harm and Herskovits' death is sufficient to hold Group Health responsible. Is a 36 percent (from 39 percent to 25 percent) reduction in the decedent's

chance for survival sufficient evidence of causation to allow the jury to consider the possibility that the physician's failure to timely diagnose the illness was the proximate cause of his death? We answer in the affirmative. To decide otherwise would be a blanket release from liability for doctors and hospitals any time there was less than a 50 percent chance of survival, regardless of how flagrant the negligence.~

[O]nce a plaintiff has demonstrated that defendant's acts or omissions~ have increased the risk of harm to another, such evidence furnishes a basis for the fact finder to go further and find that such increased risk was in turn a substantial factor in bringing about the resultant harm. The necessary proximate cause will be established if the jury finds such cause. It is not necessary for a plaintiff to introduce evidence to establish that the negligence resulted in the injury or death, but simply that the negligence increased the risk of injury or death. The step from the increased risk to causation is one for the jury to make.~

Where percentage probabilities and decreased probabilities are submitted into evidence, there is simply no danger of speculation on the part of the jury. More speculation is involved in requiring the medical expert to testify as to what would have happened had the defendant not been negligent.~

We reject Group Health's argument that plaintiffs *must show* that Herskovits "probably" would have had a 51 percent chance of survival if the hospital had not been negligent. We hold that medical testimony of a reduction of chance of survival from 39 percent to 25 percent is sufficient evidence to allow the proximate cause issue to go to the jury.

Causing reduction of the opportunity to recover (loss of chance) by one's negligence, however, does not necessitate a total recovery against the negligent party for all damages caused by the victim's death. Damages should be awarded to the injured party or his family based only on damages caused

directly by premature death, such as lost earnings and additional medical expenses, etc.

We reverse the trial court and reinstate the cause of action.

**Justice JAMES M. DOLLIVER, dissenting:**

The majority states the variations from 39 percent to 25 percent in the decedent's chance for survival are sufficient evidence to "consider the possibility" that the failure of the physician to diagnose the illness in a timely manner was the "proximate cause of his death." This reasoning is flawed. Whether the chances were 25 percent or 39 percent decedent would have survived for 5 years, in both cases, it was more probable than not he would have died. Therefore, I cannot conclude that the missed diagnosis was the proximate cause of death when a timely diagnosis could not have made it more probable the decedent would have survived. "It is legally and logically impossible for it to be probable that a fact exists, and at the same time probable that it does not exist." *Cooper v. Sisters of Charity, Inc.*, 27 Ohio St. 2d 242, 253 (1971).

**Justice VERNON ROBERT PEARSON, concurring:**

I agree with the majority that the trial court erred in granting defendant's motion for summary judgment. I cannot, however, agree with the majority's reasoning in reaching this decision.~ In an effort to achieve a fair result by means of sound analysis, I offer the following approach.~

The issue before the court, quite simply, is whether Dr. Ostrow's testimony~ established that the act complained of (the alleged delay in diagnosis) "probably" or "more likely than not" caused Mr. Herskovits' subsequent disability. In order to make this determination, we must first define the "subsequent disability" suffered by Mr. Herskovits. Therein lies the crux of this case, for it is possible to define the injury or "disability" to Mr. Herskovits in at least two different ways. First, and most obviously, the injury to Mr. Herskovits might be viewed as his death. Alternatively, however, the

injury or disability may be seen as the reduction of Mr. Herskovits' chance of surviving the cancer from which he suffered.

Therefore, although the issue before us is primarily one of causation, resolution of that issue requires us to identify the nature of the injury to the decedent. Our conception of the injury will substantially affect our analysis. If the injury is determined to be the death of Mr. Herskovits, then under the established principles of proximate cause plaintiff has failed to make a prima facie case. Dr. Ostrow was unable to state that probably, or more likely than not, Mr. Herskovits' death was caused by defendant's negligence. On the contrary, it is clear from Dr. Ostrow's testimony that Mr. Herskovits would have probably died from cancer even with the exercise of reasonable care by defendant. Accordingly, if we perceive the death of Mr. Herskovits as the injury in this case, we must affirm the trial court, unless we determine that it is proper to depart substantially from the traditional requirements of establishing proximate cause in this type of case.

If, on the other hand, we view the injury to be the reduction of Mr. Herskovits' chance of survival, our analysis might well be different. Dr. Ostrow testified that the failure to diagnose cancer in December 1974 probably caused a substantial reduction in Mr. Herskovits' chance of survival. The standard of proof is therefore met.

I turn to consider how other jurisdictions have dealt with similar cases.

One approach, and that urged by defendant, is to deny recovery in wrongful death cases unless the plaintiff establishes that decedent would probably have survived but for defendant's negligence. This approach is typified by *Cooper v. Sisters of Charity, Inc.*, 27 Ohio St. 2d 242 (1971). The court in that case affirmed a directed verdict for defendant where the only evidence of causation was that decedent had a chance "maybe some place around 50%" of survival had

defendant not been negligent. The court said: “In an action for wrongful death, where medical malpractice is alleged as the proximate cause of death, and plaintiff’s evidence indicates that a failure to diagnose the injury prevented the patient from an opportunity to be operated on, which failure eliminated any chance of the patient’s survival, the issue of proximate cause can be submitted to a jury only if there is sufficient evidence showing that with proper diagnosis, treatment and surgery the patient probably would have survived.”

On the other hand, plaintiff cites seven cases in support of her position. To summarize, in *Hicks v. United States* the decedent was deprived of a probability of survival; in *Jeanes v. Milner*, 428 F.2d 598 (8th Cir. 1970), the decedent’s chance of survival was reduced from 35 percent to 24 percent; in *O’Brien v. Stover*, 443 F.2d 1013 (8th Cir. 1971), the decedent’s 30 percent chance of survival was reduced by an indeterminate amount; in *McBride v. United States*, 462 F.2d 72 (9th Cir. 1972), the decedent was deprived of the probability of survival; in *Kallenberg v. Beth Israel Hosp.*, 45 A.D.2d 177 (N.Y. App. Div. 1974), the decedent was deprived of a 20 percent to 40 percent chance of survival; in *Hamil v. Bashline* the decedent was deprived of a 75 percent chance of survival; and in *James v. United States*, 483 F. Supp. 581 (N.D. Cal. 1980), the decedent was deprived of an indeterminate chance of survival, no matter how small.

The three cases where the chance of survival was greater than 50 percent (*Hicks*, *McBride*, and *Hamil*) are unexceptional in that they focus on the death of the decedent as the injury, and they require proximate cause to be shown beyond the balance of probabilities. Such a result is consistent with existing principles in this state, and with cases from other jurisdictions cited by defendant.

The remaining four cases allowed recovery despite the plaintiffs’ failure to prove a probability of survival. Three of these cases (*Jeanes*, *O’Brien*, and *James*) differ significantly from



the *Hicks*, *McBride*, and *Hamil* group in that they view the reduction in or loss of the chance of survival, rather than the death itself, as the injury. Under these cases, the defendant is liable, not for all damages arising from the death, but only for damages to the extent of the diminished or lost chance of survival. The fourth of these cases, *Kallenberg*, differs from the other three in that it focuses on the death as the compensable injury. This is clearly a distortion of traditional principles of proximate causation. In effect, *Kallenberg* held that a 40 percent possibility of causation (rather than the 51 percent required by a probability standard) was sufficient to establish liability for the death. Under this loosened standard of proof of causation, the defendant would be liable for all damages resulting from the death for which he was at most 40 percent responsible.

My review of these cases persuades me that the preferable approach to the problem before us is that taken (at least implicitly) in *Jeanes*, *O'Brien*, and *James*. I acknowledge that the principal predicate for these cases is the passage of obiter dictum in *Hicks*, a case which more directly supports the defendant's position. I am nevertheless convinced that these cases reflect a trend to the most rational, least arbitrary, rule by which to regulate cases of this kind.~

These reasons persuade me that the best resolution of the issue before us is to recognize the loss of a less than even chance as an actionable injury. Therefore, I would hold that plaintiff has established a prima facie issue of proximate cause by producing testimony that defendant probably caused a substantial reduction in Mr. Herskovits' chance of survival.~

I would remand to the trial court for proceedings consistent with this opinion.

### **Questions to Ponder About *Herskovits***

**A.** Do you agree with the implication of Justice Dolliver's dissent that Justice Dore's doctrinal prescription is fundamentally illogical?

**B.** According to both Justice Dore and Justice Pearson, the Herskovits estate should be able to prevail against Group Health despite it being the case that Mr. Herskovits would likely have died regardless. But the two justices look at the issue as funneling down to different elements of the prima facie case. For Justice Dore, this is a matter of causation. (Although Justice Dore says “proximate causation,” he is actually referring to a question posed by the but-for test of actual causation.) For Justice Pearson, this is a question of the existence of an injury. Which do you think is the better way to look at it and why?

### **The Thorny Question of Calibrating Damages in *Herskovits* and Some More Questions to Ponder**

Assuming there should be recovery, what should be the measure of damages? Justice Dore’s opinion is ambiguous on this point.

We will discuss the question of the measurement of compensatory damages in general later in the book. But the *Herskovits* case presents a unique question about calibrating damages, so it’s worth pondering for a moment how it might be done.

Perhaps the simplest thing that a court could do is to award the Herskovits estate damages in the same way as would be done for a “normal” wrongful death case. So if Mr. Herskovits had been killed by a negligently dropped anvil, for instance, and if the damages in that case were \$1 million, then the damages in this case would be \$1 million as well. Let’s call this the *unreduced approach*.

Justice Dore’s opinion, however, seems to invite some reduction in the amount of damages, although his opinion is ambiguous on how this would be accomplished.

Let’s consider some alternatives of how damages could be reduced.

One approach – let’s call this the *percentage-difference approach* – would be to start with the number that would be the compensatory damages for death in a “normal” case. Let’s again assume that is \$1 million. Based on expert testimony, Mr. Herskovits’s chance of survival would have been 39% with a timely diagnosis, 25% without. So we could say that since the best-case scenario was 39%, then the baseline

figure for damages should be 39% of \$1 million, or \$390,000. Given the negligent delay in diagnosis, the chance of survival dropped to 25%, which is equivalent to \$250,000. The difference between the baseline case and the negligence case is \$140,000. (Notice that this is the same as subtracting 25% from 39%, which gives 14%, and then multiplying this by \$1 million.) So, under this approach, the measure of damages would be \$140,000.

Another approach would be to ask the hypothetical question of how much would someone be willing to pay for the increased chance of survival. In this approach, we don't worry at all about the \$1 million baseline figure. Let's call this the *what-would-you-pay approach*. We know that the negligence scenario left Mr. Herskovits with a 25% chance of survival. Had he been diagnosed earlier, he would have had a 39% of survival. From Mr. Herskovits's perspective, if he could somehow magically pay for the removal of the negligence, his chances of surviving would increase 56%. (That is, 39% is 56% higher than 25%.) So the question is, how much would a person pay for a 56% increased chance of surviving cancer?

Another approach – we can call this the *unguided approach* – would be to just tell the jury that they can reduce damages as they find appropriate.

The trial court could dictate an approach in the form of jury instructions. Or, in the absence of specific instructions, the attorneys could argue these approaches to the jury.

Some questions to ponder on these approaches:

- A.** Should damages in cases such as *Herskovits* be susceptible to reduction?
- B.** Which of the approaches outlined above seems, as an abstract matter, to be more fair?
- C.** Can you think of any other ways to reduce damages?
- D.** If you were the court, would you dictate one of these measures of damages, or would you leave the matter to the attorneys' arguments before the jury and the jury's deliberations?

**E.** If you were the plaintiff's attorney, and the jury instructions said nothing about the question of reducing damages, what would you argue to the jury about damages?

**F.** Assuming the judge instructed the jury that damages must be reduced, but didn't specify how, what would you argue to the jury?

**G.** If you were the defendant's attorney, and the jury instructions said nothing about the question of reducing damages, what would you argue to the jury about damages?

Now here's a more philosophical question:

**H.** If it is sensible to reduce damages in a *Herskovits*-type situation, then why not in "normal" negligence cases? Remember that the dilemma of *Herskovits* is that if the injury is *death*, then the estate cannot satisfy the but-for test by a preponderance of the evidence in order to prove actual causation, since the death probably would have happened even if the breach of the duty of care (the "negligence") had not happened. If it has been shown that it was slightly more likely than not that an earlier diagnosis would have saved Mr. Herskovits (say 50.0000001%), then the defendant would be liable for the full measure of damages for his death. So, why not reduce damages in that situation as well. Couldn't the case be made that anytime the jury is not 100% sure that an injury was caused, then damages should be reduced by the percentage by which they jury is unsure? Why not do this for every element of the prima facie case? In fact, why not throw out the preponderance of the evidence standard altogether, and just have the jury assign a percentage by which they are sure of each element, and then adjust damages accordingly?

### **C. Pure Economic Loss**

In general, pure economic loss – that is, unaccompanied by any physical damage to the plaintiff's person or property – will not suffice as an injury to create a prima facie case for negligence.

*Example: A Tale of Two Factories* – A couple of billionaire balloon enthusiasts negligently allow their balloon to become entangled in electric power lines, causing a massive power outage to two factories. One factory makes

popsicles. The other factory makes lugnuts. Both factories lose money because of the loss of productivity during the blackout, but only the popsicle factory suffers physical damage – namely the melting of its inventory of popsicles. In this case, the popsicle factory can recover, but the lugnut factory cannot. There are also workers, at both factories, who lose out on wages while the factories are closed during the blackout. The losses suffered by these workers are purely economic, and so they cannot recover.

Despite the general rule, which is very robust, there are occasional situations in which the courts have allowed recovery for pure economic loss.

One somewhat ad hoc approach that has been used in a few jurisdictions to allow negligence plaintiffs to recover for pure economic loss is an idea of **particular foreseeability**. In *People Express Airlines, Inc. v. Consolidated Rail Corp.*, 495 A.2d 107 (N.J. 1985), the defendant railroad negligently caused a fire that forced the evacuation of an airport terminal, resulting in a slew of cancelled flights. The court allowed the airline to recover from the railroad for the financial loss suffered on account of the cancelled flights because the airline, as a plaintiff, was “particularly foreseeable.” The same court rejected claims from everyone else – including travelers who lost business deals. Even though such losses were foreseeable, they were not, in the view of the court, *particularly foreseeable*.

Another situation in which courts have allowed negligence claims for pure economic loss is against **accountants**. An accountancy’s client can sue for a negligent audit, for example, even though the only losses are economic. Moreover, third parties who relied on information provided by accountants are sometimes able to recover under a negligence theory. This type of suit can arise when a non-client makes an investment decision based on the client’s negligently audited books. The extent to which such non-clients can recover for pure economic loss from differs by jurisdiction and circumstance.

Finally, **attorneys** can be sued for negligence – professional malpractice, that is – when clients suffer purely economic losses. In

addition, third parties can also sometimes recover from an attorney, despite the lack of a client relationship. A common situation for such recovery is in the context of a negligently handled will. If it is clear that a person was intended as a beneficiary, and would, but for the attorney's negligence, have received a bequest, the intended beneficiary is often able to recover from the attorney. Without allowing non-clients a cause of action in situations like this, attorneys drafting wills could effectively have total immunity from malpractice, since it is virtually always the case that the client will be deceased when the malpractice is uncovered. Outside of the will context, it is rare that non-clients can recover against attorneys. You may learn more about attorney liability for professional malpractice in a separate course called Professional Responsibility.

#### **D. Mental Anguish and Emotional Distress**

The general rule is that emotional or mental distress will not suffice as an injury for purposes of pleading a prima facie case for negligence. There are myriad exceptions, however. Much of the development of doctrine of allowing claims for pure emotional distress involve parents seeking compensation for emotional distress related to the death or grievous bodily injury of a child. Pregnancy and childbirth are recurrent contexts as well. Much of the impetus for the development of doctrine in this area likely has to do with the fact that the death of a child – for reasons to be explored later – will ordinarily give rise to little or nothing in damages under the common law of torts.

At the outset, it is important to keep in mind that mental suffering is generally recoverable if it is occasioned by a physical injury. The loss of a limb, for instance, may cause compensable emotional harm. That much is clear. Our question here is to what extent can a mental/emotional harm itself provide the injury that is required for a prima facie case for negligence.

Historically, the courts loosened the requirement of a physical injury in cases of severe emotional distress to allow lawsuits where, despite the lack of a physical injury, there was at least a physical *impact* associated with the event that gave rise to the emotional distress.

Requiring an impact, however, led to results such as the one in *Mitchell v. Rochester Railway Co.*, 45 N.E 354 (N.Y. 1896), where a woman was denied recovery – for lack of an impact – where a team of runaway horses almost trampled her, though never touched her, and the stress of the event resulted in her having a miscarriage.

Later courts became willing to allow a claim for emotional distress where accompanied by some physical manifestation of the stress. And some courts broadened the impact exception to embrace situations where there was some risk of impact to the plaintiff, or where the plaintiff was within the “zone of danger” of an incident. Either of these rules, of course, would have aided the plaintiff in *Mitchell*.

Today, many cases support what can be thought of as an independent tort of **negligent infliction of emotional distress** – sometimes abbreviated “NIED.” Particularly influential in this regard was the case of *Dillon v. Legg*, 68 Cal. 2d 728 (Cal. 1968), which allowed recovery to a person not within the zone of danger. In that case, Margery M. Dillon witnessed her daughter Erin be fatally struck by an automobile negligently driven by the defendant. Erin, who was five, had started out ahead of her mother, legally crossing a road, when hit. The *Dillon* court set out three factors to be considered:

“(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.”

Under *Dillon*, these were only factors to be considered – that is, they were guidelines for assessing whether the plaintiff’s emotional trauma would be considered legally “foreseeable.” Many states followed

California's lead, recognizing some form of NIED in the mold of *Dillon*, often with various tweaks.

Meanwhile, two decades later, in the case of *Thing v. La Chusa*, 48 Cal.3d 644 (Cal. 1989), the California Supreme Court narrowed the scope of the NIED action it had pioneered by recasting its own *Dillon* guidelines into hard rules:

“[A] plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress – a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.”

Here are the facts of *Thing v. La Chusa*, as recited by the court:

“On December 8, 1980, John Thing, a minor, was injured when struck by an automobile operated by defendant James V. La Chusa. His mother, plaintiff Maria Thing, was nearby, but neither saw nor heard the accident. She became aware of the injury to her son when told by a daughter that John had been struck by a car. She rushed to the scene where she saw her bloody and unconscious child, who she believed was dead, lying in the roadway. Maria sued defendants, alleging that she suffered great emotional disturbance, shock, and injury to her nervous system as a result of these events, and that the injury to John and emotional distress she suffered were proximately caused by defendants' negligence.”



In *Thing*, the California Supreme Court denied recovery on the basis of the test it articulated:

“The undisputed facts establish that plaintiff was not present at the scene of the accident in which her son was injured. She did not observe defendant’s conduct and was not aware that her son was being injured. She could not, therefore, establish a right to recover for the emotional distress she suffered when she subsequently learned of the accident and observed its consequences. The order granting summary judgment was proper.”

Today, there is great variation across jurisdictions as to whether tort law allows any claim at all for pure emotional harm or for NIED. Even in jurisdictions where claims are allowed, the differences among courts are considerable.

# 10. Affirmative Defenses to Negligence

“Offense sells tickets, but defense wins championships.”  
– attributed to Paul William “Bear” Bryant

## A. In General

There are three ways for a defendant to win a negligence case. First, and easiest, the defendant can just stand by as the plaintiff fails to put on evidence to prove each of the prima facie elements. If that happens at trial, the defendant can successfully move for a directed verdict – thereby winning the case without putting on a single witness or, theoretically, even without asking a single question of any of the plaintiff’s witnesses. Assuming the plaintiff puts on a prima facie case, the second way for a defendant to win is to make out a rebuttal defense. A rebuttal defense is established by offering evidence to rebut the plaintiff’s evidence for one or more of the prima facie elements established by the plaintiff. But the defendant need not rebut a prima facie case: The third and final way for a defendant to win is to prove an affirmative defense.

Even if a plaintiff makes out a prima facie case, and even if the defendant has no rebuttal evidence whatsoever, the defendant can still obtain victory by proving an affirmative defense. Sometimes an affirmative defense will effect a complete victory for the defendant. Other times, an affirmative defense will effect a partial victory, shielding the defendant from some portion of the damages.

When it comes to affirmative defenses, the burden of proof is on the defendant. That is why it is called an “affirmative” defense – proving it up is the affirmative obligation of the defendant. In comparison, the first two ways for defendants to win – pointing out the failure of proof on the prima facie case or rebutting an element – can be thought of as “negative” defenses. There, the defense is premised on what the plaintiff lacks. With an affirmative defense, the defendant

has the burden of putting all the needed evidence in front of the factfinder.

The standard of proof for an affirmative defense is the same as for the plaintiff's prima facie case – preponderance of the evidence. And, like a cause of action, an affirmative defense may be broken down into elements. Where an affirmative defense is structured as a series of elements, the defendant will have to prove each one of the elements by a preponderance of the evidence.

Keep in mind that an affirmative defense trumps the plaintiff's prima facie case. Even if a plaintiff went far beyond its burden of proving every element by a mere preponderance of the evidence – suppose, for instance that a plaintiff proved every element to a 100% certainty – it only takes an affirmative defense with each element proved by a mere preponderance of the evidence to block the plaintiff's recovery.

There are three main affirmative defenses that are particular for negligence claims: contributory negligence, comparative negligence, and assumption of the risk. They are the subject of this chapter.

