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 of New York Law School 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."

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: Yania v. Bigan

This case is a vivid example of the no-affirmative-duty to act rule.

Yania v. Bigan

Supreme Court of Pennsylvania
November 9, 1959

397 Pa. 316. Widow of Joseph F. Yania, Appellant, v. John E. Bigan, Appellee. Before JONES, C.J., BELL, JONES, COHEN, BOK and McBRIDE, JJ.

Justice BENJAMIN R. JONES:

A bizarre and most unusual circumstance provides the background of this appeal.

On September 25, 1957 John E. Bigan was engaged in a coal strip-mining operation in Shade Township, Somerset County. On the property being stripped were large cuts or trenches created by Bigan when he removed the earthen overburden for the purpose of removing the coal underneath. One cut contained water 8 to 10 feet in depth with side walls or embankments 16 to 18 feet in height; at this cut Bigan had installed a pump to remove the water.

At approximately 4 p.m. on that date, Joseph F. Yania, the operator of another coal strip-mining operation, and one Boyd

M. Ross went upon Bigan's property for the purpose of discussing a business matter with Bigan, and, while there, were asked by Bigan to aid him in starting the pump. Ross and Bigan entered the cut and stood at the point where the pump was located. Yania stood at the top of one of the cut's side walls and then jumped from the side wall – a height of 16 to 18 feet – into the water and was drowned.

Yania's widow, in her own right and on behalf of her three children, instituted wrongful death and survival actions against Bigan contending Bigan was responsible for Yania's death.~

Since Bigan has chosen to file preliminary objections, in the nature of demurrers, every material and relevant fact well pleaded in the complaint and every inference fairly deducible therefrom are to be taken as true.

The complaint avers negligence in the following manner: (1) "The death by drowning of … [Yania] was caused entirely by the acts of [Bigan] … in *urging, enticing taunting and inveigling* [Yania] to jump into the water, which [Bigan] knew or ought to have known was of a depth of 8 to 10 feet and dangerous to the life of anyone who would jump therein" (Emphasis supplied); (2) … [Bigan] violated his obligations to a business invitee in not having his premises reasonably safe, and not warning his business invitee of a dangerous condition and to the contrary urged, induced and inveigled [Yania] into a dangerous position and a dangerous act, whereby [Yania] came to his death"; (3) "After [Yania] was in the water, a highly dangerous position, having been induced and inveigled therein by [Bigan], [Bigan] failed and neglected to take reasonable steps and action to protect or assist [Yania], or extradite [Yania] from the dangerous position in which [Bigan] had placed him". Summarized, Bigan stands charged with three-fold negligence: (1) by urging, enticing, taunting and inveigling Yania to jump into the water; (2) by failing to warn Yania of a dangerous condition on the land, i.e., the cut wherein lay 8 to 10 feet of water; (3) by failing to go to Yania's rescue after he had jumped into the water.

Our inquiry must be to ascertain whether the well-pleaded facts in the complaint, assumedly true, would, if shown, suffice to prove negligent conduct on the part of Bigan.~

[I]t is urged that Bigan failed to take the necessary steps to rescue Yania from the water. The mere fact that Bigan saw Yania in a position of peril in the water imposed upon him no legal, although a moral, obligation or duty to go to his rescue unless Bigan was legally responsible, in whole or in part, for placing Yania in the perilous position. The language of this Court in *Brown v. French* is apt: "If it appeared that the deceased, by his own carelessness, contributed in any degree to the accident which caused the loss of his life, the defendants ought not to have been held to answer for the consequences resulting from that accident. … He voluntarily placed himself in the way of danger, and his death was the result of his own act. … That his undertaking was an exceedingly reckless and dangerous one, the event proves, but there was no one to blame for it but himself. He had the right to try the experiment, obviously dangerous as it was, but then also upon him rested the consequences of that experiment, and upon no one else; he may have been, and probably was, ignorant of the risk which he was taking upon himself, or knowing it, and trusting to his own skill, he may have regarded it as easily superable. But in either case, the result of his ignorance, or of his mistake, must rest with himself – and cannot be charged to the defendants". The complaint does not aver any facts which impose upon Bigan legal responsibility for placing Yania in the dangerous position in the water and, absent such legal responsibility, the law imposes on Bigan no duty of rescue.

[W]e can reach but one conclusion: that Yania, a reasonable and prudent adult in full possession of all his mental faculties, undertook to perform an act which he knew or should have known was attended with more or less peril and it was the performance of that act and not any conduct upon Bigan's part which caused his unfortunate death.

Order affirmed.

Questions to Ponder about *Yania*

A. Jury denied: This case was decided on a demurrer, a common-law pleading device analogous to Rule 12(b)(6) in the Federal Rules of Civil Procedure and the motion used in *Boyd*, allowing for the dismissal of a complaint for failure to state a claim for which relief can be granted. In sustaining a demurrer or granting a 12(b)(6) motion, the court is saying that even assuming the facts stated in the complaint are true, the law does not allow an award of damages. Thus, this case is a good one to illustrate how the duty-of-care element allows judges to exercise a gatekeeping function on what cases reach a jury. Do you think the duty of care plays an important limiting function in this sense? Or would you be inclined to let more cases go to trial where a jury can dispense justice according to intuitions of fairness and a sense of indignancy?