The first two affirmative defenses – contributory negligence and comparative negligence – work by pointing the finger back at the plaintiff and blaming the plaintiff's injury on the plaintiff's own negligence. Contributory negligence and comparative negligence are alternatives to one another. Most jurisdictions have the defense of comparative negligence. The few that do not have the contributory negligence defense.

The defense of assumption of the risk is just what it sounds like: The plaintiff agreed to shoulder the risk that something would go wrong, so when it does, the plaintiff cannot come to the defendant for compensation.

### **B. Plaintiff's Negligence**

If the plaintiff's own negligence worked to bring about the harm the plaintiff complains about, then the defendant can use the plaintiff's negligence as a defense. Depending on the jurisdiction, the defense will either be of the contributory-negligence type or the comparative-

negligence type. Within either type, there are a myriad of possible differences between jurisdictions.

All of tort law is subject to differences from one jurisdiction to another. But there is probably no more important and fundamental set of differences in common-law doctrine than those having to do with the affirmative defense premised on the plaintiff's negligence. If you were a personal-injury attorney or an insurance-defense attorney moving to a new state, the first thing you would want to learn is how the law regards the plaintiff's negligence as a defense.

The first and most important distinction is whether the jurisdiction recognizes the comparative negligence defense or the contributory negligence defense. Contributory negligence is the older doctrine, and it is more defendant friendly. Comparative negligence – also called “comparative fault” – is the newer doctrine, and it is more plaintiff friendly. Under contributory negligence, if the plaintiff was a little bit negligent, then the plaintiff loses. Under comparative negligence, the plaintiff's negligence is not necessarily a bar to recovery, but it will at least serve to reduce the total amount of the award.

### **Contributory Negligence**

The doctrine of contributory negligence holds that if the defendant can prove that the plaintiff's own negligence contributed to the injury that the plaintiff complains of, then the defendant is not liable. To be more exact, proving a case for contributory negligence involves proving that the plaintiff's conduct fell below the standard of care a person is expected adhere to for one's own good, and that such conduct was an actual and proximate cause of the injury that the plaintiff is suing on.

To break the defense of contributory negligence into elements, we can start with the elements of negligence. To review, those are: owing a duty, breaching the duty, actual causation, proximate causation, and the existence of an injury. For purposes of contributory negligence, we can throw a couple of those elements out. It generally goes without saying that a person owes a duty to one's self, so there is no need to have the existence of duty as an element. Similarly, there is no point in discussing the existence of an injury, since the occasion

for asserting the defense will never come up unless there is an injury. So we can break contributory negligence down into three elements: (1) breach of the duty of care, (2) actual causation, and (3) proximate causation. In practice, issues of contributory negligence generally revolve around the breach element.

Contributory negligence was once available as a defense everywhere. Now it exists only in four states – Maryland, Virginia, North Carolina, and Alabama. Contributory negligence also persists in the District of Columbia. Curiously, you'll note, all of those jurisdictions are contiguous except Alabama. And interestingly enough, the state of Tennessee – which connects Alabama to Virginia and North Carolina – is the most recent convert from contributory negligence to comparative fault. Tennessee broke the contiguous swath when it switched in 1992.

The reason for the decline in contributory negligence is that it is perceived as being too harsh on plaintiffs. With the defense of contributory negligence, a plaintiff who is found to have been even slightly negligent will be completely barred from any recovery, even against a defendant who was colossally negligent. Imagine that it's late at night on a stretch of two-lane highway. The driver of a car momentarily takes his eyes off the road while adjusting his car's air conditioning vents, and at that moment is hit head-on by an overloaded truck with no lights whose driver was simultaneously under the heavy influence of alcohol, cocaine, and heroin, and – at the moment of the collision – was attempting to learn juggling by watching an instructional video on a laptop set on the dashboard and practicing the moves with a set of steak knives. The collision causes the driver of the car to be grievously injured and permanently disabled, while the truck driver walks away without a scratch. What is the result in a contributory negligence jurisdiction? No recovery for the plaintiff.

#### **Case: Coleman v. Soccer Association**

The following case shows contributory negligence in action and fleshes out the debate over its continued existence.

*Coleman v. Soccer Association of Columbia*

Court of Appeals of Maryland

July 9, 2013

432 Md. 679. James COLEMAN v. SOCCER ASSOCIATION OF COLUMBIA. No. 9, Sept. Term, 2012. ELDRIDGE, J. (Retired, Specially Assigned); GREENE, J., wrote a concurrence joined by BATTAGLIA, McDONALD and RAKER (Retired, Specially Assigned), JJ.; HARRELL, J., dissented.

**Judge JOHN C. ELDRIDGE:**

Thirty years ago, in *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 444 (1983), this Court issued a writ of certiorari to decide “whether the common law doctrine of contributory negligence should be judicially abrogated in Maryland and the doctrine of comparative negligence adopted in its place as the rule governing trial of negligence actions in this State.” In a comprehensive opinion by then Chief Judge Robert C. Murphy, the Court in *Harrison*, declined to abandon the doctrine of contributory negligence in favor of comparative negligence, pointing out that such change “involves fundamental and basic public policy considerations properly to be addressed by the legislature.”

The petitioner in the case at bar presents the same issue that was presented in *Harrison*, namely whether this Court should change the common law and abrogate the defense of contributory negligence in certain types of tort actions. After reviewing the issue again, we shall arrive at the same conclusion that the Court reached in *Harrison*.

The petitioner and plaintiff below, James Kyle Coleman, was an accomplished soccer player who had volunteered to assist in coaching a team of young soccer players in a program of the Soccer Association of Columbia, in Howard County, Maryland. On August 19, 2008, Coleman, at the time 20 years old, was assisting the coach during the practice of a team of

young soccer players on the field of the Lime Kiln Middle School. While the Soccer Association of Columbia had fields of its own, it did not have enough to accommodate all of the program's young soccer players; the Association was required to use school fields for practices. At some point during the practice, Coleman kicked a soccer ball into a soccer goal. As he passed under the goal's metal top rail, or crossbar, to retrieve the ball, he jumped up and grabbed the crossbar. The soccer goal was not anchored to the ground, and, as he held on to the upper crossbar, Coleman fell backwards, drawing the weight of the crossbar onto his face. He suffered multiple severe facial fractures which required surgery and the placing of three titanium plates in his face. Coleman instituted the present action by filing a complaint, in the Circuit Court for Howard County, alleging that he was injured by the defendants' negligence. In his first amended complaint, Coleman named four defendants: the Soccer Association of Columbia, the Columbia Soccer Club, the Howard County Government, and the Howard County Board of Education. On August 16, 2010, Coleman filed a notice of voluntary dismissal as to the Howard County Government. Subsequently, on October 5, 2011, the parties stipulated to dismissal with prejudice of the Columbia Soccer Club. On October 24, 2011, the Howard County Board of Education was also dismissed with prejudice from the suit, leaving the Soccer Association of Columbia as the sole remaining defendant during the trial.<sup>27</sup> The defendant and respondent, the Soccer Association of Columbia, asserted the defense of contributory negligence.

At the ensuing jury trial, the soccer coach who had invited Coleman to help coach the soccer players testified that he had not inspected or anchored the goal which fell on Coleman. The coach also testified that the goal was not owned or provided by the Soccer Association, and he did not believe that it was his responsibility to anchor the goal. During the trial, the parties disputed whether the goal was located in an

area under the supervision and control of the Soccer Association and whether the Soccer Association was required to inspect and anchor the goal. The Soccer Association presented testimony tending to show that, because the goal was not owned by the Soccer Association, the Soccer Association owed no duty to Coleman. The Soccer Association also presented testimony that the condition of the goal was open and obvious to all persons. The Association maintained that the accident was caused solely by Coleman's negligence.

Testimony was provided by Coleman to the effect that players commonly hang from soccer goals and that his actions should have been anticipated and expected by the Soccer Association. Coleman also provided testimony that anchoring goals is a standard safety practice in youth soccer.

At the close of evidence, Coleman's attorney proffered a jury instruction on comparative negligence.

“The proffered jury instruction read as follows:

“A. Comparative Negligence—Liability

“If you find that more than one party has established his/her burden of proof as to negligence, as defined by the court, you must then compare the negligence of those parties. The total amount of negligence is 100%. The figure that you arrive at should reflect the total percentage of negligence attributed to each party with respect to the happening of the accident. A comparison of negligence is made only if the negligence of more than one party proximately caused the accident.”<sup>7</sup>

The judge declined to give Coleman's proffered comparative negligence instruction and, instead, instructed the jury on contributory negligence.

The jury was given a verdict sheet posing several questions. The first question was: “Do you find that the Soccer



Association of Columbia was negligent?” The jury answered “yes” to this question. The jury also answered “yes” to the question: “Do you find that the Soccer Association of Columbia’s negligence caused the Plaintiff’s injuries?” Finally, the jury answered “yes” to the question: “Do you find that the Plaintiff was negligent and that his negligence contributed to his claimed injuries?”

In short, the jury concluded that the Soccer Association of Columbia was negligent and that the Soccer Association’s negligence caused Coleman’s injuries. The jury also found that Coleman was negligent, and that his negligence contributed to his own injuries. Because of the contributory negligence finding, Coleman was barred from any recovery. The trial court denied Coleman’s motion for judgment notwithstanding the verdict and subsequently entered judgment in favor of the Soccer Association of Columbia.~

The General Assembly’s repeated failure to pass legislation abrogating the defense of contributory negligence is very strong evidence that the legislative policy in Maryland is to retain the principle of contributory negligence.~ For this Court to change the common law and abrogate the contributory negligence defense in negligence actions, in the face of the General Assembly’s repeated refusal to do so, would be totally inconsistent with the Court’s long-standing jurisprudence.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT JAMES COLEMAN.

**Judge GLENN T. HARRELL, JR., dissenting:**

Paleontologists and geologists inform us that Earth’s Cretaceous period (including in what is present day Maryland) ended approximately 65 million years ago with an asteroid striking Earth (the Cretaceous–Paleogene Extinction Event), wiping-out, in a relatively short period of geologic time, most plant and animal species, including dinosaurs. As to the last

premise, they are wrong. A dinosaur roams yet the landscape of Maryland (and Virginia, Alabama, North Carolina and the District of Columbia), feeding on the claims of persons injured by the negligence of another, but who contributed proximately in some way to the occasion of his or her injuries, however slight their culpability. The name of that dinosaur is the doctrine of contributory negligence. With the force of a modern asteroid strike, this Court should render, in the present case, this dinosaur extinct. It chooses not to do so. Accordingly, I dissent.

My dissent does not take the form of a tit-for-tat trading of thrusts and parries with the Majority opinion. Rather, I write for a future majority of this Court, which, I have no doubt, will relegate the fossilized doctrine of contributory negligence to a judicial tar pit at some point.~

Under the doctrine of contributory negligence, a plaintiff who fails to exercise ordinary care for his or her own safety, and thus contributes proximately to his or her injury, “is barred from all recovery, regardless of the quantum of a defendant’s primary negligence.” *Harrison v. Montgomery Cnty. Bd. of Ed.*, 295 Md. 442, 451 (1983). Contributory negligence is the “neglect of duty imposed upon all men to observe ordinary care for their own safety,” *Potts v. Armour & Co.*, 183 Md. 483, 490 (1944), and refers not to the breach of a duty owed to another, but rather to the failure of an individual to exercise that degree of care necessary to protect him or her self. An “all-or-nothing” doctrine, contributory negligence operates in application as a total bar to recovery by an injured plaintiff.

The doctrine is of judicial “Big Bang” origin, credited generally to the 1809 English case of *Butterfield v. Forrester* (1809) 103 Eng. Rep. 926 (K.B.). In *Butterfield*, the court considered whether a plaintiff, injured while “violently” riding his horse on a roadway, by a pole negligently placed in the roadway, could recover damages. Denying recovery, Lord Ellenborough penned the first recognized incantation of

contributory negligence, declaring, “One person being in fault will not dispense with another’s using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.”~

Whatever the initial justifications attributed to its birth, contributory negligence has been a mainstay of Maryland law since its adoption in *Irvin v. Sprigg*, 6 Gill 200 (1847). Since that time, Maryland courts applied the doctrine of contributory negligence to bar recovery in negligence actions by at-fault plaintiffs. Exceptions evolved, however, to allow recovery in specific instances. For example, the defense of contributory negligence is not available against claimants under five years of age, in strict liability actions, and in actions based on intentional conduct. Additionally, the doctrine of last clear chance developed, to allow a plaintiff to recover, despite his or her contributory negligence, if he or she establishes “something new or sequential, which affords the defendant a fresh opportunity (of which he fails to avail himself) to avert the consequences of his original negligence.”

The all-or-nothing consequences of the application of contributory negligence have long been criticized nationally by scholars and commentators. See, e.g., *Hilen v. Hays*, 673 S.W.2d 713, 717 (Ky.1984) (“A list of the critics of contributory negligence as a complete bar to a plaintiff’s recovery reads like a tort hall of fame. The list includes, among others, Campbell, Fleming, Green, Harper and James, Dreton, Leflar, Malone, Pound and Prosser.”); Prosser, *Comparative Negligence*, supra, at 469 (“Criticism of the denial of recovery was not slow in coming, and it has been with us for more than a century.”); 2 Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts*, § 218 at 763 (2d ed. 2011) (“The traditional contributory negligence rule was extreme not merely in results but in principle. No satisfactory reasoning has ever explained the rule.”).~

Respondent and its Amici count as a strength of the doctrine of contributory negligence its inflexibility in refusing to compensate any, even marginally, at-fault plaintiff. They argue that, in so doing, contributory negligence encourages personal responsibility by foreclosing the possibility of recovery for potential, negligent plaintiffs, and thus cannot possibly be outmoded. To the contrary, that the doctrine of contributory negligence grants one party a windfall at the expense of the other is, as courts and commentators alike have noted, unfair manifestly as a matter of policy. See, e.g., *Katz v. State*, 540 P.2d 1037, 1048 (Alaska 1975) (“The central reason for adopting a comparative negligence system lies in the inherent injustice of the contributory negligence rule.”); *Hoffman v. Jones*, 280 So.2d 431, 436 (Fla.1973) (“Whatever may have been the historical justification for [the rule of contributory negligence], today it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss.”); Lande & MacAlister, *supra*, at 4 (“The ‘all or nothing’ system [of contributory negligence], disconnected from a party’s degree of fault, is unfair and counterintuitive.”); Prosser, *Comparative Negligence*, *supra*, at 469 (characterizing contributory negligence as “outrageous” and an “obvious injustice” that “[n]o one has ever succeeded in justifying ..., and no one ever will”). Moreover, if contributory negligence encourages would-be plaintiffs to exercise caution with respect to themselves, then so too does the doctrine of comparative fault by reducing the plaintiff’s recoverable damages. Unlike contributory negligence, however, comparative fault deters also negligence on the part of the defendant by holding him or her responsible for the damages that he or she inflicted on the plaintiff. See Lande & MacAlister, *supra*, at 5–6 (noting that, although contributory negligence systems “burden[ ] only plaintiffs with the obligation to take precautions,” comparative negligence provides a “mixture of responsibility” that is “the best way to

prevent most accidents”); Prosser, *Comparative Negligence*, supra, at 468 (“[T]he assumption that the speeding motorist is, or should be meditating on the possible failure of a lawsuit for his possible injuries lacks all reality, and it is quite as reasonable to say that the rule promotes accidents by encouraging the negligent defendant.”). Thus, Respondent’s contention that contributory negligence encourages personal responsibility, and is therefore preferable to comparative negligence, is unpersuasive.~

As noted above, the widespread acceptance of contributory negligence as a complete defense is attributed principally to (1) the desire to protect the nations’ newly-developing industry from liability and plaintiff-minded juries,~ and (2) “the concept prevalent at the time that a plaintiff’s irresponsibility in failing to use due care for his own safety erased whatever fault could be laid at defendant’s feet for contributing to the injury.” *Scott v. Rizzo*, 96 N.M. 682 (1981). Neither of these justifications, however, carry weight in present-day Maryland. In today’s society, there has been no need demonstrated to protect any “newly-developing” industry at the expense of injured litigants. Industry generally in this nation is no longer fledgling or so prone to withering at the prospect of liability. See, e.g., *Alvis v. Ribar*, 85 Ill.2d 1, 52 Ill.Dec. 23, (1981) (“There is no longer any justification for providing the protective barrier of the contributory negligence rule for industries of the nation at the expense of deserving litigants.”); *Frummer v. Hilton Hotels Int’l, Inc.*, 60 Misc.2d 840, (N.Y.Sup.1969) (“Courts now do not feel any need to act as a protector of our nation’s infant industries, for their infancy has long since passed.... In an age where a defendant may through various means, such as insurance, readily protect himself from a ruinous judgment, the solicitude of nineteenth century courts for defendants is certainly out of place....”). Moreover, tilting the scales to favor industry is inconsistent with modern conceptions of justice, which focus instead on proportional responsibility and

fundamental fairness. See *Hilen v. Hays*, 673 S.W.2d 713, 718 (Ky.1984) (“It may well be that the 19th century judicial mind perceived of the need for courts to tilt the scales of justice in favor of defendants to keep the liabilities of growing industry within some bounds. But assuming such a rule was ever viable, certainly it no longer comports to present day morality and concepts of fundamental fairness.”) Rather, the array of Amici lined up in support of the continuation of contributory negligence is populated by the entrenched and established business interests who seek to maintain an economic advantage.

Our statements in *Harrison* did not circumscribe, however, our authority to alter judicially-created common law rules in the face of repeated legislative inaction on the subject. Although we have declined frequently to effect changes in decisional doctrine upon observing repeated legislative inaction, see, e.g., *Potomac Valley Orthopaedic Assocs. v. Md. State Bd. of Physicians*, 417 Md. 622, 639–40 (2011) (“Our conclusion is confirmed by the fact that, in 2007, 2008, 2009, and 2010, the General Assembly ‘rejected efforts to achieve legislatively that which we [are being] asked to grant judicially.’”); *Moore v. State*, 388 Md. 623, 641 (2005) (“Legislative inaction is very significant where bills have repeatedly been introduced in the General Assembly to accomplish a particular result, and where the General Assembly has persistently refused to enact such bills.”), we determined, on multiple occasions, that legislative inaction may not be a sufficient premise from which to draw a positive legislative intent in certain situations. See, e.g., *City of Balt. Dev. Corp. v. Carmel Realty Assocs.*, 395 Md. 299, 329 (2006) (cautioning against drawing a positive inference from legislative inaction because “the General Assembly may well have ... decided not to enact the amendment for a myriad of other reasons”); *Goldstein v. State*, 339 Md. 563, 570 (1995) (“[T]he mere fact that the General Assembly has declined to adopt a particular proposal does not preclude this Court from

incorporating the substance of that proposal into the common law....”); *Automobile Trade Assoc. of Md., Inc. v. Ins. Comm’r*, 292 Md. 15, 24 (1981) (“[T]he fact that a bill on a specific subject fails of passage in the General Assembly is a rather weak reed upon which to lean in ascertaining legislative intent.”); *Cicoria v. State*, 89 Md.App. 403, 428 n. 9 (1991) (noting that “[t]rying to determine what the legislature intended (or did not intend) by rejecting those bills is no easy assignment” and declining to draw either a positive or negative inference from the rejected bills).

Although the *Harrison* court opted to defer to the Legislature, the opinion in that case gives no indication that such deference was unlimited. No acknowledgment was advanced that we lack the authority to alter a long-standing common law rule where the Legislature declines to enact proposed legislation.~ Further, we did not characterize the inaction of the General Assembly as a conclusive, definitive declaration of public policy – to the contrary, we specifically stated that legislative inaction is “not conclusive” and merely “indicative of an intention to retain the doctrine of contributory negligence.”~

Declining to perpetuate unmindful deference to the Legislature on such a topic would not be without precedent. For example, as noted above, this Court stated repeatedly its intention to defer to legislative action on the topic of interspousal immunity before acting. Decades later, after noting the Legislature's continued stasis on the subject, we rescinded our deference and modernized an outdated common law rule.~

C.J. Bell has authorized me to state he joins in this opinion.

### **Questions to Ponder About *Coleman v. Soccer Association***

**A.** What should be made of the Maryland legislature not providing for a system of comparative negligence by statute? Are you persuaded that this is a good reason for the court not to act? Should drawing an inference from legislative inaction depend on particulars – such as

how often bills were introduced, whether committee hearings were ever held, or whether there was a floor vote?

**B.** If the Maryland courts adopted a comparative negligence rule, the Maryland legislature could overrule it with a simple statute. Is this a persuasive reason to disregard the legislature's prior inaction in deciding whether the Maryland courts should overrule themselves?

**C.** From the perspective of people favoring comparative negligence, do you think this case was a good vehicle for trying overturn Maryland law?

**D.** What qualities, in general, would make a case a good vehicle for attempting to effect a change in the law?

### **Last Clear Chance Doctrine**

Contributory negligence can be harsh. But the bare doctrine of contributory negligence doctrine is not the whole story. Perhaps because of its harshness, various subversions have evolved that ameliorate contributory negligence in favor of plaintiffs in certain circumstances. The most important of these, mentioned in *Coleman*, is the doctrine of last clear chance.

The idea of last clear chance is that if, despite the plaintiff's negligence, the defendant has a last clear chance to avoid the injury, then the defendant must seize that chance to prevent the harm. If the defendant doesn't, the defendant will be liable, the plaintiff's negligence notwithstanding.

Last clear chance applies when there is a particular temporal sequence to the plaintiff's and defendant's negligence: First, the plaintiff does something negligent, creating some perilous situation. Next, the defendant has a chance to avoid injury to the plaintiff by being careful. Then, the defendant omits to take the precaution, and injury results. This chronological order is essential – without it, last clear chance doctrine will not apply.

A good example of last clear chance is the case credited with introducing it: *Davies v. Mann*, 152 Eng. Rep. 588 (Court of Exchequer 1842). In *Davies*, a donkey was left in a highway fettered by its fore feet. This means of tying up the animal – called “an illegal



act” in the opinion – prevented the animal from being able to get out of the way of traffic. The defendant, driving a horse-drawn wagon along the highway at a high rate of speed, ran over and killed the donkey. The court held:

“[A]lthough the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.”

Keep in mind that last clear chance doctrine is relevant only in a jurisdiction following contributory negligence. In a comparative fault jurisdiction, the more blameworthy kind of negligence involved when a tortfeasor disregards an opportunity to avoid harm is swept up into the general comparative fault rubric of apportioning blame.

### **Other Subversions of Contributory Negligence**

In addition to last clear chance doctrine, there are other subversions to contributory negligence that are favorable to plaintiffs. Some of these, recognized in Maryland, are discussed in Judge Harrell’s dissent in *Coleman*. Common subversion are that contributory negligence is not available against very young plaintiffs (in Maryland, under five years of age), in cases of willful, wanton or reckless negligence, or in cases of intentional conduct. Also, while the reasonable-person standard of care is not generally adjusted downward for persons with mental illness or cognitive limitations when those persons are defendants, the standard may be lowered in the context of the contributory negligence defense to prevent the defense from barring recovery. Along the same lines, negligence actions based on negligence per se doctrine may be impervious to a defense of contributory negligence if the statute upon which the suit is based is one specifically designed to protect persons who are unable to protect themselves – such as children, intoxicated persons, or persons with mental illness or cognitive disabilities.

## Comparative Negligence

At the time of this writing, 46 states have overturned the common-law doctrine of contributory negligence in favor of some form of comparative negligence. About a dozen have done so as the result of a court decision, with the remainder having introduced comparative negligence by way of a statutory reform.

Comparative negligence – also commonly called “comparative fault” because it has applications in tort law beyond negligence claims – is a partial defense. It allows a defendant to escape some portion of the damages under certain circumstances on account of the plaintiff’s negligence. Generally the jury is required to determine the relative fault between the parties in the form of percentages. The reduction in damages is then done by multiplying the total damages by the relevant percentage. So if a jury finds that the plaintiff is 1% at fault, that the defendant is 99% at fault, and that the plaintiff suffered \$100,000 in damages, then the plaintiff’s recovery will be reduced by \$1,000, meaning that the defendant will be liable for \$99,000.

That is a simple example, but comparative negligence gets much more complicated. The complications arise from the many variables that allow the doctrine to be very different from one jurisdiction to the next. As a result, there are myriad versions of comparative negligence.

The first and most important variable is whether there is a threshold quantum of the plaintiff’s negligence beyond which the defendant has a complete, rather than partial, defense. The version called **pure comparative negligence** has no threshold. By a recent count, this approach is followed in 12 states. Whatever percentage the plaintiff is negligent, that is the percentage by which the plaintiff’s recovery is reduced. For instance, if the plaintiff is determined to be 99% negligent, then the recovery is reduced by 99%, and the plaintiff can only recover 1% of the compensatory damages from the defendant. In such a case, the plaintiff is, in the judgment of the factfinder, almost entirely to blame for her or his own injury, yet a small amount of recovery is still possible.

The perception among some courts and lawmakers that it would be unfair to allow recovery in such a situation – where the plaintiff is mostly to blame – has led to a form of the doctrine known as **modified comparative negligence** (also known as “partial comparative negligence.”) In this form, if the plaintiff’s negligence meets or exceeds some threshold, then the plaintiff is entirely barred from any recovery. In essence, there is a reversion to contributory negligence. How this threshold works differs greatly among jurisdictions.

In some jurisdictions the plaintiff is allowed recovery – subject to reduction – so long as the plaintiff’s fault is *not more than* the defendant’s fault. Other jurisdictions say that the plaintiff is allowed recovery – subject to reduction – so long as the plaintiff’s fault is *less than* the defendant’s fault. Notice that either way, the threshold is 50%. The difference is what happens in the event of a tie, where the jury determines that both the plaintiff and the defendant are each equally at fault, assigning 50% of the responsibility to each.

The more popular version of modified comparative negligence is the more plaintiff-friendly one – the one in which the plaintiff can still recover if fault is apportioned 50/50. By one count, 23 states use this version. The more defendant-friendly rule – where equal fault means the plaintiff is denied all recovery – is the choice of 10 states.

So we have two main versions of modified comparative negligence, distinguished by what happens in the event that the plaintiff and the defendant are equally at fault. What are these alternative versions called? Putting labels on the rules is a potential source of extreme confusion. Some sources use the label “50% rule” to refer to the rule where defendant wins a complete victory in the event of tie. Indubitably it makes sense to call this the “50% rule,” since the plaintiff is barred from recovering if adjudged 50% at fault. But other sources use the label “50% rule” to denote the rule that allows a plaintiff recovery in the event of a tie. This too makes perfect sense, since under the rule the plaintiff can be up to 50% at fault without being barred.

Unfortunately, it is very hard to know what someone is talking about when they use the phrase “50% rule” (or, for that matter, “49% rule,” or “51% rule”). You might distinguish them by calling one the “50% bar rule” and the other the “50% allowed rule.” The safest way to distinguish the two, however, may be to call them the plaintiff-wins-in-a-tie rule and the defendant-wins-in-a-tie rule. It’s inelegant, but unambiguous.

None of this would matter much if ties were rare. But they are not. If you ask a jury to assign proportional blame between two negligent parties, the easiest and most obvious answer will often be to say that they are both equally at fault. So what happens in the event of a tie may amount to a huge difference in the overall effect of tort law in a given jurisdiction.

Even once the labels are straightened out, there is still a problem grouping states together in this way. One of the 23 states counted under the plaintiff-wins-in-a-tie rule was Michigan. But in Michigan, under Michigan Compiled Laws § 600.2959, a plaintiff who is more to blame than the defendant is barred just from noneconomic damages. So a more-than-half negligent plaintiff in Michigan could recover a percentage of medical bills and lost wages even while being barred from all pain-and-suffering damages.

But wait. There are yet more complications. Up to this point, we have spoken only of situations in which there is one defendant. What if there are multiple defendants? Is the negligence threshold applied by comparing the plaintiff to each individual defendant, or to all defendants considered collectively? You will not be surprised to find out that jurisdictions differ on this point. Most states consider defendants collectively – employing the threshold by comparing the plaintiff’s percentage of the blame to the percentage of all the defendant’s considered collectively. A few states apply the threshold on a defendant-by-defendant basis.

One more note: If you’ve been adding up numbers, you’ll notice something’s missing. Among the states we’ve counted four contributory, 12 pure comparative, 23 plaintiff-wins-in-a-tie, and 10 defendant-wins-in-a-tie. That’s 49 states. The one left over? South

Dakota, which is in a category all its own. The Mount Rushmore State has a comparative negligence statute that's something like contributory negligence with a hard-to-reach comparative negligence escape hatch: A plaintiff's negligence bars recovery unless that negligence is "slight in comparison with the negligence of the defendant," in which case damages are reduced proportionately. S.D.C.L. § 20-9-2.

### **Statutes: Comparative Negligence**

The following statutes show some of the variety of implementations of the comparative negligence defense.

#### *Kentucky Revised Statues Title XXXVI, Chapter 411*

411.182 Allocation of fault in tort actions – Award of damages – Effect of release.

(1) In all tort actions, including products liability actions, involving fault of more than one (1) party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:

(a) The amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(b) The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.

(2) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(3) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any

reduction under subsection (4) of this section, and shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(4) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable, shall discharge that person from all liability for contribution, but it shall not be considered to discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons shall be reduced by the amount of the released persons' equitable share of the obligation, determined in accordance with the provisions of this section.

*Minnesota Statutes*  
*Chapter 604, Section 01*

604.01 COMPARATIVE FAULT; EFFECT.

Subdivision 1. Scope of application. Contributory fault does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, in injury to person or property, or in economic loss, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.

Subd. 1a. Fault. "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty,

unreasonable assumption of risk not constituting an express consent or primary assumption of risk, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity under section 340A.801. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. The doctrine of last clear chance is abolished.

Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.

Subd. 2. Personal injury or death; settlement or payment. Settlement with or any payment made to an injured person or to others on behalf of such injured person with the permission of such injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment or on whose behalf payment was made.

Subd. 3. Property damage or economic loss; settlement or payment. Settlement with or any payment made to a person or on the person's behalf to others for damage to or destruction of property or for economic loss does not constitute an admission of liability by the person making the payment or on whose behalf the payment was made.

Subd. 4. Settlement or payment; admissibility of evidence. Except in an action in which settlement and release has been pleaded as a defense, any settlement or payment referred to in subdivisions 2 and 3 shall be inadmissible in evidence on the trial of any legal action.

Subd. 5. Credit for settlements and payments; refund. All settlements and payments made under subdivisions 2 and 3 shall be credited against any final settlement or judgment; provided however that in the event that judgment is entered

against the person seeking recovery or if a verdict is rendered for an amount less than the total of any such advance payments in favor of the recipient thereof, such person shall not be required to refund any portion of such advance payments voluntarily made. Upon motion to the court in the absence of a jury and upon proper proof thereof, prior to entry of judgment on a verdict, the court shall first apply the provisions of subdivision 1 and then shall reduce the amount of the damages so determined by the amount of the payments previously made to or on behalf of the person entitled to such damages.

*Maine Revised Statutes*

*Title 14, §1*

§156. Comparative negligence

When any person suffers death or damage as a result partly of that person's own fault and partly of the fault of any other person or persons, a claim in respect of that death or damage may not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof must be reduced to such extent as the jury thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

When damages are recoverable by any person by virtue of this section, subject to such reduction as is mentioned, the court shall instruct the jury to find and record the total damages that would have been recoverable if the claimant had not been at fault, and further instruct the jury to reduce the total damages by dollars and cents, and not by percentage, to the extent considered just and equitable, having regard to the claimant's share in the responsibility for the damages, and instruct the jury to return both amounts with the knowledge that the lesser figure is the final verdict in the case.

Fault means negligence, breach of statutory duty or other act or omission that gives rise to a liability in tort or would, apart



from this section, give rise to the defense of contributory negligence.

If such claimant is found by the jury to be equally at fault, the claimant may not recover.

In a case involving multiparty defendants, each defendant is jointly and severally liable to the plaintiff for the full amount of the plaintiff's damages. However, any defendant has the right through the use of special interrogatories to request of the jury the percentage of fault contributed by each defendant. If a defendant is released by the plaintiff under an agreement that precludes the plaintiff from collecting against remaining parties that portion of any damages attributable to the released defendant's share of responsibility, then the following rules apply.

1. General rule. The released defendant is entitled to be dismissed with prejudice from the case. The dismissal bars all related claims for contribution assertable by remaining parties against the released defendant.
2. Post-dismissal procedures. The trial court must preserve for the remaining parties a fair opportunity to adjudicate the liability of the released and dismissed defendant. Remaining parties may conduct discovery against a released and dismissed defendant and invoke evidentiary rules at trial as if the released and dismissed defendant were still a party.
3. Binding effect. To apportion responsibility in the pending action for claims that were included in the settlement and presented at trial, a finding on the issue of the released and dismissed defendant's liability binds all parties to the suit, but such a finding has no binding effect in other actions relating to other damage claims.

### **Some Problems for Applying Comparative Negligence Statutes**

For the following problems, apply what you have learned from the foregoing statutes as well as from the case of *Coleman v. Soccer Association of Columbia*.

**A.** The law firm of Lorisbarn & Lindern has built a successful boutique litigation practice representing plaintiffs on a contingency fee basis in personal-injury negligence actions arising from accidents involving personal all-terrain vehicles or ATVs. In the kinds of cases L&L takes on, the plaintiff's negligence is often an issue and there are often multiple defendants. The firm is now considering opening up an office in a new state. The firm has determined that Kentucky, Maine, Maryland, and Minnesota all represent approximately equal opportunities in terms of the saturation of the market for contingency-fee plaintiff's representation and financially lucrative cases. The firm has decided that a key factor in its determination of where to open a new practice will be the state's doctrine regarding the impact of the plaintiff's negligence on the recovery of damages. All else being equal, how would you rank the states in order of desirability for L&L? To support your conclusion, how would you describe the differences among those states in terms of their treatment of a plaintiff's negligence?

**B.** Suppose a jury privately determines, in the course of deliberations, that the total amount of damages suffered by a plaintiff is \$100,000, and that the apportionment of fault among the parties is as follows: Plaintiff: 50%; Defendant: 50%. The jury then returns a verdict in accordance with that determination – including filling out any special interrogatories or verdict forms as instructed. How much will the plaintiff receive from the defendant in Kentucky? In Maine? In Maryland? In Minnesota?

**C.** Suppose a jury privately determines, in the course of deliberations, that the total amount of damages suffered by a plaintiff is \$100,000, and that the apportionment of fault among the parties is as follows: Plaintiff: 40%; Defendant X: 20%; Defendant Y: 20%; Defendant Z: 20%. The jury then returns a verdict in accordance with that

determination – including filling out any special interrogatories or verdict forms as instructed. How much can the plaintiff receive from Defendant X in Kentucky? In Maine? In Maryland? In Minnesota?

### **C. Assumption of the Risk**

The affirmative defense of assumption of the risk provides that defendants can avoid liability where plaintiffs have voluntarily taken the chance that they might get hurt. One way to think about assumption of the risk is in relation to the prima facie elements of a negligence claim. Where plaintiffs assume the risk, they relieve defendants of their duty of due care.

#### **Implied vs. Express Assumption of the Risk**

The label “assumption of the risk” is applied by courts to many different situations, and it may differentially engage different requirements and limitations. There are two broad categories, however, that form an important division: implied and express. Implied assumption of the risk comes about when plaintiffs, by their conduct or actions, show that they have assumed the risk. Express assumption of the risk results from an explicit agreement in words – written or oral – assuming the risk.

#### **The Elements of Assumption of the Risk**

Assumption of the risk – whether of the implied or express type – can be broken down into two elements: (1) The plaintiff must **know and appreciate** the risk, including its nature and severity. (2) The plaintiff must take on the risk in an entirely **voluntary** way.

These requirements are quite strict.

*Knowledge* – To show knowledge it is generally not enough for the defendant to show that the plaintiff should have known about the risk. There generally must be proof that the plaintiff actually knows about the risk. And it is not just knowledge that is required, but real understanding and appreciation. In other words, plaintiffs have to really know what they are getting into. To put it in more formal terms, the standard is a *subjective* one – looking at what the person actually understood, rather than an objective one, which would look at what the person should have understood given the circumstances.

Contrast the doctrine of assumption of the risk with the objective reasonable person standard in the prima face case for negligence. The reasonable person standard, being objective, will not bend to a defendant's lack of understanding or awareness. So, it is readily possible for an inattentive or hapless person to blunder into negligence liability. In fact, the more inattentive you are, the most likely negligence liability becomes. By contrast, the more witless you are, the harder it is to assume the risk. A plaintiff, who, because of a lack of experience or intelligence is incapable of understanding the risk, cannot assume it.

There are limits to the subjectivity of assumption of the risk. In the sports context, there is less tolerance for claims of ignorance. Plaintiffs hit by foul balls as spectators at baseball games tend to be held to a more objective standard. The same goes for participants in sports activities.

*Voluntariness* – The standard for voluntariness is quite strict as well. There must be a genuine choice if a plaintiff is to be held to having assumed the risk. If it is the case that the plaintiff was compelled by circumstance and had no reasonable choice other than to confront the risk, then it does not count as voluntary for purposes of assumption-of-the-risk doctrine. Similarly, if a plaintiff's only choice to avoid the risk is to forego a legal right – such as enjoying one's own property – then there is no voluntariness. In the celebrated case of *Marshall v. Ranne*, 511 S.W.2d 255 (Tex. 1974), a plaintiff who was attacked and bitten by his neighbor's boar was held not to have assumed the risk by walking out of his own house.

### **Relationship with Contributory and Comparative Negligence**

There is considerable practical and conceptual overlap between the defense of assumption of the risk and the defenses of contributory or comparative negligence. But assumption of the risk is conceptually distinguishable in that a plaintiff that assumes the risk might be acting reasonably. By definition, in a contributory/comparative negligence situation, the plaintiff is not acting reasonably. On the other hand, plaintiffs might be quite reasonable in assuming the risk if they have

determined that rewards outweigh the downside of the potential for injury.

Since the move from contributory negligence to the flexible system of comparative fault, many courts have held that the assumption of the risk doctrine is absorbed to some extent into comparative fault doctrine. The extent of the continuing viability of assumption of the risk depends in large part about whether we are talking about implied or express assumption of the risk. The trend has been to abrogate the defense of implied assumption the risk. On the other hand, express assumption of the risk generally remains viable as a defense.

**Case: Murphy v. Steeplechase Amusement Co.**

The following case is an example of implied assumption of the risk.

*Murphy v. Steeplechase Amusement Co.*

Court of Appeals of New York

April 16, 1929

250 N.Y. 479. James Murphy, an Infant, by John Murphy, His Guardian ad Litem, Respondent, v. Steeplechase Amusement Co., Inc., Appellant. Submitted March 25, 1929. Decided April 16, 1929. Court below: Appellate Division of the Supreme Court in the First Judicial Department affirmed judgment for plaintiff entered upon a verdict. *Murphy v. Steeplechase Amusement Co., Inc.*, 224 App. Div. 832 (1928). This court: Counsel: Gardiner Conroy and Reginald S. Hardy for appellant-defendant. Charles Kennedy for respondent-plaintiff. Judges: Cardozo, Ch. J. Pound, Crane, Lehman, Kellogg and Hubbs, JJ., concur; O'Brien, J., dissents.

**Chief Judge BENJAMIN N. CARDOZO:**

The defendant, Steeplechase Amusement Company, maintains an amusement park at Coney Island, New York.

One of the supposed attractions is known as "The Flopper." It is a moving belt, running upward on an inclined plane, on which passengers sit or stand. Many of them are unable to keep their feet because of the movement of the belt, and are

thrown backward or aside. The belt runs in a groove, with padded walls on either side to a height of four feet, and with padded flooring beyond the walls at the same angle as the belt. An electric motor, driven by current furnished by the Brooklyn Edison Company, supplies the needed power.

Plaintiff, a vigorous young man, visited the park with friends. One of them, a young woman, now his wife, stepped upon the moving belt. Plaintiff followed and stepped behind her. As he did so, he felt what he describes as a sudden jerk, and was thrown to the floor. His wife in front and also friends behind him were thrown at the same time. Something more was here, as every one understood, than the slowly-moving escalator that is common in shops and public places. A fall was foreseen as one of the risks of the adventure. There would have been no point to the whole thing, no adventure about it, if the risk had not been there. The very name above the gate, the Flopper, was warning to the timid. If the name was not enough, there was warning more distinct in the experience of others. We are told by the plaintiff's wife that the members of her party stood looking at the sport before joining in it themselves. Some aboard the belt were able, as she viewed them, to sit down with decorum or even to stand and keep their footing; others jumped or fell. The tumbling bodies and the screams and laughter supplied the merriment and fun. "I took a chance," she said when asked whether she thought that a fall might be expected.

Plaintiff took the chance with her, but, less lucky than his companions, suffered a fracture of a knee cap. He states in his complaint that the belt was dangerous to life and limb in that it stopped and started violently and suddenly and was not properly equipped to prevent injuries to persons who were using it without knowledge of its dangers, and in a bill of particulars he adds that it was operated at a fast and dangerous rate of speed and was not supplied with a proper railing, guard or other device to prevent a fall therefrom. No other negligence is charged.

We see no adequate basis for a finding that the belt was out of order. It was already in motion when the plaintiff put his foot on it. He cannot help himself to a verdict in such circumstances by the addition of the facile comment that it threw him with a jerk. One who steps upon a moving belt and finds his heels above his head is in no position to discriminate with nicety between the successive stages of the shock, between the jerk which is a cause and the jerk, accompanying the fall, as an instantaneous effect. There is evidence for the defendant that power was transmitted smoothly, and could not be transmitted otherwise. If the movement was spasmodic, it was an unexplained and, it seems, an inexplicable departure from the normal workings of the mechanism. An aberration so extraordinary, if it is to lay the basis for a verdict, should rest on something firmer than a mere descriptive epithet, a summary of the sensations of a tense and crowded moment. But the jerk, if it were established, would add little to the case. Whether the movement of the belt was uniform or irregular, the risk at greatest was a fall. This was the very hazard that was invited and foreseen.

*Volenti non fit injuria.* One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquillity. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.

A different case would be here if the dangers inherent in the sport were obscure or unobserved, or so serious as to justify

the belief that precautions of some kind must have been taken to avert them. Nothing happened to the plaintiff except what common experience tells us may happen at any time as the consequence of a sudden fall. Many a skater or a horseman can rehearse a tale of equal woe. A different case there would also be if the accidents had been so many as to show that the game in its inherent nature was too dangerous to be continued without change. The president of the amusement company says that there had never been such an accident before. A nurse employed at an emergency hospital maintained in connection with the park contradicts him to some extent. She says that on other occasions she had attended patrons of the park who had been injured at the Flopper, how many she could not say. None, however, had been badly injured or had suffered broken bones. Such testimony is not enough to show that the game was a trap for the unwary, too perilous to be endured. According to the defendant's estimate, two hundred and fifty thousand visitors were at the Flopper in a year. Some quota of accidents was to be looked for in so great a mass. One might as well say that a skating rink should be abandoned because skaters sometimes fall.

There is testimony by the plaintiff that he fell upon wood, and not upon a canvas padding. He is strongly contradicted by the photographs and by the witnesses for the defendant, and is without corroboration in the testimony of his companions who were witnesses in his behalf. If his observation was correct, there was a defect in the equipment, and one not obvious or known. The padding should have been kept in repair to break the force of any fall. The case did not go to the jury, however, upon any such theory of the defendant's liability, nor is the defect fairly suggested by the plaintiff's bill of particulars, which limits his complaint. The case went to the jury upon the theory that negligence was dependent upon a sharp and sudden jerk.



The judgment of the Appellate Division and that of the Trial Term should be reversed, and a new trial granted, with costs to abide the event.

**Questions to Ponder About *Murphy v. Steeplechase***

**A.** Amusement parks in the in the Roaring 20s seem to be more dangerous places than the amusement parks of today. Do you think an amusement park today would have a ride like the Flopper? Assuming it did, and the facts of *Murphy* came to pass, do you think the case would come out the same way these days?

**B.** Judge Cardozo seems to say that risk was necessary for the Flopper to be fun: “There would have been no point to the whole thing, no adventure about it, if the risk had not been there.” Do you agree?

**C.** Generally speaking, assumption of the risk requires not only that the plaintiff knows about the risk, but that the plaintiff understands the nature of the risk. Clearly James Murphy appreciated the risk that he might fall. But do you think James Murphy appreciated the fact that he might suffer a broken kneecap from the Flopper?

**Case: *Hulsey v. Elsinore Parachute Center***

The following case explores express assumption of the risk and considers under what circumstances a release will be enforceable.

***Hulsey v. Elsinore Parachute Center***

Court of Appeal of California, Fourth Appellate District,  
Division Two  
May 16, 1985

ANTHONY HULSEY, Plaintiff and Appellant, v.  
ELSINORE PARACHUTE CENTER, Defendant and  
Respondent. No. E000643. Court ofdozo Appeal of  
California, Fourth Appellate District, Division Two. Opinion  
by McDaniel, J., with Kaufman, Acting P.J., and Rickles, J.,  
concurring.

**Judge FRANKLIN DOUGLAS McDANIEL:**

In this appeal, we are called upon to review the propriety of a summary judgment entered for defendant in a sports risk case. The action in the trial court was to recover for personal injuries suffered by plaintiff at the time of his first parachute jump, one attempted under the auspices of defendant. At the hearing of the motion for summary judgment, no disputed issues of fact were raised in connection with the count based on negligence. As a consequence, the trial court was concerned generally with whether the agreement and release of liability signed by plaintiff at the time of the instructional preparation for his first parachute jump is enforceable against him. In our view, the trial court correctly ruled that the release is enforceable.

After the case was at issue and defendant had taken plaintiff's deposition, defendant noticed a motion for summary judgment. The supporting papers included the declaration of counsel for defendant, Peter James McBreen, the principal purpose of which was to authenticate certain documentary evidence he wished to place before the court: (1) Exhibit "A," a copy of plaintiff's deposition; (2) exhibit "B," a copy of the "Registration Card" signed by plaintiff several hours before he took off on his misadventure; and (3) exhibit "C," a copy of the "Agreement of Release of Liability," also signed by plaintiff at the same time he filled out the "Registration Card" on the reverse side.

As established by plaintiff's deposition, he went to defendant's place of business, the Elsinore Parachute Center (EPC), in the company of three friends, two of whom had had previous experience in sport parachuting. Upon arriving at EPC, plaintiff enrolled in the "First Jump Course" offered by defendant. Although plaintiff stated he had no recollection of filling out or signing the "Parachute Center Adult Registration Form," he did admit that the written inscriptions, the initials and the signature on the form were his.

Continuing, plaintiff also disclaimed any recollection of reading or signing the "Agreement & Release of Liability," but he did admit once again that the signature and the initials on the agreement were his. Plaintiff admitted that he voluntarily enrolled in the first-jump course and was not coerced in any way during the registration process.

During the classroom training, the instructor advised the class that students occasionally break their legs while jumping. In addition, canopy control was discussed and plaintiff received instruction on the proper procedure to be followed in maneuvering the parachute for landing. Plaintiff admitted that he understood the information provided and felt he was one of the better students in the class.

Plaintiff's actual jump was postponed several hours because of wind. At approximately 6:30 p.m., plaintiff boarded the aircraft for his first jump. Plaintiff recalled that the wind was "still" or "very calm" when he boarded the aircraft.

Plaintiff's exit from the aircraft was normal. Plaintiff testified that he attempted to steer toward the target area but was unable to reach it. Plaintiff attempted to land in a vacant lot but collided with electric power lines as he neared the ground. As he drifted into the wires, plaintiff saw a bright flash. Plaintiff's next recollection was of regaining consciousness on the ground. Despite the extreme risk to which he was thereby exposed, plaintiff sustained only a broken wrist.

As for other items before the court, exhibit "B" and exhibit "C," attached to Attorney McBreen's declaration, are included herein. These items are copies of the registration card and the release reproduced here.

11/22/82

PARACHUTING CENTER ADULT REGISTRATION FORM

LAST NAME Hulsey FIRST NAME Anthony MIDDLE INITIAL J AGE 23 SEX M  
 PERMANENT ADDRESS 5530 W 190th St, #169 PHONE 370-6454  
 CITY TERRACE, CA STATE CA ZIP CODE 90503  
 OCCUPATION CRAFTSMAN DATE OF BIRTH 3/8/59 WEIGHT 170 HEIGHT 5'7"  
 PRESENT ADDRESS SAME as above CITY TERRACE, CA STATE CA ZIP CODE 90503  
 CITY TERRACE, CA STATE CA ZIP CODE 90503 PHONE 370-6454

How did you learn of this center (Check Only One Please)

- Magazine Article
- Sports Show (Which)  Lecture
- Yellow Pages Ad  Other
- Friend (Name) Steve Samson, Gray Pistol How Did You Travel To Center
- Word of Mouth  Plane  Car  Bus  Other

MEDICAL STATEMENT FOR UNDERGOING PARACHUTE TRAINING AND JUMPING A J A.

I hereby certify that I am not aware of and am not under treatment for any physical infirmity or chronic ailment, or injury of any nature, and that I have normal vision or have corrective lenses, and that I have never been treated for any of the following:

- 1.) Cardiac or pulmonary condition or disease
- 2.) High or low blood pressure
- 3.) Fainting spells or convulsions
- 4.) Hard of hearing
- 5.) Nervous disorder
- 6.) Diabetes
- 7.) Kidney or related diseases

Signature Anthony Hulsey Date 5/22/82

IMPORTANT - AFTER READING, SIGNING AND DATING THIS SIDE - TURN FORM OVER - READ AND COMPLETE OTHER SIDE

**AGREEMENT & RELEASE OF LIABILITY, A. I. H.**

I, Anthony Hulsey, HEREBY ACKNOWLEDGE that I have voluntarily applied to participate in parachuting instruction and training, culminating in a parachute jump at the premises of Elsinore Parachute Center.

I AM AWARE THAT PARACHUTE INSTRUCTION AND JUMPING ARE HAZARDOUS ACTIVITIES, AND I AM VOLUNTARILY PARTICIPATING IN THESE ACTIVITIES WITH KNOWLEDGE OF THE DANGER INVOLVED AND HEREBY AGREE TO ACCEPT ANY AND ALL RISKS OF INJURY OR DEATH. PLEASE INITIAL P.A.S.A.

AS LAWFUL CONSIDERATION for being permitted by Elsinore Parachute Center or one of its affiliated organizations to participate in these activities and use their facilities, I hereby agree that I, my heirs, distributees, guardians, legal representatives and assigns will not make a claim against, sue, attach the property of, or prosecute Elsinore Parachute Center, Parachute, Inc., and or one of its affiliated organizations, and Aurora Leasing Company, and Orange Sport Parachuting Center, Inc., and Elsinore Sport Parachuting Center, Inc., and Lakewood Sport Parachuting Center, Inc. for injury or damage resulting from the negligence or other acts, howsoever caused, by any employee, agent or contractor of Elsinore Parachute Center or its affiliates, as a result of my participation in parachuting activities. In addition, I hereby release and discharge Elsinore Parachute Center, Parachute, Inc., Skydive, Skydive II, and its affiliated organizations, and Aurora Leasing Company, and Orange Sport Parachuting Center, Inc., and Elsinore Sport Parachuting Center, Inc., and Lakewood Sport Parachuting Center, Inc. from all actions, claims or demands I, my heirs, distributees, guardians, legal representatives, or assigns now have or may hereafter have for injury or damage resulting from my participation in parachuting activities.

I HAVE CAREFULLY READ THIS AGREEMENT AND FULLY UNDERSTAND ITS CONTENTS. I AM AWARE THAT THIS IS A RELEASE OF LIABILITY AND A CONTRACT BETWEEN MYSELF AND ELSINORE PARACHUTE CENTER AND/OR ITS AFFILIATED ORGANIZATIONS AND SIGN IT OF MY OWN FREE WILL.

DATE 8/22/87

WITNESS Rebecca Oula

SIGNATURE Anthony Joe Hulsey

DATE 5/22/87

In pursuing his appeal, plaintiff makes four substantive contentions. They are that: (1) on the undisputed factual scenario there was no clear and comprehensive notice to plaintiff of what the legal consequences of the release would be; (2) such releases are against public policy; (3) the release is unenforceable because unconscionable in that it did not comport with plaintiff's reasonable expectations.

Before proceeding to a discussion of the issues of substance noted, we must also note in passing that we are not at all persuaded that plaintiff should be relieved of the legal consequences of the things he signed because he did not realize what he was signing or that somehow he was distracted or misled from a fair realization of what was involved. It is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it. On the record here, there is no indication whatsoever of fraud or other behavior by defendant which would otherwise have made the [usual] rule inapplicable.

Another aspect of this preliminary inquiry into the circumstances surrounding plaintiff's filling out the registration card and signing the release involves the size of the type used in printing the release. In the case of *Conservatorship of Link* (1984) 158 Cal.App.3d 138, the court held the purported exculpatory documents unenforceable for several reasons, including the fact that they were printed in five and one half point type and thus could not easily be read by persons of ordinary vision. (*Id.*, at pp. 141-142.) Actually, as observed in *Link*, "The five and one-half point print is so small that one would conclude defendants never intended it to be read ... the lengthy fine print seems calculated to conceal and not to warn the unwary."

The type size contained in *Link* is not present here. As appears from the actual size reproduction in the appendix, the release is in 10-point type, both caps and lower case

letters. This size comports with a number of minimums prescribed by statute. <sup>7</sup>Examples: Civil Code sections 1630 [eight to ten-point: parking lots]; 1677 [eight-point bold red or ten-point bold: liquidated damages provision in realty purchase contract]; 1803.1 and 1803.2 [eight to fourteen-point: retail installment sales]; 1812.85 [ten-point bold: health studio services]; 1812.205 and 1812.209 [ten to sixteen-point bold: seller assisted marketing plan]; 1812.302 and 1812.303 [ten-point bold: membership camping]; 1812.402 [ten-point: disability insurance]; 1861.8 [ten-point bold: innkeepers]; 1916.5 and 1916.7 [ten-point bold: loan of money]; 2924c [twelve to fourteen-point bold: mortgage default notice]; 2982.5 and 2983.2 [eight to ten-point bold: automobile sales finance]; 2985.8, 2986.2 and 2986.4 [six to ten-point bold: vehicle leasing act]; 3052.5 [ten-point bold: service dealer lien].” (Conservatorship of Link, supra, 158 Cal.App.3d 138, 141.)<sup>7</sup>

As appears from a copy of the agreement reproduced in actual size and attached as an appendix, the second paragraph recites in bold-faced type: “I Am Aware That Parachute Instruction And Jumping Are Hazardous Activities, And I Am Voluntarily Participating In These Activities With Knowledge Of The Danger Involved And Hereby Agree To Accept Any And All Risks Of Injury Or Death. Please Initial.” Plaintiff affixed his initials.

The third paragraph recites that the subscriber will not sue EPC or its employees “for injury or damage resulting from the negligence or other acts, howsoever caused, by any employee, agent or contractor of [EPC] or its affiliates, as a result of my participation in parachuting activities.” That paragraph goes on to recite that the subscriber will “release and discharge” EPC and its employees “from all actions, claims or demands ... for injury or damage resulting from [the subscriber’s] participation in parachuting activities.”

The fourth paragraph, also in bold-faced type, recites that: “I Have Carefully Read This Agreement And Fully Understand Its Contents. I Am Aware That This Is A Release Of Liability And A Contract Between Myself And Elsinore Parachute Center And/Or Its Affiliated Organizations And Sign It Of My Own Free Will.” Plaintiff’s signature was thereto subscribed.

I

Plaintiff’s first contention involves an inquiry into whether plaintiff could reasonably have been expected to understand its legal consequences for him. In substance, plaintiff argues that the agreement was not sufficiently explicit or unambiguous to be enforceable against him.

*Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd.* (1983) 147 Cal.App.3d 309 refused to enforce an exculpatory agreement between a race car driver and race sponsor. The operative language used in the agreement there in issue provided that the driver would “save harmless and keep indemnified” (*Id.*, at p. 312) the race sponsor. The court reasoned that such language could not be reasonably expected to alert a layperson to the significance of the agreement and, therefore, that it was not sufficiently clear and explicit.

In contrast to the agreement in *Ferrell*, the one here was phrased in language clear to anyone. We have already quoted the pertinent provision, and it would be hard to imagine language more clearly designed to put a layperson on notice of the significance and legal effect of subscribing it. The flaws which the *Ferrell* court found in the agreement it had before it are not present here. Instead of disguising the operative language in legalese, the defendant prepared its agreement in simple, clear and unambiguous language understandable to any layperson. In sum, we hold that the language of the agreement here falls well within the *Ferrell* rule, i.e., that it was effectively drafted so as “clearly [to] notify the prospective releasor or indemnitor of the effect of signing the



agreement.” (*Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd.*, *supra*, 147 Cal.App.3d 309, 318.)

## II

Turning to plaintiff’s second contention, namely that releases of the type here used are against public policy, we note first that such agreements as this are arguably contemplated by section 1668 of the Civil Code. That section provides: “All contracts which have for their object, directly or indirectly, to exempt anyone from the responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.”

Whatever it proscribes, this section does *not* invalidate contracts which seek to except one from liability for simple negligence or strict liability.

Civil Code section 1668 refers to limitations which are described as against the policy of the law. Such policy is the aggregate of judicial pronouncements on a given issue, and in this context deal with the concept characterized as “the public interest.” This concept calls up for discussion *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92.

*Tunkl* is a case in which the plaintiff signed an agreement that relieved the defendant hospital from liability for the wrongful acts of the defendant’s employees. The plaintiff was required to sign the agreement to gain admission into the defendant’s hospital. Thereafter, the plaintiff brought suit against the hospital claiming that he was injured as a result of the negligence of hospital employees. The trial court upheld the release. On appeal, the California Supreme Court invalidated the release agreement on the grounds that it affected the “public interest. “The court set forth the following six factors which it deemed relevant in determining whether a contract affects the public interest: (1) It concerns a business of a type generally thought suitable for public regulation; (2) the party seeking exculpation is engaged in performing a service of

great importance to the public, which is often a matter of practical necessity for some members of the public; (3) the party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards; (4) as a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services; (5) in exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence; (6) as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agent.

Applying the *Tunkl* factors to the facts here, several distinctions are readily apparent. First, parachute jumping is not subject to the same level of public regulation as is the delivery of medical and hospital services. Second, the *Tunkl* agreement was executed in connection with services of great importance to the public and of practical necessity to anyone suffering from a physical infirmity or illness. Parachute jumping, on the other hand, is not an activity of great importance to the public and is a matter of necessity to no one.

Finally, because of the essential nature of medical treatment, the consuming party in *Tunkl* had little or no choice but to accept the terms offered by the hospital. Defendant had no decisive advantage in bargaining power over plaintiff by virtue of any “essential services” offered by defendant. When referring to “essential services” the court in *Tunkl* clearly had in mind medical, legal, housing, transportation or similar services which must *necessarily* be utilized by the general

public. Purely recreational activities such as sport parachuting can hardly be considered “essential.”

In sum, measuring the transaction here against the *Tunkel* factors, we can see no logical reason for extending the “public interest” limitation on the freedom to contract to the exculpatory agreement here relied on by defendant.

There are no California cases directly on point dealing with exculpatory contracts in the context of high risk sports activities, but there are an ample number on the books in other states. *Jones v. Dressel* (Colo. 1981) 623 P.2d 370, a Colorado case, was decided on very similar facts by means of a summary judgment. The case is especially persuasive because the Colorado court relied extensively on *Tunkel* in arriving at its holding that the exculpatory agreement there relied upon by an operator of business furnishing sky diving facilities did *not* fall within the ambit of agreements proscribed as against the public interest.~

Accordingly, following both logic and the persuasive holdings cited from other jurisdictions, we hold that the exculpatory agreement here under discussion is not against the “public interest” so as to bring it within the prohibitions of section 1668 of the Civil Code because contrary to “the policy of the law.”

We come now to the narrower issue of whether the exculpatory contract here relied upon as an affirmative defense by defendant should not be enforced because, as to plaintiff, it would be “unconscionable.”~ Plaintiff has made the picturesque if not ludicrous contention that he “was led to believe” that the urgent thing confronting him at the time he signed and initialed the agreement was to sign up to purchase a photograph, and that as a consequence he did not realize the significance of the agreement when he signed it. He makes this contention despite the fact that his initials appear immediately adjacent to the capitalized words in bold-faced type, “Agreement & Release of Liability.” It is hard to

imagine that plaintiff, after having initialed the agreement in three places and signed it in one could have harbored any *reasonable* expectations other than what was unambiguously recited in the title and text of the agreement.

Because the agreement, in both its language and format, was not one which could even remotely operate to defeat the reasonable expectations of plaintiff and hence be unconscionable if enforced, we hold that it did not so operate and hence that its enforcement against him was not unconscionable.

**Case: Hiett v. Lake Barcroft Community Association**

The following case shows the flexibility of the public policy doctrine to invalidate waivers.

*Hiett v. Lake Barcroft Community Association*

Supreme Court of Virginia

June 5, 1992

Robert David Hiett v. Lake Barcroft Community Association, Inc., et al. Record No. 911395. Justice Keenan delivered the opinion of the Court.

**Justice BARBARA MILANO KEENAN:**

The primary issue in this appeal is whether a pre-injury release from liability for negligence is void as being against public policy.

Robert D. Hiett sustained an injury which rendered him a quadriplegic while participating in the “Teflon Man Triathlon” (the triathlon) sponsored by the Lake Barcroft Community Association, Inc. (LABARCA). The injury occurred at the start of the swimming event when Hiett waded into Lake Barcroft to a point where the water reached his thighs, dove into the water, and struck his head on either the lake bottom or an object beneath the water surface.

Thomas M. Penland, Jr., a resident of Lake Barcroft, organized and directed the triathlon. He drafted the entry

form which all participants were required to sign. The first sentence of the form provided:

In consideration of this entry being accept[ed] to participate in the Lake Barcroft Teflon Man Triathlon I hereby, for myself, my heirs, and executors waive, release and forever discharge any and all rights and claims for damages which I may have or m[a]y hereafter accrue to me against the organizers and sponsors and their representatives, successors, and assigns, for any and all injuries suffered by me in said event.

Evelyn Novins, a homeowner in the Lake Barcroft subdivision, asked Hiett to participate in the swimming portion of the triathlon. She and Hiett were both teachers at a school for learning-disabled children. Novins invited Hiett to participate as a member of one of two teams of fellow teachers she was organizing. During a break between classes, Novins presented Hiett with the entry form and he signed it.

Hiett alleged in his third amended motion for judgment that LABARCA, Penland, and Novins had failed to ensure that the lake was reasonably safe, properly supervise the swimming event, advise the participants of the risk of injury, and train them how to avoid such injuries. Hiett also alleged that Penland and Novins were agents of LABARCA and that Novins's failure to direct his attention to the release clause in the entry form constituted constructive fraud and misrepresentation.

In a preliminary ruling, the trial court held that, absent fraud, misrepresentation, duress, illiteracy, or the denial of an opportunity to read the form, the entry form was a valid contract and that the pre-injury release language in the contract released the defendants from liability for negligence. The trial court also ruled that such a release was prohibited as a matter of public policy only when it was included: (1) in a common carrier's contract of carriage; (2) in the contract of a

public utility under a duty to furnish telephone service; or (3) as a condition of employment set forth in an employment contract.

Pursuant to an agreement between the parties, the trial court conducted an evidentiary hearing in which it determined that there was sufficient evidence to present to a jury on the issue of constructive fraud and misrepresentation. Additionally, the trial court ruled that as a matter of law Novins was not an agent of LABARCA, and it dismissed her from the case.

The remaining parties proceeded to trial solely on the issue whether there was constructive fraud and misrepresentation by the defendants such as would invalidate the waiver-release language in the entry form. After Hiett had rested his case, the trial court granted the defendants' motion to strike the evidence. This appeal followed.

Hiett first argues that the trial court erred in ruling that the pre-injury release provision in the entry form did not violate public policy. He contends that since the decision of this Court in *Johnson's Adm'x v. Richmond and Danville R.R. Co.*, 86 Va. 975 (1890), the law in Virginia has been settled that an agreement entered into prior to any injury, releasing a tortfeasor from liability for negligence resulting in personal injury, is void because it violates public policy. Hiett asserts that the later cases of this Court have addressed only the release of liability from property damage or indemnification against liability to third parties. Thus, he contends that the holding in *Johnson* remains unchanged. In response, LABARCA and Novins argue that the decisions of this Court since *Johnson* have established that pre-injury release agreements such as the one before us do not violate public policy. We disagree with LABARCA and Novins.

The case law in this Commonwealth over the past one hundred years has not altered the holding in *Johnson*. In *Johnson*, this Court addressed the validity of a pre-injury release of liability for future negligent acts. There, the

decedent was a member of a firm of quarry workers which had entered into an agreement with a railroad company to remove a granite bluff located on the company's right of way. The agreement specified that the railroad would not be liable for any injuries or death sustained by any members of the firm, or its employees, occurring from any cause whatsoever.

The decedent was killed while attempting to warn one of his employees of a fast-approaching train. The evidence showed that the train was moving at a speed of not less than 25 miles per hour, notwithstanding the railroad company's agreement that all trains would pass by the work site at speeds not exceeding six miles per hour.

In holding that the release language was invalid because it violated public policy, this Court stated:

[I]o hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct ... can never be lawfully done where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void.

This Court emphasized that its holding was not based on the fact that the railroad company was a common carrier. Rather, this Court found that such provisions for release from liability for personal injury which may be caused by future acts of negligence are prohibited "universally."

As noted by Hiett, the cases following *Johnson* have not eroded this principle. Instead, this Court's decisions after *Johnson* have been limited to upholding the right to contract for the release of liability for property damage, as well as indemnification from liability to third parties for such damage.

In *C. & O. Ry. Co. v. Telephone Co.*, 216 Va. 858 (1976), this Court upheld a provision in an agreement entered into by the parties to allow the telephone company to place underground cables under a certain railway overpass. In the agreement, the

telephone company agreed to release the C & O Railway Company from any damage to the wire line crossing and appurtenances. In upholding this property damage stipulation, this Court found that public policy considerations were not implicated.~

Other cases decided by this Court since *Johnson* have upheld provisions for indemnification against future property damage claims. In none of these cases, however, did the Court address the issue whether an indemnification provision would be valid against a claim for personal injury.

[W]e conclude here, based on *Johnson*, that the pre-injury release provision signed by Hiatt is prohibited by public policy and, thus, it is void.~

### **Questions to Ponder About *Hiatt v. LABARCA***

- A.** Does this case mean that a release of liability for parachuting (of the kind found in *Hulsey v. Elsinore Parachute Center*) would not be upheld in Virginia? (A quick search indicates that there is no shortage of skydiving centers in Virginia.)
- B.** Is it beneficial for triathlon organizers to make entrants sign releases – even if those releases are doomed to be struck down in court as against public policy?
- C.** If you were an attorney for LABARCA after this case, what would you recommend they do going forward to protect themselves from liability?

### **Public Policy Exceptions to Express Agreements to Assume Risk**

As is apparent in both *Hulsey v. Elsinore Parachute Center* and *Hiatt v. LABARCA*, courts impose a public policy limitation to agreements to waive negligence liability.

Where the defendant is providing some kind of service that is essential to a normal, modern life, and where there is unequal bargaining power between the plaintiff and the defendant, the public policy exception is likely to bar the defendant from using exculpatory



releases to avoid liability for negligence. Certain traditional categories for the public-policy exception are hospitals, physicians, dentists, public utilities, professional bailiees (e.g., parking lots), and common carriers (e.g., airlines). It is not hard to imagine that if such releases were allowed for hospitals and physicians, it would be impossible to receive medical treatment without having to release claims for negligence. Indeed, the UCLA Medical Center actually tried this, conditioning their treatment on a patient's waiver of any future claim for negligence. Patients had to sign a document called "Conditions of Admission," which included the following:

Release: The hospital is a nonprofit, charitable institution. In consideration of the hospital and allied services to be rendered and the rates charged therefor, the patient or his legal representative agrees to and hereby releases The Regents of the University of California, and the hospital from any and all liability for the negligent or wrongful acts or omissions of its employees, if the hospital has used due care in selecting its employees.

This was tested in *Tunkel v. Regents of University of California*, 60 Cal.2d 92 (Cal. 1963). Justice Trobriner wrote for the court:

While obviously no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party, the above circumstances pose a different situation. In this situation the releasing party does not really acquiesce voluntarily in the contractual shifting of the risk, nor can we be reasonably certain that he receives an adequate consideration for the transfer. Since the service is one which each member of the public, presently or potentially, may find essential to him, he faces, despite his economic inability to do so, the prospect of a compulsory assumption of the risk of

another's negligence. The public policy of this state has been, in substance, to posit the risk of negligence upon the actor; in instances in which this policy has been abandoned, it has generally been to allow or require that the risk shift to another party better or equally able to bear it, not to shift the risk to the weak bargainer.

*Tunkel* has been followed just about everywhere. Otherwise, one imagines that every hospital would follow UCLA's lead.

Theoretically, if a grocery store or hotel tried to make patrons agree to such a release, such releases would be invalidated as well. Grocery stores and hotels are essential services in modern life.

By contrast, skydiving is about as nonessential as a service could be. Courts in many states have thus refused to find a public policy exception to waivers for parachuting services.

A good example of a case that would seem to be on the bubble is a fitness center. Fitness advocates and physicians like to talk about regular exercise as being "essential." But Maryland's high court held that going to the gym was nonessential, and so no there was no public-policy exception for an express waiver signed by customer. *See Seigneur v. National Fitness Institute, Inc.*, 752 A.2d 631 (Md. 2000). Another case that would seem to be in the gray zone is a ski resort. In Vermont, a general exculpatory agreement used by a ski resort was found to be invalid. *See Dalury v. S-K-I, Ltd.*, 164 Vt. 329 (Vt. 1995).

Another category of defendants traditionally barred from using agreements to avoid negligence liability are manufacturers of products. Products liability – a complicated area – is a subject for Volume Two of this casebook. But for now it is enough to know that manufacturers and retailers generally cannot use things like assumption-of-the-risk agreements or disclaimers to escape liability from property damage and personal injury caused by defective products.

Part III:  
Liability Relating to  
Healthcare

# 11. Common Law Liability in the Healthcare Context

“Like a surgeon – hey! – cuttin’ for the very first time.  
Like a surgeon! Here’s a waiver, for you to sign.”  
– “Weird Al” Yankovic, 1985

## A. In General

The healthcare setting is a fertile one for torts. So many things can go wrong in the course of diagnoses, drug treatments, and surgeries. Of course, automobiles and roadways provide many opportunities for accidents as well, but hospitals and physicians tend to have one thing that the average driver does not – deep pockets. The confluence of injuries to fuel complaints and money to pay judgments makes healthcare a uniquely important setting for tort law.

At this point, you have learned the basics of negligence law, and thus you know most of what is relevant to lawsuits against physicians and hospitals. But there are a few important things to add. This chapter covers some additional common-law doctrine that applies to healthcare torts. The next chapter concerns the effect of a federal statute, ERISA, which often blocks plaintiffs from suing health-insurers and HMOs in tort.

There are three aspects of common-law torts in the healthcare context that are covered in this chapter.

First, in a medical malpractice action for negligence, the standard of care is different. As we saw – in particular with *The T.J. Hooper* – the custom or standard practice of an industry is not dispositive when it comes to determining the standard of care. That is to say, the standard practice of an entire industry can be found unreasonable and thus held to fall below the standard of care to which defendants are held in negligence actions. That is not the case, however, with medical malpractice. Medical custom – what physicians generally call the “standard practice” or “standard of care” – is the benchmark for determining breach of duty in the context of medical malpractice

negligence claims. This means that what is called “standard of care” in medical jargon ends up dictating what we refer to as the “standard of care” in legal jargon.

Second, the intentional tort of battery – to be dealt with in a more general way in the second volume of this casebook – has a unique role in the medical setting. The healthcare version of battery, called **medical battery**, provides a way for patients to sue physicians who treat them beyond the scope of the patient’s consent. Consistent with battery doctrine, and in distinction to negligence, a medical battery action has no requirement of showing damages or an injury.

Third, there is a kind of claim that is unique to healthcare: the action for **informed consent**. The informed consent action is generally available where a patient was not apprised of an important risk necessary to make an informed decision about treatment, and the patient then suffers the negative consequence associated with the undisclosed risk.

## **B. The Standard of Care for Healthcare Professionals in Negligence Actions**

### **Basics**

Most cases falling under the label “medical malpractice” are negligence cases. Examples of medical malpractice negligence actions would include suits arising from an internist who prescribes a drug contraindicated by something in the patient’s history or a radiologist who fails to see a tumor that other radiologists would have seen.

There is a key difference between negligence law generally and negligence law as applied to physicians: the standard of care. Physicians are considered *professionals*, and for professionals, the standard of care is not that of a reasonable person, but is instead **the knowledge and skill of the minimally competent member of that professional community**. Another way of putting this is that custom becomes dispositive in cases of professional negligence. Is it the prevailing custom for neurosurgeons to order an MRI scan before undertaking a scheduled brain surgery? If so, then failing to do this is a breach of the duty of care. If not, then there is no breach –

even if the plaintiff can demonstrate that a practice of doing so would be prudent.

This way of setting the standard of care works both for and against physicians. On the one hand, hewing to custom keeps a physician insulated from malpractice judgments – even where the hypothetical reasonable physician might be more cautious. On the other hand, deviating from custom – even when doing so would seem reasonable – exposes the physician to liability.

This standard for professional negligence is objective, and it is calibrated in accordance with the community of professionals in the defendant's practice. If the defendant is a general dentist, then the standard is the minimally qualified member of the relevant community of general dentists. If the defendant is a cardiologist, then the standard is the minimally qualified member of the relevant community of cardiologists. By saying the standard is objective, we mean that it is the same standard for all members of the professional community. That is, the standard of care is not adjusted in favor of professionals who have lower levels of experience, skill, or knowledge. Thus, it does not matter whether a physician is just out of medical school and doesn't know much yet – the physician must come up to the level of the standard of practice of the relevant professional community. Also, the standard of practice will evolve over time. What starts as an obscure technique may gain enough acceptance to become standard practice. Thus, negligence law puts the onus on physicians and other healthcare professionals to stay up to date.

There is an important exception or caveat to this objective standard: If a physician has superior knowledge or skills, then those ratchet up the standard of care. This same thing was discussed in Chapter 6, in the section titled "Experience and Level of Skill," with regard to the reasonable-person standard of care. What is true in that general, nonprofessional context is also true for professionals.

Suppose a particular physician, Dr. D, has learned of obscure research showing that persons taking herbal supplement X are likely to suffer heart valve damage if they simultaneously take a certain

prescribed medication Y. Suppose further that every other physician in the world does not know of this research, and that the state of practice is for physicians to prescribe Y without regard to whether patients are taking X. If Dr. D knows that a patient is taking X and prescribes Y anyway, Dr. D is liable for the resulting heart valve damage – notwithstanding the fact that any other physician would have done the same thing.

One more thing to bear in mind: The objective standard of care for professionals applies only when they are accused of negligence in the course of their professional practice. If an orthopedist drives her car into your mailbox, the standard applied will be that of the hypothetical reasonable person and not that of the knowledge and skill of the minimally competent orthopedist.

### **The Role of Expert Testimony**

The fact that the professional standard of care is defined with objective reference to the professional community means that it is almost always the case that expert testimony will be needed to establish the standard of care. In practice, this makes medical negligence actions expensive to litigate. It also changes the role of the jury. Instead of jurors asking themselves what is reasonable, jurors are generally left to choose between the competing views of the plaintiff's expert and the defendant's expert. Thus, a medical negligence case can often come down to whether the plaintiff's expert or the defendant's seems more knowledgeable and credible.

Expert testimony is not always necessary. Some cases can be prosecuted based on common knowledge. If a surgeon mistakenly cuts off the wrong limb or removes the wrong kidney, no expert testimony is necessary to show that the standard of care has been breached. Another example is leaving foreign objects inside a patient, such as surgical sponges. In fact, a sponge left inside the body cavity is a leading example of the doctrine of *res ipsa loquitur* in action. One way to think about cases such as these is that they really are not medical malpractice cases at all, since medical knowledge and skill are not at issue. Most medical malpractice cases, however, involve a question of professional judgment. In such cases, the question of

whether the physician used appropriate professional judgment will require the testimony of a medical expert.

### **How the Professional Community is Defined**

Since the standard of care is defined by the professional community, a key question concerns how to define the “community.” The analysis of what constitutes the relevant community involves issues of both specialty and geography.

Exactly what skills and knowledge a physician is expected to have depends on whether or not the physician has a specialty, and, if so, what that specialty is. Physicians who are general practitioners are held to a different and lower standard than specialists. If a general practitioner prescribes an aerosol inhaler for asthma, the standard is different and lower than a pulmonologist who writes the prescription. For the general practitioner, the standard of care is set by the knowledge and skill level of a minimally competent general practitioner. For the pulmonologist, it is what is the knowledge and skill level of a pulmonologist. By the way, holding one’s self out to the public as a specialist is generally what counts for being held to the higher standard of knowledge and skill of a specialist.

Geography may be relevant as well. Historically, professional communities were conceived of as being local. If the question of negligence concerns a physician practicing in Ridgefield, population 20,000, then the standard of care is set by the customs, skills, and level of knowledge of Ridgefield physicians. So the question of whether a physician in a particular town was negligent required getting experts from that city to testify as to the standard practice in that town. Such a requirement, as you might imagine, works greatly to the benefit of defendant physicians in small cities and towns. First, it allows small-town medical care to be held to a lower standard than in the big cities. And the lower the standard, the easier it is for physicians to escape liability. But there is another, sharper advantage for physicians in smaller locales when the standard of care is defined locally. Professionals in small locales are often unwilling to testify against one another. Without an expert to testify as to the standard of care in the community, the lawsuit may be stopped in its tracks.



Because of the recurrent problem of a lack of willing experts, the trend in the law has been to move away from defining professional communities in this way. The more favored alternatives are (1) to use a national standard, or (2) to use a nonparticularized local standard, meaning that the standard is defined with reference to a *similar* city or town. The similar-communities standard means that experts for small towns and cities can be found across the country if necessary.

A typical way for courts to define professional communities is to use a similar-geographical-place standard for general practitioners and to use a national standard for members of a medical specialty. Thus, a cardiothoracic surgeon practicing in a city of a few thousand people will be held to the same standard as cardiothoracic surgeons in a megalopolis of millions.

### **Problems for Professional Medical Negligence**

**A.** Delinda, a medical doctor practicing as a general practitioner, was trying her best when she prescribed sploramoxacin to her patient, Perry. Based on lab results, Delinda figured that Perry had a bacterial infection that was causing him pain in his lower left side – around the site of a deep cut he had gotten while hiking. Delinda also knew that sploramoxacin was a good broad-spectrum antibiotic. Most physicians would have done exactly what Delinda did. Unknown to Delinda, the *Nashlanta Journal of Medicine* had published an article in the previous week showing that sploramoxacin was contraindicated in cases of lower-left-side pain because of a newly identified condition named Lower Left Syndrome. (The *Nashlanta Journal of Medicine* is a relatively obscure journal which few people read.) While Lower Left Syndrome presents with all the symptoms of a bacterial infection, it is in fact caused by a eukaryotic plasmodium. Generally, the body's natural defenses will destroy the plasmodia in two to three weeks without treatment. If, however, sploramoxacin is administered in patients with Lower Left Syndrome, the body's natural defenses against the plasmodium are lowered, and the plasmodium will attack the liver, causing liver failure. This is what happened to Perry. Will Perry prevail in a lawsuit against Delinda?

**B.** Same as A., but suppose Delinda had happened to have read the article on Lower Left Syndrome before she saw Perry. Different result?

**C.** Same as A., but suppose the standard of practice in a case such as Perry's was to use an expensive test that not only indicates infection, but also discerns the difference between a bacterial infection and a plasmodial infection. (And note that antibiotics do not work against plasmodia.) Different result?

**D.** Same as A., but suppose immediately before seeing Delinda, Perry consumed a substantial quantity of snasmygla cheese, which, as researchers will soon find out, has precisely the same effect as sploramoxacin in lowering the body's natural defenses to the eukaryotic plasmodium. Different result?

### **Professional Negligence Outside the Healthcare Setting**

The professional standard of negligence that applies to medical doctors and dentists applies to non-healthcare professionals as well, such as accountants, architects, engineers, veterinarians, and attorneys. That is to say that these professionals, when sued for negligence in the course of their professional practice, are held to a standard of care that is dictated by the custom or standard of practice that prevails in the relevant community of professionals – what the reasonable person would do is irrelevant. (Attorney malpractice is, of course, an important area of the law for budding lawyers to be familiar with. But we will leave an in-depth treatment of the topic for your professional responsibility course.)

Whether or not something counts as a “profession” can be a tricky question. In general, a profession for the purpose of assigning a standard of care in negligence is one that consists primarily of intellectual labor and that requires higher education.

Plumbers, electricians, and carpenters, for instance, are not considered professionals in the negligence context – even though their work requires a great deal of knowledge. Meanwhile, surgeons are considered professionals, even though their work might be considered primarily manual as opposed to intellectual.

### **C. Medical Battery**

Medical battery is an intentional tort cause of action that can be alleged against a physician or other healthcare provider who performs a course of treatment without the patient's consent.

What we are calling “medical battery” is not really a separate tort; instead it is really just a particular factual context for the tort of battery. The intentional torts, including battery, are covered later in this casebook. So, assuming you are proceeding through this casebook in order, and you have not studied battery yet, you will need the basics of the doctrine to be able to understand actions for medical battery.

The intentional tort of battery requires that the defendant inflict a harmful or offensive touching on the plaintiff's body. Consent is an affirmative defense. To break it down into elements, battery – including medical battery – requires: (1) an act; (2) intent; (3) actual and proximate causation; (4) a physical touching of the plaintiff's body; and (5) harmfulness or offensiveness. The fifth element and the affirmative defense of consent are key to preventing the tort of battery from getting out of control. People touch each other's bodies all the time, rarely accruing claims for battery. The reason why most touches do not create liability is that nearly all touches are either not harmful or offensive, or else they are consented to.

Now that you understand the basics of battery, you can see some key differences between the negligence cause of action and the battery cause of action. Unlike a prima facie case for negligence, a claim for battery does not require an injury. That makes a battery claim, at least in that sense, easier to bring. But there is a tradeoff. Unlike negligence, which works for accidents, a claim for battery requires intent, which can make a battery claim harder to bring.

In a later chapter on that covers battery in general, we will explore more of what it means for a touching to be “harmful or offensive.” In the medical context, however, this is not a difficult requirement for plaintiffs to meet. Cutting into someone or introducing a medical instrument into a bodily orifice certainly counts as harmful or offensive.

The key issue for medical battery is generally whether there was consent. Physicians touch patients all the time, and almost always, that touching is in accordance with the patient's consent. To be valid, consent does not have to be in writing. It does not even need to be expressed orally. Consent can be implied. When a patient opens up his mouth to say "ahh," permission to insert a tongue depressor into the patient's mouth is implied.

There is one important and constantly recurring circumstance in which physicians touch patients without any consent whatsoever: the emergency room. When an unconscious patient is brought into an emergency room, the consent to touching the patient is said to be "implied by law." This means that even though there is no actual consent, the law will pretend that there is consent for public-policy reasons. After all, if every unconscious patient given emergency treatment was able to win a lawsuit for battery, there would be a steep decline in emergency services.

Now that you have a firmer grasp of when medical battery claims will not arise, you can more readily discern the relatively rare circumstances in which they will arise. In particular, a common scenario that creates liability for medical battery is when a physician goes further with a touching than the patient consented to.

**Case: Mohr v. Williams**

The following case is the classic example of how a medical battery results when a physician goes beyond the patient's scope of consent.

*Mohr v. Williams*

Supreme Court of Minnesota

June 23, 1905

ANNA MOHR v. CORNELIUS WILLIAMS. Nos. 14,312, 14,360 - (94, 95). Opinion by Brown, J., Jaggard, J. took no part.

**Justice CALVIN L. BROWN:**

Defendant is a physician and surgeon of standing and character, making disorders of the ear a specialty, and having

an extensive practice in the city of St. Paul. He was consulted by plaintiff, who complained to him of trouble with her right ear, and, at her request, made an examination of that organ for the purpose of ascertaining its condition. He also at the same time examined her left ear, but, owing to foreign substances therein, was unable to make a full and complete diagnosis at that time. The examination of her right ear disclosed a large perforation in the lower portion of the drum membrane, and a large polyp in the middle ear, which indicated that some of the small bones of the middle ear (ossicles) were probably diseased. He informed plaintiff of the result of his examination, and advised an operation for the purpose of removing the polyp and diseased ossicles. After consultation with her family physician, and one or two further consultations with defendant, plaintiff decided to submit to the proposed operation. She was not informed that her left ear was in any way diseased, and understood that the necessity for an operation applied to her right ear only. She repaired to the hospital, and was placed under the influence of anesthetics; and, after being made unconscious, defendant made a thorough examination of her left ear, and found it in a more serious condition than her right one. A small perforation was discovered high up in the drum membrane, hooded, and with granulated edges, and the bone of the inner wall of the middle ear was diseased and dead. He called this discovery to the attention of Dr. Davis – plaintiff's family physician, who attended the operation at her request – who also examined the ear and confirmed defendant in his diagnosis. Defendant also further examined the right ear, and found its condition less serious than expected, and finally concluded that the left, instead of the right, should be operated upon; devoting to the right ear other treatment. He then performed the operation of ossiculectomy on plaintiff's left ear; removing a portion of the drum membrane, and scraping away the diseased portion of the inner wall of the ear. The operation was in every way successful and skilfully performed. It is claimed by plaintiff that the operation greatly

impaired her hearing, seriously injured her person, and, not having been consented to by her, was wrongful and unlawful, constituting an assault and battery; and she brought this action to recover damages therefor.~

We come then to a consideration of the questions presented by defendant's appeal from the order denying his motion for judgment notwithstanding the verdict. It is contended that final judgment should be ordered in his favor for the following reasons: (a) That it appears from the evidence received on the trial that plaintiff consented to the operation on her left ear. (b) If the court shall find that no such consent was given, that, under the circumstances disclosed by the record, no consent was necessary. (c) That, under the facts disclosed, an action for assault and battery will not lie; it appearing conclusively, as counsel urge, that there is a total lack of evidence showing or tending to show malice or an evil intent on the part of defendant, or that the operation was negligently performed.

We shall consider first the question whether, under the circumstances shown in the record, the consent of plaintiff to the operation was necessary.~ We have given it very deliberate consideration, and are unable to concur with counsel for defendant in their contention that the consent of plaintiff was unnecessary.

The evidence tends to show that, upon the first examination of plaintiff, defendant pronounced the left ear in good condition, and that, at the time plaintiff repaired to the hospital to submit to the operation on her right ear, she was under the impression that no difficulty existed as to the left. In fact, she testified that she had not previously experienced any trouble with that organ. It cannot be doubted that ordinarily the patient must be consulted, and his consent given, before a physician may operate upon him.

It was said in the case of *Pratt v. Davis*: "Under a free government, at least, the free citizen's first and greatest right,

which underlies all others – the right to the inviolability of his person; in other words the right to himself – is the subject of universal acquiescence, and this right necessarily forbids a physician or surgeon, however skilful or eminent, who has been asked to examine, diagnose, advise, and prescribe (which are at least necessary first steps in treatment and care), to violate, without permission, the bodily integrity of his patient by a major or capital operation, placing him under an anaesthetic for that purpose, and operating upon him without his consent or knowledge.”

1 KINKEAD TORTS, § 375, states the general rule on this subject as follows: “The patient must be the final arbiter as to whether he shall take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal right. Consent, therefore, of an individual, must be either expressly or impliedly given before a surgeon may have the right to operate.”

It is not, however, contended by defendant that under ordinary circumstances consent is unnecessary, but that, under the particular circumstances of this case, consent was implied; that it was an emergency case, such as to authorize the operation without express consent or permission. The medical profession has made signal progress in solving the problems of health and disease, and they may justly point with pride to the advancements made in supplementing nature and correcting deformities, and relieving pain and suffering, but we are aware of no rule or principle of law which would extend to [a physician] free license respecting surgical operations. Reasonable latitude must, however, be allowed the physician in a particular case; and we would not lay down any rule which would unreasonably interfere with the exercise of his discretion, or prevent him from taking such measures as his judgment dictated for the welfare of the patient in a case of emergency. If a person should be injured to the extent of rendering him unconscious, and his injuries

were of such a nature as to require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb, and consent on the part of the injured person would be implied. And again, if, in the course of an operation to which the patient consented, the physician should discover conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life or health of the patient, he would, though no express consent was obtained or given, be justified in extending the operation to remove and overcome them.

But such is not the case at bar. The diseased condition of plaintiff's left ear was not discovered in the course of an operation on the right which was authorized, but upon an independent examination of that organ, made after the authorized operation was found unnecessary.

The last contention of defendant is that the act complained of did not amount to an assault and battery. This is based upon the theory that the absence of a showing that defendant was actuated by a wrongful intent, or guilty of negligence, relieves the act of defendant from the charge of an unlawful assault and battery.

We are unable to reach that conclusion, [i]f the operation was performed without plaintiff's consent, and the circumstances were not such as to justify its performance without, it was wrongful; and, if it was wrongful, it was unlawful. As remarked in 1 JAGGARD, TORTS, 437, every person has a right to complete immunity of his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege; and any unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery. In the case at bar, whether defendant's act in performing the operation upon plaintiff was authorized was a question for the jury to determine. If it was



unauthorized, then it was, within what we have said, unlawful. It was a violent assault, not a mere pleasantry; and, even though no negligence is shown, it was wrongful and unlawful.~

The amount of plaintiff's recovery, if she is entitled to recover at all, must depend upon the character and extent of the injury inflicted upon her, in determining which the nature of the malady intended to be healed and the beneficial nature of the operation should be taken into consideration, as well as the good faith of the defendant.

Orders affirmed.

### **Check-Your-Understanding Questions About *Mohr***

- A.** Would Anna Mohr have been able to recover in negligence? Why or why not?
- B.** Would Mohr have had a cause of action if she had been brought to the hospital unconscious and the surgery had been necessary on an emergency basis?

### **Questions to Ponder About *Mohr***

- A.** Do you think plaintiffs such as Anna Mohr should have a cause of action even in circumstances such as these where no harm is actually done?
- B.** If there is an interest in making sure that physicians do not exceed the scope of a patient's consent, could that be better handled through professional rules that are enforced by licensing boards? Or is the tort system a proper tool to use? Why or why not?

### **D. Informed Consent**

An informed-consent action alleges that a patient was harmed by a physician's failure to disclose risks associated with medical treatment.

Informed-consent actions are something of a battery-negligence hybrid. That is, they have some things in common with the intentional tort of battery, and some things in common with the tort of negligence. As a matter of pleading, informed-consent actions

might be brought as either an intentional tort or as negligence. Indeed, whether an informed-consent action is pled as an intentional tort or negligence may have important ramifications for what deadline applies for purposes of the statute of limitations (which typically is longer for negligence). Whether an informed-consent action is brought as an intentional tort or a negligence claim may also be important for determining whether a judgment would be covered by insurance (generally insurance covers negligence but not battery). But as a conceptual matter, it is probably best to think of informed-consent actions as a breed of their own.

In general, an informed-consent action requires the following to be proved:

1. A risk should have been disclosed.
2. The risk was not disclosed.
3. The patient would have made a different decision about treatment if the risk had been disclosed.
4. The patient was injured as a result.

Let's look at an example of an easy prima facie case.

*Example: Spinal Injection* – Suppose a man went to his physician with a complaint of moderate back pain. The physician suggested injecting a new drug directly into the spinal canal. The trials of this drug, used in this way, indicated a one-in-10 chance that permanent partial paralysis would result. The physician did not, however, disclose this risk. If the physician had disclosed the risk, the patient never would have agreed to the procedure – especially since the back pain was not severe. But, being ignorant of the risk, the patient consented to the procedure. Unfortunately, the patient suffered paralysis as a result. Is there a good claim for informed consent? Yes. The patient will prevail in an informed-consent action. Why? There was a risk that should have been disclosed, the risk was not disclosed, the patient would have made a different decision if the risk had been

disclosed, and the patient was injured. All the elements are met.

Let's discuss the requirements of an informed-consent action in a bit more detail:

1. *The risk should have been disclosed.* – The risk must be of the type that should have been disclosed in order for the patient to make an informed decision about the course of treatment. There are two schools of thought on how to decide if the risk was of the type that should have been disclosed. One is to judge it by the standard of the reasonable physician. If the reasonable physician would have disclosed the risk, then this element of the informed-consent action has been fulfilled. This approach is sometimes called the **physician rule**. The other school of thought is that the risk should be disclosed if it would be “material” to the reasonable patient. The word “material” here is related to the word “matter.” A material risk is one that would *matter* to the patient's decision. This approach is sometimes called the **patient rule**.

2. *The risk was not disclosed.* The physician must omit to disclose the risk at issue. This requirement is generally a question of factual evidence to be submitted to the jury. In order to have evidence of the disclosure of risks readily available, it is common for physicians to ask patients who are about to undergo surgery or other invasive procedures to sign documents acknowledging that the risks have been explained to them.

3. *The patient would have made a different decision about treatment if the risk had been disclosed.* If, despite the risk, the patient would have gone ahead with the course of treatment anyway, then there is no claim. This requirement is essentially an actual causation requirement. If the patient would have had the treatment anyway, then it is not possible to say that *but for* the failure of the physician to disclose the risk, the patient would not have suffered the injury. There are two different approaches to this causation requirement. Some courts use a “subjective” standard, asking whether the particular plaintiff who is bringing the suit would have made a different decision. Other courts use an “objective” standard, asking whether the hypothetical

reasonable patient would have made a different decision in awareness of the risk. The objective standard represents a slight departure from straightforward but-for causation.

4. *The patient was thereby injured.* In general, the patient must have suffered a bad outcome that counts as an injury. It is clear that an injury is required when the informed-consent action is brought as a form of negligence. In the absence of an injury, it may be possible to allege a claim of informed-consent as a battery action.

#### **Case: Largey v. Rothman**

The following is a leading case discussing in depth the question of whether informed consent action should use the physician-perspective to determine what risks should be disclosed (the physician rule) or the patient-perspective to determine what risks are material (the patient rule). You will notice that this case generally refers to the physician rule as the “professional standard’ rule,” and the patient rule as the “prudent patient’ rule.”

#### ***Largey v. Rothman***

Supreme Court of New Jersey

May 5, 1988

JANICE LARGEY AND JOSEPH LARGEY,  
PLAINTIFFS-APPELLANTS, v. DONALD ROTHMAN,  
M.D., DEFENDANT-RESPONDENT. No. A-52. Justices  
Clifford, Handler, Pollock, Garibaldi, and Stein. All for  
reversal with none opposed.

#### **PER CURIAM**

This medical malpractice case raises an issue of a patient’s informed consent to treatment. The jury found that plaintiff Janice Largey had consented to an operative procedure performed by the defendant physician. The single question presented goes to the correctness of the standard by which the jury was instructed to determine whether the defendant, Dr. Rothman, had adequately informed his patient of the risks of that operation.

The trial court told the jury that when informing the plaintiff Janice Largey of the risks of undergoing a certain biopsy procedure, described below, defendant was required to tell her “what reasonable medical practitioners in the same or similar circumstances would have told their patients undertaking the same type of operation.” By answer to a specific interrogatory on this point, the jurors responded that defendant had not “fail[ed] to provide Janice Largey with sufficient information so that she could give informed consent” for the operative procedure. On plaintiffs’ appeal the Appellate Division affirmed in an unreported opinion, noting that the trial court’s charge on informed consent followed the holding in *Kaplan v. Haines*, 96 N.J. Super. 242, 257 (App.Div. 1967), which this Court affirmed on the basis of the Appellate Division’s opinion, 51 N.J. 404 (1968).

Plaintiffs argued below, and repeat the contention here, that the proper standard is one that focuses not on what information a reasonable doctor should impart to the patient (the “professional” standard) but rather on what the physician should disclose to a reasonable patient in order that the patient might make an informed decision (the “prudent patient” or “materiality of risk” standard). The latter is the standard announced in *Canterbury v. Spence*, 464 F.2d 772 (D.C.Cir. 1972). The Appellate Division rejected the *Canterbury* standard, not because it disagreed with that standard but because the court felt itself bound, correctly, by the different standard of *Kaplan*, which represents “the latest word” from this Court.

On plaintiffs’ petition we granted certification, to address the correct standard for informed consent. We now discard *Kaplan*’s “reasonable physician” standard and adopt instead the *Canterbury* “reasonable patient” rule. Hence, we reverse and remand for a new trial.

The narrow issue before us can be placed in satisfactory context by our adopting in pertinent part the Appellate Division's recitation of the facts. In the quoted passage as well as henceforth in this opinion, the word "plaintiff" refers to plaintiff Janice Largey.

In the course of a routine physical examination plaintiff's gynecologist, Dr. Glassman, detected a "vague mass" in her right breast. The doctor arranged for mammograms to be taken. The radiologist reported two anomalies to the doctor: an "ill-defined density" in the subareola region and an enlarged lymph node or nodes, measuring four-by-two centimeters, in the right axilla (armpit). The doctor referred plaintiff to defendant, a surgeon. Defendant expressed concern that the anomalies on the mammograms might be cancer and recommended a biopsy. There was a sharp dispute at trial over whether he stated that the biopsy would include the lymph nodes as well as the breast tissue. Plaintiff claims that defendant never mentioned the nodes.

Plaintiff submitted to the biopsy procedure after receiving a confirmatory second opinion from a Dr. Slattery. During the procedure defendant removed a piece of the suspect mass from plaintiff's breast and excised the nodes. The biopsies showed that both specimens were benign. About six weeks after the operation, plaintiff developed a right arm and hand lymphedema, a swelling caused by inadequate drainage in the lymphatic system. The condition resulted from the excision of the lymph nodes. Defendant did not advise plaintiff of this risk. Plaintiff's experts testified that defendant should have informed plaintiff that lymphedema was a risk of the operation.

Defendant's experts testified that it was too rare to be discussed with a patient.

Plaintiff and her husband, who sued *per quod*, advanced two theories of liability \* \* \*. They claimed that they were never told that the operation would include removal of the nodes and therefore that procedure constituted an unauthorized battery. Alternatively, they claimed that even if they had authorized the node excision, defendant was negligent in failing to warn them of the risk of lymphedema and therefore their consent was uninformed. The jury specifically rejected both claims.

## II

The origins of the requirement that a physician obtain the patient's consent before surgery may be traced back at least two centuries. See *Slater v. Baker & Stapleton*, 95 *Eng.Rep.* 860 (K.B.1767). The doctrine is now well-embedded in our law. In *Schloendorff v. The Soc'y of the N.Y. Hosp.*, 211 *N.Y.* 125 (1914), Justice Cardozo announced a patient's right to be free of uninvited, unknown surgery, which constitutes a trespass on the patient: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." Earlier case law recognized that theories of fraud and misrepresentation would sustain a patient's action in battery for an unauthorized intervention. Although that cause of action continues to be recognized in New Jersey, there is no "battery" claim implicated in this appeal because the jury determined as a matter of fact that plaintiff had given consent to the node excision performed by Dr. Rothman.

Although the requirement that a patient give consent before the physician can operate is of long standing, the doctrine of *informed* consent is one of relatively recent development in our

jurisprudence. It is essentially a negligence concept, predicated on the duty of a physician to disclose to a patient such information as will enable the patient to make an evaluation of the nature of the treatment and of any attendant substantial risks, as well as of available options in the form of alternative therapies.

An early statement of the “informed consent” rule is found in *Salgo v. Leland Stanford, Jr. Univ. Bd. of Trustees*, 154 *Cal.App.2d* 560 (Dist.Ct.App.1957), in which the court declared that “[a] physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment.” *Salgo* recognized that because each patient presents a “special problem,” the physician has a certain amount of discretion in dismissing the element of risk, “consistent, of course, with the full disclosure of facts necessary to an informed consent.”

Further development of the doctrine came shortly thereafter, in *Natanson v. Kline*, 186 *Kan.* 393 (1960), which represented one of the leading cases on informed consent at that time. In *Natanson* a patient sustained injuries from excessive doses of radioactive cobalt during radiation therapy. Even though the patient had consented to the radiation treatment, she alleged that the physician had not informed her of the nature and consequences of the risks posed by the therapy. Thus, the case sounded in negligence rather than battery. The court concluded that when a physician either affirmatively misrepresents the nature of an operation or fails to disclose the probable consequences of the treatment, he may be subjected to a claim of unauthorized treatment. The *Natanson* court established the standard of care to be exercised by a physician in an informed consent case as “limited to those disclosures which a reasonable medical practitioner would make under the same or similar circumstances.” At bottom the decision turned on the principle of a patient’s right of self-determination:



Anglo-American law starts with the premise of thorough self-determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment. A doctor might well believe that an operation or form of treatment is desirable or necessary but the law does not permit him to substitute his own judgment for that of the patient by any form of artifice or deception.

After *Salgo* and *Natanson* the doctrine of informed consent came to be adopted and developed in other jurisdictions, which, until 1972, followed the “traditional” or “professional” standard formulation of the rule. Under that standard, as applied by the majority of the jurisdictions that adopted it, a physician is required to make such disclosure as comports with the prevailing medical standard in the community – that is, the disclosure of those risks that a reasonable physician in the community, of like training, would customarily make in similar circumstances. A minority of the jurisdictions that adhere to the “professional” standard do not relate the test to any kind of community standard but require only such disclosures as would be made by a reasonable medical practitioner under similar circumstances. In order to prevail in a case applying the “traditional” or “professional” standard a plaintiff would have to present expert testimony of the community’s medical standard for disclosure in respect of the procedure in question and of the defendant physician’s failure to have met that standard.

In both the majority and minority formulations the “professional” standard rests on the belief that a physician, and *only* a physician, can effectively estimate both the psychological and physical consequences that a risk inherent in a medical procedure might produce in a patient. The burden imposed on the physician under this standard is to “consider the state of the patient’s health, and whether the

risks involved are mere remote possibilities or real hazards which occur with appreciable regularity \* \* \*.” A second basic justification offered in support of the “professional” standard is that “a general standard of care, as required under the prudent patient rule, would require a physician to waste unnecessary time in reviewing with the patient *every* possible risk, thereby interfering with the flexibility a physician needs in deciding what form of treatment is best for the patient.”

It was the “professional” standard that this Court accepted when, twenty years ago, it made the doctrine of informed consent a component part of our medical malpractice jurisprudence. *See Kaplan v. Haines*. In falling into step with those other jurisdictions that by then had adopted informed consent, the Court approved the following from the Appellate Division’s opinion in *Kaplan*:

The authorities \* \* \* are in general agreement that the nature and extent of the disclosure, essential to an informed consent, depends upon the medical problem as well as the patient. Plaintiff has the burden to prove what a reasonable medical practitioner of the same school and same or similar community, under the same or similar circumstances, would have disclosed to his patient and the issue is one for the jury where, as in the case *sub judice*, a fact issue is raised upon conflicting testimony as to whether the physician made an adequate disclosure.

In 1972 a new standard of disclosure for “informed consent” was established in *Canterbury v. Spence*. The case raised a question of the defendant physician’s duty to warn the patient beforehand of the risk involved in a laminectomy, a surgical procedure the purpose of which was to relieve pain in plaintiff’s lower back, and particularly the risk attendant on a myelogram, the diagnostic procedure preceding the surgery. After several surgical interventions and hospitalizations, plaintiff was still, at the time of trial, using crutches to walk,

suffering from urinary incontinence and paralysis of the bowels, and wearing a penile clamp.

The *Canterbury* court announced a duty on the part of a physician to “warn of the dangers lurking in the proposed treatment” and to “impart information [that] the patient has every right to expect,” as well as a duty of “reasonable disclosure of the choices with respect to proposed therapy and the dangers inherently and potentially involved.” The court held that the scope of the duty to disclose

must be measured by the patient’s need, and that need is the information material to the decision. Thus the test for determining whether a particular peril must be divulged is its materiality to the patient’s decision: all risks potentially affecting the decision must be unmasked. And to safeguard the patient’s interest in achieving his own determination on treatment, the law must itself set the standard for adequate disclosure.

The breadth of the disclosure of the risks legally to be required is measured, under *Canterbury*, by a standard whose scope is “not subjective as to either the physician or the patient,”; rather, “it remains *objective* with due regard for the patient’s informational needs and with suitable leeway for the physician’s situation.” A risk would be deemed “material” when a reasonable patient, in what the physician knows or should know to be the patient’s position, would be “likely to attach significance to the risk or cluster of risks” in deciding whether to forego the proposed therapy or to submit to it.

The foregoing standard for adequate disclosure, known as the “prudent patient” or “materiality of risk” standard, has been adopted in a number of jurisdictions.

The jurisdictions that have rejected the “professional” standard in favor of the “prudent patient” rule have given a number of reasons in support of their preference. Those include:

(1) The existence of a discernible custom reflecting a medical consensus is open to serious doubt. The desirable scope of disclosure depends on the given fact situation, which varies from patient to patient, and should not be subject to the whim of the medical community in setting the standard.

(2) Since a physician in obtaining a patient's informed consent to proposed treatment is often obligated to consider non-medical factors, such as a patient's emotional condition, professional custom should not furnish the legal criterion for measuring the physician's obligation to disclose. Whether a physician has conformed to a professional standard should \* \* \* be important [only] where a pure medical judgment is involved, e.g. in ordinary malpractice actions, where the issue generally concerns the quality of treatment provided to the patient.

(3) Closely related to both (1) and (2) is the notion that a professional standard is *totally* subject to the whim of the physicians in the particular community. Under this view a physician is vested with virtually unlimited discretion in establishing the proper scope of disclosure; this is inconsistent with the patient's right of self-determination. As observed by the court in *Canterbury v. Spence*: "Respect for the patient's right of self-determination \* \* \* demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves."

(4) The requirement that the patient present expert testimony to establish the professional standard has created problems for patients trying to find physicians willing to breach the

“community of silence” by testifying against fellow colleagues.

Taken together, the reasons supporting adoption of the “prudent patient” standard persuade us that the time has come for us to abandon so much of the decision by which this Court embraced the doctrine of informed consent as accepts the “professional” standard. To that extent *Kaplan v. Haines* is overruled.

As indicated by the foregoing passages, the policy considerations are clear-cut. At the outset we are entirely unimpressed with the argument, made by those favoring the “professional” standard, that the “prudent patient” rule would compel disclosure of *every* risk (not just *material* risks) to *any* patient (rather than the *reasonable* patient). As *Canterbury* makes clear,

[t]he topics importantly demanding a communication of information are the inherent and potential hazards of the proposed treatment, the alternatives to that treatment, if any, and the results likely if the patient remains untreated. The factors contributing significance to the dangerousness of a medical technique are, of course, the incidence of injury and the degree of harm threatened.

The court in *Canterbury* did not presume to draw a “bright line separating the significant [risks] from the insignificant”; rather, it resorted to a “rule of reason,” concluding that “[w]henever non-disclosure of particular risk information is open to debate by reasonable-minded men, the issue is one for the finder of facts.” The point assumes significance in this case because defendant argues that the risk of lymphedema from an axillary node biopsy is remote, not material. Plaintiff’s experts disagree, contending that she should have been informed of that risk. Thus there will be presented on the retrial a factual issue for the jury’s resolution: would the

risk of lymphedema influence a prudent patient in reaching a decision on whether to submit to the surgery?

Perhaps the strongest consideration that influences our decision in favor of the “prudent patient” standard lies in the notion that the physician’s duty of disclosure “arises from phenomena apart from medical custom and practice”: the patient’s right of self-determination. The foundation for the physician’s duty to disclose in the first place is found in the idea that “it is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie.” In contrast the arguments for the “professional” standard smack of an anachronistic paternalism that is at odds with any strong conception of a patient’s right of self-determination.

Although today’s decision marks the first time we have confronted directly the choice between the “professional” and “prudent patient” standards, and hence to that extent our stated preference for the latter represents a clear break with the past, surely the considerations that we have identified as having played a significant role in that choice are familiar features of our case law. For example, just two terms ago we declared that “[t]he doctrine of informed consent presupposes that the patient has the information necessary to evaluate the risks and benefits of all the available options and is competent to do so.”

### III

Finally, we address the issue of proximate cause. As with other medical malpractice actions, informed-consent cases require that plaintiff prove not only that the physician failed to comply with the applicable standard for disclosure but also that such failure was the proximate cause of plaintiff’s injuries.

Under the “prudent patient” standard “causation must also be shown: *i.e.*, that the prudent person in the patient’s

position would have decided differently if adequately informed.” As *Canterbury* observes,

[t]he patient obviously has no complaint if he would have submitted to the therapy notwithstanding awareness that the risk was one of its perils. On the other hand, the very purpose of the disclosure rule is to protect the patient against consequences which, if known, he would have avoided by foregoing the treatment. The more difficult question is whether the factual issue on causality calls for an objective or a subjective determination.

*Canterbury* decided its own question in favor of an objective determination. The subjective approach, which the court rejected, inquires whether, if the patient had been informed of the risks that in fact materialized, he or she would have consented to the treatment. The shortcoming of this approach, according to *Canterbury*, is that it

places the physician in jeopardy of the patient’s hindsight and bitterness. It places the factfinder in the position of deciding whether a speculative answer to a hypothetical question is to be credited. It calls for a subjective determination solely on testimony of a patient-witness shadowed by the occurrence of the undisclosed risk.

The court therefore elected to adopt an objective test, as do we. Because we would not presume to attempt an improvement in its articulation of the reasons, we quote once again the *Canterbury* court:

Better it is, we believe, to resolve the causality issue on an objective basis: in terms of what a prudent person in the patient’s position would have decided if suitably informed of all perils bearing significance. If adequate disclosure could reasonably be expected to have caused that person to decline the treatment because

of the revelation of the kind of risk or danger that resulted in harm, causation is shown, but otherwise not. The patient's testimony is relevant on that score of course but it would not threaten to dominate the findings. And since that testimony would probably be appraised congruently with the factfinder's belief in its reasonableness, the case for a wholly objective standard for passing on causation is strengthened. Such a standard would in any event ease the fact-finding process and better assure the truth as its product.

#### IV

The judgment of the Appellate Division is reversed. The cause is remanded for a new trial consistent with this opinion.

#### **Questions to Ponder About *Largey***

- A.** Which is better, the physician rule (a/k/a the “professional standard’ rule”) or the patient rule (a/k/a the “prudent patient’ rule”)? Why?
- B.** Assuming that a jurisdiction opts for the patient rule, do you agree with the *Largey* court that the causation standard should be objective? Or should it be subjective? Stated differently, should the plaintiff have a cause of action if the hypothetical prudent patient would have made a different decision had the risk been disclosed? (The objective causation standard.) Or should it only matter whether the particular plaintiff would have made a different decision had the risk been disclosed? (The subjective causation standard.)



## 12. ERISA Preemption

“A rule without a penalty is just a suggestion.”

– Unknown

### Basics

The Employee Retirement Income Security Act of 1974 – known as “ERISA” – is a federal statute regulating employee benefits. ERISA is important in the negligence context because of its preemptive effect.

Federal laws can trump state laws – an effect called “preemption” – because of the Supremacy Clause of the U.S. Constitution in Article VI, Clause 2:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

This power allows federal statutes to erase state causes of action. As you know, tort law is a matter of state law.

The ERISA preemption provision is found in the federal statutes at 29 U.S.C. § 1144, but it is better known by its native section number as ERISA § 514. The statute provides:

“[T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan[.]”

This provision has been interpreted to bar tort lawsuits stemming from wrongfully withheld benefits. So if an employee is entitled to medical care under the employer’s health plan, and that medical care

is wrongfully denied, a common-law contract or tort lawsuit will not be allowed. This has the effect of providing a substantial level of immunity for healthcare decisions made in the context of employee-benefit program. The ERISA preemption effect is especially sharply felt in the context of decisions made by health maintenance organizations (HMOs).

Although state-law causes of action are not available to employees wrongfully denied benefits, ERISA itself provides a cause of action. ERISA § 502 creates a special private right of action such that employees wrongfully denied benefits can sue to recover the value of the benefits. The crucial difference between ERISA § 502 and common-law causes of action lies in the amount recoverable. ERISA § 502 does not permit recovery for consequential damages or punitive damages. So if a person dies because of being wrongfully denied coverage for needed treatment under an employee-benefit plan, the recovery is limited to the monetary amount that should have been disbursed for the treatment. The family may not recover an amount that would compensate them for the loss of their loved one.

Critics charge that this gives insurers and HMOs little incentive to pay the benefits that insureds are legally due. If a health-care organization is confronted with an authorization request for a life-saving surgery that will cost \$75,000, the organization can authorize the surgery, in which case it will be out \$75,000, or the organization can withhold authorization, in which case it faces a potential liability – assuming a § 502 action is brought – of \$75,000. This means that health-care organizations have little to lose by withholding treatment authorizations. Of course, if a health-care organization is chronically uncooperative, it can expect to lose customers. Since, however, the health-care organizations' true customer is the employer – not the covered employees – the organization may find that it wins more business by keeping costs low rather than by prioritizing excellent service.

It is important to keep in mind what causes of action ERISA does not bar.

ERISA does not bar state tort law suits against health-insurers or HMOs that are not providing services as part of an employee benefit program. The majority of non-elderly people with health insurance get that insurance through an employee-benefit program. But where an individual contracts directly with a health-care insurer, ERISA does not apply.

Moreover, ERISA does not bar suits against physicians who commit malpractice. Similarly, ERISA does not bar medical negligence lawsuits against hospitals. This is true even when the physicians' bills and hospital bills are being paid by an employee-benefit plan. Moreover, courts have often allowed suits against HMOs where the physician is directly employed by the HMO and where the basis of the claim is one of vicarious liability for employing the malpractice-committing physician.

**Case: Corcoran v. United Healthcare**

The following leading case shows the power of ERISA preemption in action and indicates the extent of its effect on common-law torts.

*Corcoran v. United Healthcare*

United States Court of Appeals for the Fifth Circuit  
June 26, 1992

965 F.2d 1321. FLORENCE B. CORCORAN Wife of/and WAYNE D. CORCORAN, Plaintiffs-Appellants, v. UNITED HEALTHCARE, INC., and BLUE CROSS and BLUE SHIELD OF ALABAMA, INC., Defendants-Appellees. No. 91-3322. THORNBERRY, KING, and DeMOSS, Circuit Judges.

**Judge CAROLYN DINEEN KING:**

This appeal requires us to decide whether ERISA pre-empts a state-law malpractice action brought by the beneficiary of an ERISA plan against a company that provides "utilization review" services to the plan. We also address the availability under ERISA of extracontractual damages. The district court granted the defendants' motion for summary judgment, holding that ERISA both pre-empted the plaintiffs' medical

malpractice claim and precluded them from recovering emotional distress damages. We affirm.

## I. BACKGROUND

The basic facts are undisputed. Florence Corcoran, a long-time employee of South Central Bell Telephone Company (Bell), became pregnant in early 1989. In July, her obstetrician, Dr. Jason Collins, recommended that she have complete bed rest during the final months of her pregnancy. Mrs. Corcoran applied to Bell for temporary disability benefits for the remainder of her pregnancy, but the benefits were denied. This prompted Dr. Collins to write to Dr. Theodore J. Borgman, medical consultant for Bell, and explain that Mrs. Corcoran had several medical problems which placed her “in a category of high risk pregnancy.” Bell again denied disability benefits. Unbeknownst to Mrs. Corcoran or Dr. Collins, Dr. Borgman solicited a second opinion on Mrs. Corcoran’s condition from another obstetrician, Dr. Simon Ward. In a letter to Dr. Borgman, Dr. Ward indicated that he had reviewed Mrs. Corcoran’s medical records and suggested that “the company would be at considerable risk denying her doctor’s recommendation.” As Mrs. Corcoran neared her delivery date, Dr. Collins ordered her hospitalized so that he could monitor the fetus around the clock. “This was the same course of action Dr. Collins had ordered during Mrs. Corcoran’s 1988 pregnancy. In that pregnancy, Dr. Collins intervened and performed a successful Caesarean section in the 36th week when the fetus went into distress.”

Mrs. Corcoran was a member of Bell’s Medical Assistance Plan (MAP or “the Plan”). MAP is a self-funded welfare benefit plan which provides medical benefits to eligible Bell employees. It is administered by defendant Blue Cross and Blue Shield of Alabama (Blue Cross) pursuant to an Administrative Services Agreement between Bell and Blue Cross. The parties agree that it is governed by ERISA

“Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, 29 U.S.C. §§ 1001-1461.”

Under a portion of the Plan known as the “Quality Care Program” (QCP), participants must obtain advance approval for overnight hospital admissions and certain medical procedures (“pre-certification”), and must obtain approval on a continuing basis once they are admitted to a hospital (“concurrent review”), or plan benefits to which they otherwise would be entitled are reduced.

QCP is administered by defendant United HealthCare (United) pursuant to an agreement with Bell. United performs a form of cost-containment service that has commonly become known as “utilization review.” See Blum, *An Analysis of Legal Liability in Health Care Utilization Review and Case Management*, 26 Hous. L. Rev. 191, 192-93 (1989) (Utilization review refers to “external evaluations that are based on established clinical criteria and are conducted by third-party payors, purchasers, or health care organizers to evaluate the appropriateness of an episode, or series of episodes, of medical care.”). The Summary Plan Description (SPD) explains QCP as follows:

The Quality Care Program (QCP), administered by United HealthCare, Inc., assists you and your covered dependents in securing quality medical care according to the provisions of the Plan while helping reduce risk and expense due to unnecessary hospitalization and surgery. They do this by providing you with information which will permit you (in consultation with your doctor) to evaluate alternatives to surgery and hospitalization when those alternatives are medically appropriate. In addition, QCP will monitor any certified hospital confinement to keep you informed as to whether or not the stay is covered by the Plan.

Two paragraphs below, the SPD contains this statement: **When reading this booklet, remember that all decisions regarding your medical care are up to you and your doctor.** It goes on to explain that when a beneficiary does not contact United or follow its pre-certification decision, a “QCP Penalty” is applied. The penalty involves reduction of benefits by 20 percent for the remainder of the calendar year or until the annual out-of-pocket limit is reached. Moreover, the annual out-of-pocket limit is increased from \$ 1,000 to \$ 1,250 in covered expenses, not including any applicable deductible. According to the QCP Administrative Manual, the QCP penalty is automatically applied when a participant fails to contact United. However, if a participant complies with QCP by contacting United, but does not follow its decision, the penalty may be waived following an internal appeal if the medical facts show that the treatment chosen was appropriate.

A more complete description of QCP and the services provided by United is contained in a separate booklet. Under the heading “WHAT QCP DOES” the booklet explains:

Whenever your doctor recommends surgery or hospitalization for you or a covered dependent, QCP will provide an independent review of your condition (or your covered dependent’s). The purpose of the review is to assess the need for surgery or hospitalization and to determine the appropriate length of stay for a hospitalization, based on nationally accepted medical guidelines. As part of the review process, QCP will discuss with your doctor the appropriateness of the treatments recommended and the availability of alternative types of treatments – or locations for treatment – that are equally effective, involve less risk, and are more cost effective.

The next paragraph is headed “INDEPENDENT, PROFESSIONAL REVIEW” and states:

United Health Care, an independent professional medical review organization, has been engaged to provide services under QCP. United's staff includes doctors, nurses, and other medical professionals knowledgeable about the health care delivery system. Together with your doctor, they work to assure that you and your covered family members receive the most appropriate medical care.

At several points in the booklet, the themes of “independent medical review” and “reduction of unnecessary risk and expense” are repeated. Under a section entitled “THE QUALITY CARE PROGRAM ... AT A GLANCE” the booklet states that QCP “Provides independent, professional review when surgery or hospitalization is recommended – to assist you in making an enlightened decision regarding your treatment.” QCP “[p]rovides improved quality of care by eliminating medically unnecessary treatment,” but beneficiaries who fail to use it “may be exposed to unnecessary health risks. ...” Elsewhere, in the course of pointing out that studies show one-third of all surgery may be unnecessary, the booklet explains that programs such as QCP “help reduce unnecessary and inappropriate care and eliminate their associated costs.” Thus, “one important service of QCP will help you get a second opinion when your doctor recommends surgery.”

The booklet goes on to describe the circumstances under which QCP must be utilized. When a Plan member's doctor recommends admission to the hospital, independent medical professionals will review, with the patient's doctor, the medical findings and the proposed course of treatment, including the medically necessary length of confinement. The Quality Care Program may require additional tests or information (including second opinions), when determined necessary during consultation between QCP professionals and the attending physician.

When United certifies a hospital stay, it monitors the continuing necessity of the stay. It also determines, for certain medical procedures and surgeries, whether a second opinion is necessary, and authorizes, where appropriate, certain alternative forms of care. Beneficiaries are strongly encouraged to use QCP to avoid loss of benefits: “‘fully using’ QCP means following the course of treatment that’s recommended by QCP’s medical professionals.”

In accordance with the QCP portion of the plan, Dr. Collins sought pre-certification from United for Mrs. Corcoran’s hospital stay. Despite Dr. Collins’s recommendation, United determined that hospitalization was not necessary, and instead authorized 10 hours per day of home nursing care.

Mrs. Corcoran entered the hospital on October 3, 1989, but, because United had not pre-certified her stay, she returned home on October 12. On October 25, during a period of time when no nurse was on duty, the fetus went into distress and died.

Mrs. Corcoran and her husband, Wayne, filed a wrongful death action in Louisiana state court alleging that their unborn child died as a result of various acts of negligence committed by Blue Cross and United. Both sought damages for the lost love, society and affection of their unborn child. In addition, Mrs. Corcoran sought damages for the aggravation of a pre-existing depressive condition and the loss of consortium caused by such aggravation, and Mr. Corcoran sought damages for loss of consortium. The defendants removed the action to federal court on grounds that it was pre-empted by ERISA and that there was complete diversity among the parties. <sup>5</sup>*See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987) (because ERISA pre-emption is so comprehensive, pre-emption defense provides sufficient basis for removal to federal court notwithstanding “well-pleaded complaint” rule).<sup>7</sup>



Shortly thereafter, the defendants moved for summary judgment. They argued that the Corcorans' cause of action, properly characterized, sought damages for improper handling of a claim from two entities whose responsibilities were simply to administer benefits under an ERISA-governed plan. They contended that their relationship to Mrs. Corcoran came into existence solely as a result of an ERISA plan and was defined entirely by the plan. Thus, they urged the court to view the claims as "relating to" an ERISA plan, and therefore within the broad scope of state law claims pre-empted by the statute. In their opposition to the motion, the Corcorans argued that "this case essentially boils down to one for malpractice against United HealthCare. ... " They contended that under this court's analysis in *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986), their cause of action must be classified as a state law of general application which involves an exercise of traditional state authority and affects principal ERISA entities in their individual capacities. This classification, they argued, together with the fact that pre-emption would contravene the purposes of ERISA by leaving them without a remedy, leads to the conclusion that the action is permissible notwithstanding ERISA.

The district court, relying on the broad ERISA pre-emption principles developed by the Supreme Court and the Fifth Circuit, granted the motion. The court noted that ERISA pre-emption extends to state law claims "of general application," including tort claims where ERISA ordinarily plays no role in the state law at issue." The court found that the state law claim advanced by the Corcorans "related to" the employee benefit plan (citing the statutory pre-emption clause, ERISA § 514(a)), and therefore was pre-empted, because

but for the ERISA plan, the defendants would have played no role in Mrs. Corcoran's pregnancy; the sole reason the defendants had anything to do with her pregnancy is because

the terms of the ERISA plan directed Mrs. Corcoran to the defendants (or at least to United HealthCare) for approval of coverage of the medical care she initially sought.

The court held that, because the ERISA plan was the source of the relationship between the Corcorans and the defendants, the Corcorans' attempt to distinguish United's role in paying claims from its role as a source of professional medical advice was unconvincing.

The Corcorans filed a motion for reconsideration under Rule 59 of the Federal Rules of Civil Procedure. They did not ask the district court to reconsider its pre-emption ruling, but instead contended that language in the district court's opinion had implicitly recognized that they had a separate cause of action under ERISA's civil enforcement mechanism, § 502(a)(3). "The district court had stated that "because the plaintiffs concede that the defendants have fully paid any and all medical expenses that Mrs. Corcoran actually incurred that were covered by the plan, the plaintiffs have no remaining claims under ERISA." In a footnote, the court indicated that Mrs. Corcoran could have (1) sued under ERISA, before entering the hospital, for a declaratory judgment that she was entitled to hospitalization benefits; or (2) gone into the hospital, incurred out-of-pocket expenses, and sued under ERISA for these expenses." They argued that the Supreme Court's decision in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), did not foreclose the possibility that compensatory damages such as they sought constituted "other appropriate equitable relief" available under § 502(a)(3) for violations of ERISA or the terms of an ERISA plan. The district court denied the motion. Although the court recognized that there was authority to the contrary, it pointed out that "the vast majority of federal appellate courts have ... held that a beneficiary under an ERISA health plan may not recover under section 509(a)(3) [sic] of ERISA compensatory or consequential damages for emotional

distress or other claims beyond medical expenses covered by the plan.” (citations omitted). Moreover, the court pointed out, a prerequisite to recovery under § 502(a)(3) is a violation of the terms of ERISA itself. ERISA does not place upon the defendants a substantive responsibility in connection with the provision of medical advice which, if breached, would support a claim under § 502(a)(3). The court entered final judgment in favor of Blue Cross and United, and this appeal followed.

## II. STANDARD OF REVIEW

Because this case is on appeal from the district court’s grant of summary judgment, our review is plenary. We view the evidence in the light most favorable to the nonmoving party.

## III. PRE-EMPTION OF THE STATE LAW CAUSE OF ACTION

### A. The Nature of the Corcorans’ State Law Claims

The Corcorans’ original petition in state court alleged that acts of negligence committed by Blue Cross and United caused the death of their unborn child. Specifically, they alleged that Blue Cross wrongfully denied appropriate medical care, failed adequately to oversee the medical decisions of United, and failed to provide United with Mrs. Corcoran’s complete medical background. They alleged that United wrongfully denied the medical care recommended by Dr. Collins and wrongfully determined that home nursing care was adequate for her condition. It is evident that the Corcorans no longer pursue any theory of recovery against Blue Cross, they challenge only the district court’s conclusion that ERISA pre-empts their state law cause of action against United.

The claims against United arise from a relatively recent phenomenon in the health care delivery system – the prospective review by a third party of the necessity of medical care. Systems of prospective and concurrent review, rather

than traditional retrospective review, were widely adopted throughout the 1980s as a method of containing the rapidly rising costs of health care. Blum, *supra*, at 192; Furrow, *Medical Malpractice and Cost Containment: Tightening the Screws*, 36 Case Western L. Rev. 985, 986-87 (1986). Under the traditional retrospective system (also commonly known as the fee-for-service system), the patient obtained medical treatment and the insurer reviewed the provider's claims for payment to determine whether they were covered under the plan. Denial of a claim meant that the cost of treatment was absorbed by an entity other than the one designed to spread the risk of medical costs – the insurer.

Congress's adoption in 1983 of a system under which hospitals are reimbursed for services provided to Medicare patients based upon average cost calculations for patients with particular diagnoses spurred private insurers to institute similar programs in which prospective decisions are made about the appropriate level of care. Although plans vary, the typical prospective review system requires some form of pre-admission certification by a third party (e.g., the HMO if an HMO-associated doctor provides care; an outside organization such as United if an independent physician provides care) before a hospital stay. Concurrent review involves the monitoring of a hospital stay to determine its continuing appropriateness. *See generally*, Blum, *supra*, at 192-93; Tiano, *The Legal Implications of HMO Cost Containment Measures*, 14 Seton Hall Legis. J. 79, 80 (1990). As the SPD makes clear, United performs this sort of prospective and concurrent review (generically, "utilization review") in connection with, *inter alia*, the hospitalization of Bell employees.

The Corcorans based their action against United on Article 2315 of the Louisiana Civil Code, which provides that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Article 2315 provides parents with a cause of action for the wrongful

death of their unborn children, and also places liability on health care providers when they fail to live up to the applicable standard of care.~

### B. Principles of ERISA Pre-emption

The central inquiry in determining whether a federal statute pre-empts state law is the intent of Congress. In performing this analysis we begin with any statutory language that expresses an intent to pre-empt, but we look also to the purpose and structure of the statute as a whole.

ERISA contains an explicit pre-emption clause, which provides, in relevant part:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a). ...

ERISA § 514(a). It is by now well-established that the “deliberately expansive” language of this clause, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987), is a signal that it is to be construed extremely broadly. See *FMC Corp.*, (“the pre-emption clause is conspicuous for its breadth”). The key words “relate to” are used in such a way as to expand pre-emption beyond state laws that relate to the specific subjects covered by ERISA, such as reporting, disclosure and fiduciary obligations. Thus, state laws “relate[] to” employee benefit plans in a much broader sense – whenever they have “a connection with or reference to such a plan.” *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). This sweeping pre-emption of state law is consistent with Congress’s decision to create a comprehensive, uniform federal scheme for the regulation of employee benefit plans.

The most obvious class of pre-empted state laws are those that are specifically designed to affect ERISA-governed employee benefit plans. But a law is not saved from pre-

emption merely because it does not target employee benefit plans. Indeed, much pre-emption litigation involves laws of general application which, when applied in particular settings, can be said to have a connection with or a reference to an ERISA plan. *See Pilot Life*, 481 U.S. at 47-48 (common law tort and contract causes of action seeking damages for improper processing of a claim for benefits under a disability plan are pre-empted); *Shaw*, 463 U.S. at 95-100 (statute interpreted by state court as prohibiting plans from discriminating on the basis of pregnancy is pre-empted); *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1218 (5th Cir. 1992) (common law fraud and negligent misrepresentation claims that allege reliance on agreements or representations about the coverage of a plan are pre-empted). On the other hand, the Court has recognized that not every conceivable cause of action that may be brought against an ERISA-covered plan is pre-empted. “Some state actions may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law ‘relates to’ the plan.” Thus, “run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan” are not pre-empted.

### C. Pre-emption of the Corcorans’ Claims

Initially, we observe that the common law causes of action advanced by the Corcorans are not that species of law “specifically designed” to affect ERISA plans, for the liability rules they seek to invoke neither make explicit reference to nor are premised on the existence of an ERISA plan. Rather, applied in this case against a defendant that provides benefit-related services to an ERISA plan, the generally applicable negligence-based causes of action may have an effect on an ERISA-governed plan. In our view, the pre-emption question devolves into an assessment of the significance of these effects.

1. *United's position – it makes benefit determinations, not medical decisions*

United's argument in favor of pre-emption is grounded in the notion that the decision it made concerning Mrs. Corcoran was not primarily a medical decision, but instead was a decision made in its capacity as a plan fiduciary about what benefits were authorized under the Plan. All it did, it argues, was determine whether Mrs. Corcoran qualified for the benefits provided by the plan by applying previously established eligibility criteria. The argument's coup de grace is that under well-established precedent, participants may not sue in tort to redress injuries flowing from decisions about what benefits are to be paid under a plan. One commentator has endorsed this view of lawsuits against providers of utilization review services, arguing that, because medical services are the "benefits" provided by a utilization review company, complaints about the quality of medical services (i.e., lawsuits for negligence) "can therefore be characterized as claims founded upon a constructive denial of plan benefits." Chittenden, *Malpractice Liability and Managed Health Care: History & Prognosis*, 26 *Tort & Ins. Law J.* 451, 489 (1991).

In support of its argument, United points to its explanatory booklet and its language stating that the company advises the patient's doctor "what the medical plan will pay for, based on a review of [the patient's] clinical information and nationally accepted medical guidelines for the treatment of [the patient's] condition." It also relies on statements to the effect that the ultimate medical decisions are up to the beneficiary's doctor. It acknowledges at various points that its decision about what benefits would be paid was based on a consideration of medical information, but the thrust of the argument is that it was simply performing commonplace administrative duties akin to claims handling.

Because it was merely performing claims handling functions when it rejected Dr. Collins's request to approve Mrs.

Corcoran's hospitalization, United contends, the principles of *Pilot Life* and its progeny squarely foreclose this lawsuit. In *Pilot Life*, a beneficiary sought damages under various state-law tort and contract theories from the insurance company that determined eligibility for the employer's long term disability benefit plan. The company had paid benefits for two years, but there followed a period during which the company terminated and reinstated the beneficiary several times. The Court made clear, however, that ERISA pre-empts state-law tort and contract actions in which a beneficiary seeks to recover damages for improper processing of a claim for benefits. United suggests that its actions here were analogous to those of the insurance company in *Pilot Life*, and therefore urges us to apply that decision.

2. *The Corcorans' position – United makes medical decisions, not benefit determinations*

The Corcorans assert that *Pilot Life* and its progeny are inapposite because they are not advancing a claim for improper processing of benefits. Rather, they say, they seek to recover solely for United's erroneous medical decision that Mrs. Corcoran did not require hospitalization during the last month of her pregnancy. This argument, of course, depends on viewing United's action in this case as a medical decision, and not merely an administrative determination about benefit entitlements. Accordingly, the Corcorans, pointing to the statements United makes in the QCP booklet concerning its medical expertise, contend that United exercised medical judgment which is outside the purview of ERISA pre-emption.

The Corcorans suggest that a medical negligence claim is permitted under the analytical framework we have developed for assessing pre-emption claims. Relying on *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986), they contend that we should not find the state law under which they proceed pre-empted because it (1) involves the exercise of traditional state



authority and (2) is a law of general application which, although it affects relations between principal ERISA entities in this case, is not designed to affect the ERISA relationship.

*3. Our view – United makes medical decisions incident to benefit determinations*

We cannot fully agree with either United or the Corcorans. Ultimately, we conclude that United makes medical decisions – indeed, United gives medical advice – but it does so in the context of making a determination about the availability of benefits under the plan. Accordingly, we hold that the Louisiana tort action asserted by the Corcorans for the wrongful death of their child allegedly resulting from United’s erroneous medical decision is pre-empted by ERISA.

Turning first to the question of the characterization of United’s actions, we note that the QCP booklet and the SPD lend substantial support to the Corcorans’ argument that United makes medical decisions. United’s own booklet tells beneficiaries that it “assesses the need for surgery or hospitalization and ... determines the appropriate length of stay for a hospitalization, based on nationally accepted medical guidelines.” United “will discuss with your doctor the appropriateness of the treatments recommended and the availability of alternative types of treatments.” Further, “United’s staff includes doctors, nurses, and other medical professionals knowledgeable about the health care delivery system. Together with your doctor, they work to assure that you and your covered family members receive the most appropriate medical care.” According to the SPD, United will “provide you with information which will permit you (in consultation with your doctor) to evaluate alternatives to surgery and hospitalization when those alternatives are medically appropriate.”

United makes much of the disclaimer that decisions about medical care are up to the beneficiary and his or her doctor. While that may be so, and while the disclaimer may support

the conclusion that the relationship between United and the beneficiary is not that of doctor-patient, it does not mean that United does not make medical decisions or dispense medical advice. *See Wickline*, 239 Cal. Rptr. at 819 (declining to hold Medi-Cal liable but recognizing that it made a medical judgment); Macaulay, *Health Care Cost Containment and Medical Malpractice: On a Collision Course*, 19 Suffolk U.L. Rev. 91, 106-07 (1986) (“As illustrated in [*Wickline*], an adverse prospective determination on the ‘necessity’ of medical treatment may involve complex medical judgment.”) (footnote omitted). In response, United argues that any such medical determination or advice is made or given in the context of administering the benefits available under the Bell plan. Supporting United’s position is the contract between United and Bell, which provides that “[United] shall contact the Participant’s physician and based upon the medical evidence and normative data determine whether the Participant should be eligible to receive full plan benefits for the recommended hospitalization and the duration of benefits.”

United argues that the decision it makes in this, the prospective context, is no different than the decision an insurer makes in the traditional retrospective context. The question in each case is “what the medical plan will pay for, based on a review of [the beneficiary’s] clinical information and nationally accepted medical guidelines for the treatment of [the beneficiary’s] condition.” *See* QCP Booklet at 4. A prospective decision is, however, different in its impact on the beneficiary than a retrospective decision. In both systems, the beneficiary theoretically knows in advance what treatments the plan will pay for because coverage is spelled out in the plan documents. But in the retrospective system, a beneficiary who embarks on the course of treatment recommended by his or her physician has only a potential risk of disallowance of all or a part of the cost of that treatment, and then only after treatment has been rendered. In contrast, in a prospective system a beneficiary may be squarely

presented in advance of treatment with a statement that the insurer will not pay for the proposed course of treatment recommended by his or her doctor and the beneficiary has the potential of recovering the cost of that treatment only if he or she can prevail in a challenge to the insurer's decision. A beneficiary in the latter system would likely be far less inclined to undertake the course of treatment that the insurer has at least preliminarily rejected.

By its very nature, a system of prospective decisionmaking influences the beneficiary's choice among treatment options to a far greater degree than does the theoretical risk of disallowance of a claim facing a beneficiary in a retrospective system. Indeed, the perception among insurers that prospective determinations result in lower health care costs is premised on the likelihood that a beneficiary, faced with the knowledge of specifically what the plan will and will not pay for, will choose the treatment option recommended by the plan in order to avoid risking total or partial disallowance of benefits. When United makes a decision pursuant, QCP, it is making a medical recommendation which – because of the financial ramifications – is more likely to be followed.~

Although we disagree with United's position that no part of its actions involves medical decisions, we cannot agree with the Corcorans that no part of United's actions involves benefit determinations. In our view, United makes medical decisions as part and parcel of its mandate to decide what benefits are available under the Bell plan. As the QCP Booklet concisely puts it, United decides "what the medical plan will pay for." When United's actions are viewed from this perspective, it becomes apparent that the Corcorans are attempting to recover for a tort allegedly committed in the course of handling a benefit determination. The nature of the benefit determination is different than the type of decision that was at issue in *Pilot Life*, but it is a benefit determination nonetheless. The principle of *Pilot Life* that ERISA pre-empts

state-law claims alleging improper handling of benefit claims is broad enough to cover the cause of action asserted here.

Moreover, allowing the Corcorans' suit to go forward would contravene Congress's goals of "ensuring that plans and plan sponsors would be subject to a uniform body of benefit law" and "minimizing the administrative and financial burdens of complying with conflicting directives among States or between States and the Federal Government." Thus, statutes that subject plans to inconsistent regulatory schemes in different states, thereby increasing inefficiency and potentially causing the plan to respond by reducing benefit levels, are consistently held pre-empted.<sup>~</sup>

[A]lthough imposing liability on United might have the salutary effect of deterring poor quality medical decisions, there is a significant risk that state liability rules would be applied differently to the conduct of utilization review companies in different states. The cost of complying with varying substantive standards would increase the cost of providing utilization review services, thereby increasing the cost to health benefit plans of including cost containment features such as the Quality Care Program (or causing them to eliminate this sort of cost containment program altogether) and ultimately decreasing the pool of plan funds available to reimburse participants. *See* Macaulay, *supra*, at 105.

<sup>~</sup>The acknowledged absence of a remedy under ERISA's civil enforcement scheme for medical malpractice committed in connection with a plan benefit determination does not alter our conclusion. While we are not unmindful of the fact that our interpretation of the pre-emption clause leaves a gap in remedies within a statute intended to protect participants in employee benefit plans, the lack of an ERISA remedy does not affect a pre-emption analysis. Congress perhaps could not have predicted the interjection into the ERISA "system" of the medical utilization review process, but it enacted a pre-emption clause so broad and a statute so comprehensive that it would be incompatible with the language, structure and

purpose of the statute to allow tort suits against entities so integrally connected with a plan.

\* \* \*

The result ERISA compels us to reach means that the Corcorans have no remedy, state or federal, for what may have been a serious mistake. This is troubling for several reasons. First, it eliminates an important check on the thousands of medical decisions routinely made in the burgeoning utilization review system. With liability rules generally inapplicable, there is theoretically less deterrence of substandard medical decisionmaking. Moreover, if the cost of compliance with a standard of care (reflected either in the cost of prevention or the cost of paying judgments) need not be factored into utilization review companies' cost of doing business, bad medical judgments will end up being cost-free to the plans that rely on these companies to contain medical costs. ERISA plans, in turn, will have one less incentive to seek out the companies that can deliver both high quality services and reasonable prices.

Second, in any plan benefit determination, there is always some tension between the interest of the beneficiary in obtaining quality medical care and the interest of the plan in preserving the pool of funds available to compensate all beneficiaries. In a prospective review context, with its greatly increased ability to deter the beneficiary (correctly or not) from embarking on a course of treatment recommended by the beneficiary's physician, the tension between interest of the beneficiary and that of the plan is exacerbated. A system which would, at least in some circumstances, compensate the beneficiary who changes course based upon a wrong call for the costs of that call might ease the tension between the conflicting interests of the beneficiary and the plan.

Finally, cost containment features such as the one at issue in this case did not exist when Congress passed ERISA. While we are confident that the result we have reached is faithful to

Congress's intent neither to allow state-law causes of action that relate to employee benefit plans nor to provide beneficiaries in the Corcorans' position with a remedy under ERISA, the world of employee benefit plans has hardly remained static since 1974. Fundamental changes such as the widespread institution of utilization review would seem to warrant a reevaluation of ERISA so that it can continue to serve its noble purpose of safeguarding the interests of employees. Our system, of course, allocates this task to Congress, not the courts, and we acknowledge our role today by interpreting ERISA in a manner consistent with the expressed intentions of its creators.

**Questions to Ponder About *Corcoran***

- A.** Do you agree that the language of the ERISA statute requires the preemption of medical malpractice suits of the kind brought in the *Corcoran* case?
- B.** Putting aside the language of the ERISA statute, do you think such pre-emption is a good idea? What are the arguments for and against it as a matter of policy?

# Notes About Edits and Editions

## Unmarked Edits Generally

*(For both volumes)*

Various edits are not marked in the text. They have been left unmarked because to mark them would have made the text substantially less readable.

In general, whole citations and portions of citations have been liberally removed from the readings. Parallel citations have been removed generally. Spaces have been added or deleted in cases where the observed style was unconventional and jarring. Formatting of headings has been changed. In cases where case names were printed in roman type, case names have generally been italicized. Where quotation marks occurred around a blockquote, they have generally been removed. Lengthy portions of quoted material have sometimes been re-set as blockquotes. Dashes and ellipses have been set in a uniform typographical style regardless of how they appeared in the original document. Official headnote references have been eliminated. In addition, I have sought to remove all indicia of additions to any text made by unofficial publishers. Footnote references and footnotes have been removed without notation.

The author attributions at the beginning of case material, in general, are not attributable to the original source. In various places, the spelled-out word “section” has been replaced with the § symbol, including in *Rowland v. Christian*, *Beswick v. CareStat*, the text discussing California Civil Code § 847, and *Issacs v. Monkeytown, U.S.A.* Typesetting for citations may have been changed, such as from lower-case to small-caps for titles of journals, for example in *Tarasoff v. UC Regents* and *Weirum v. RKO*.

Case citations have generally been changed so that where the court uses a secondary-reference citation style, if it is the first reference in the case as it appears in edited form in this casebook, the secondary-

reference cite has been replaced with the full citation as is appropriate for use on first reference. In some cases, punctuation was changed to accommodate cites that were eliminated without notation.

### **Idiosyncratic Unmarked Edits in this Volume**

Idiosyncratic unmarked edits were made as follows:

Material from footnotes was reworked into the body of the text without notation in the following cases: *Georgetown v. Wheeler*, *Rogers v. Retrum*, *Bruenig v. American Family Insurance*, *Sindell v. Abbott Labs*, and *Cocoran v. United Healthcare*. The reworked material does not necessarily appear at the precise point of the omitted footnote reference (often done because references were in the middle of sentences). Punctuation has in some cases been added or altered to accommodate this.

*Georgetown v. Wheeler*: An asterisk has been used to replace a numerical reference for a footnote reproduced in the case.

*Weirum v. RKO*: Quotation marks have been removed for material reformatted as a blockquote.

*Boyd v. Racine Currency Exchange*: Some text has been rearranged without notation. Recited facts are as alleged.

*South v. Amtrak*: Quotation marks have been removed for material reformatted as a blockquote. Underlining has been changed to italics. Some brackets have been changed to parentheses. “AMTRAK” has been changed to “Amtrak”.

*Vaughn v. Menlove*: Two periods have been replaced by colons at the ends of paragraphs introducing the appellate lawyers’ arguments.

*Martin v. Herzog*: A colon has been added without notation. Quoted matter re-set as blockquotes. Numbers spelled out in words have been replaced in appropriate instances with numerals.

In the text from *Calvillo-Silva v. Home Grocery* that follows California Civil Code § 847, spaces after dollar signs have been removed.



*Campbell v. Weathers*: Testimony excerpts have been reformatted and quotation marks dropped. Other quoted matter has been reformatted as blockquotes.

*Rowland v. Christian*: Long quotations have been re-set as block quotes.

In *the T.J. Hooper* and *United States v. Carroll Towing*, single quotes around vessel names were removed and vessel names were italicized. Inconsistent use of a period after “Anna C” was corrected to remove all such periods except where occurring at the end of sentences. In *Carroll Towing*, a typo “it it” was corrected to “it.”

In *Fowler v. Seaton*: The errant comma in “September, 1958” was removed.

*Besnick v. CareStat*: A missing period was supplied. Some quoted matter was re-formatted in blockquote form.

*Herskovits v. Group Health*: Roman numeral section headers have been removed. Secondary-reference cites have been altered to be put into the form of first-reference cites, since the locations of the first-reference cites were removed through editing. The order of the opinions (concurring and dissenting) has been changed. Blockquotes have been reformatted to be inline quotes.

*Hulsey v. Elsinore Parachute Center*: Section headers have been removed, and case citations have been changed to a full citation on first reference.

### **Edition Changes**

#### ***(Volume One, Version 2.0)***

A complete view of all changes between the first edition and second edition can be obtained by running a comparison of the DOCX file of the first edition, available at <https://www.cali.org/books/torts-cases-and-contexts-volume-1>, and the DOCX file of this edition, available at <http://ericejohnson.com/projects/tcc>.

The following is a list of salient changes:

- The cover image has been changed to a lime green traffic cone.
- Within chapters, first-level sections have been lettered (A, B, etc.).
- Various typos and other minor errata were corrected. The text has been updated and polished in myriad places. Text was added or re-written in various places to better explain concepts or provide additional context.
- Font size has been changed so that font sizes smaller than 12 points are not used. This change is to enhance accessibility for persons with visual impairments.
- In Chapter 5:
  - A new narrative/explanatory section has been added: “A Quick Note About Respondeat Superior.”
  - The case of *Boyd v. Racine Currency Exchange* has been edited down.
  - The case of *Yania v. Bigan* has been removed.
- In Chapter 6:
  - The following cases have been edited down: *Brennig v. American Family Insurance*, *Gorris v. Scott*, *Martin v. Herzog*, *The T.J. Hooper*.
  - The opposite is the case for *Campbell v. Weathers* – some text that had been edited out has now been re-inserted.
  - Material has been added to the narrative/explanatory sections named “Experience and Level of Skill” and “Negligence Per Se and Causation.”
  - The narrative/explanatory section formerly called “Negligence Per Se and Comparative Negligence” has been partly re-written and renamed “Negligence Per

Se in the Context of Contributory Negligence or Comparative Negligence.”

- There have been minor changes to the problem “SparkleStar Skate” (question C has been changed and sharpened); the problems using the Hand Formula (minor wording changes); problem B regarding duties of land owners/occupiers (a potential ambiguity regarding whether Jayla’s shelves are built-in or freestanding has been called out with a sharpened question).
- In Chapter 7:
  - The section “Some Notes on the Terminology of Causation” has been renamed “How to Talk About Actual Causation.”
  - The narrative/explanatory section “Think ‘A’ Not ‘The’” has been extended.
  - A new narrative/explanatory section has been added: “The Need for Causal Linkage – From Breach to Injury.”
  - In “Check-Your-Understanding Questions About *Summers*,” question C has been reworded.
- In Chapter 8:
  - There has been various minor revisions to the wording of the narrative/explanatory sections preceding the first case (*Palsgraf*).
  - The example that was formerly named “Bonked by a Shotgun” has been re-named “Gun Splinters.”
  - The case *Ryan v. New York Central Railroad* was edited down further.
- In Chapter 9, instead of being referred to as “negligently inflicted emotional distress,” that tort is now called by its

more common name, “negligent infliction of emotional distress.”

- In Chapter 10, the discussion of jurisdictions adopting different forms of comparative negligence has been updated to reflect a change in the number of states falling into various categories, and a discussion of South Dakota’s unique form of comparative negligence has been added.
- Various sections at the front, including “About the Author” and “Notices” have been updated.
- The last part, formerly called “Aftermatter,” has been renamed “Notes about Edits and Editions.” The section you are reading now, about changes made in this edition, was added to it.