B. The wrong side of the law: Just because there is no legal duty to act doesn't mean there is no moral duty to act. Most people would agree that, as a moral matter, John E. Bigan should have helped the drowning man. Does that mean, as a moral matter, the law should hold him responsible when he doesn't? If not, why not?

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 to 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 –9ºF with a wind-chill temperature of –24ºF. 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 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. [4]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.[5] 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

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 story? 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).

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 primce impressionis; 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.

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 is 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.

There are authorities which generally hold insanity is not a defense in tort cases except for intentional torts. These cases rest on the historical view of strict liability without regard to the fault of the individual. Prosser, in his *Law of Torts* (3d ed.), p. 1028, states this view is a historical survival which originated in the dictum in *Weaver v. Ward* (1616), Hob. 134, 80 English Reports 284, when the action of trespass still rested upon strict liability. He points out that when the modern law developed to the point of holding the defendant liable for negligence, the dictum was repeated in some cases.

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.~
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> *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.

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 the dangers of wet haystacks are generally unknown. But suppose the evidence at trial uncovered 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. Shlansky,* 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 adultness.

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 *Purtle 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, treaties, 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 ability, but unyielding for elderly defendants? 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?

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 torts 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.

The argument of the defendant is, that the Act has imposed penalties to secure the observance of its provisions, and that, according to the general rule, the remedy prescribed by the statute must be pursued; that although, when penalties are imposed for the violation of a statutory duty, a person aggrieved by its violation may sometimes maintain an action for the

damage so caused, that must be in cases where the object of the statute is to confer a benefit on individuals, and to protect them against the evil consequences which the statute was designed to prevent, and which have in fact ensued; but that if the object is not to protect individuals against the consequences which have in fact ensued, it is otherwise; that if, therefore, by reason of the precautions in question not having been taken, the plaintiffs had sustained that damage against which it was intended to secure them, an action would lie, but that when the damage is of such a nature as was not contemplated at all by the statute, and as to which it was not intended to confer any benefit on the plaintiffs, they cannot maintain an action founded on the neglect. The principle may be well illustrated by the case put in argument of a breach by a railway company of its duty to erect a gate on a level crossing, and to keep the gate closed except when the crossing is being actually and properly used. The object of the precaution is to prevent injury from being sustained through animals or vehicles being upon the line at unseasonable times; and if by reason of such a breach of duty, either in not erecting the gate, or in not keeping it closed, a person attempts to cross with a carriage at an improper time, and injury ensues to a passenger, no doubt an action would lie against the railway company, because the intention of the legislature was that, by the erection of the gates and by their being kept closed individuals should be protected against accidents of this description. And if 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 and Contributory/Comparative Negligence

When the plaintiff's own negligence contributes the injury that the plaintiff is suing over, the defendant can use that fact to establish an affirmative defense – called contributory negligence or comparative negligence, depending on the jurisdiction. This is discussed in more detail in a later chapter. For now, note only that negligence per se can be used by plaintiffs in a prima facie case and by defendants to establish contributory/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

When negligence per se is being used, it is important to keep in mind that for the prima facie case to work as a whole, the violation of the statute must have caused the injury the plaintiff is suing over. Again,

let's go back to the example of the flatbed loaded with rebar. Suppose evidence at trial shows that before the accident, the plaintiff had seen the truck from the side, and had mentally noted how far the rebar extended beyond the bumper. If that is the case, then violation of the portion of the statute that requires 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 could have done was make the plaintiff aware of the protuberance – but the plaintiff was already aware, so the violation of the statute 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 is more intuitive when the reasonable person standard is used than with negligence per se, where it seems to present a habitual pitfall.

Case: Martin v. Herzog

The following case is from the New York Court of Appeals, which, despite the name, is actually the highest state court – equivalent to the "supreme" court in most jurisdictions. This case is written by the most famous New York Court of Appeals judge of all time: Benjamin N. Cardozo.

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. Whether the omission of an absolute duty, not willfully or heedlessly, but through unavoidable accident, is also to be characterized as negligence, is a question of nomenclature into which we need not enter, for it does not touch the case before us. There may be times, when if jural niceties are to be preserved, the two wrongs, negligence and breach of statutory duty, must be kept distinct in speech and thought. In the conditions here present they come together and coalesce. A rule less rigid has been applied where the one who complains of the omission is not a member of the class for whose protection the safeguard is designed. Some relaxation there has also been where the safeguard is prescribed by local ordinance, and not by statute. Courts have been reluctant to hold that the police regulations of boards and councils and other subordinate officials create rights of action beyond the specific penalties imposed. This has led them to say that the violation of a statute is negligence, and the violation of a like ordinance is only evidence of negligence. An ordinance, however, like a statute, is a law within its sphere of operation, and so the distinction has not escaped criticism. Whether it has become too deeply rooted to be abandoned, even if it be thought illogical, is a question not

now before us. What concerns us at this time is that even in the ordinance cases, the omission of a safeguard prescribed by statute is put upon a different plane, and is held not merely some evidence of negligence, but negligence in itself. 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 a 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?

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?

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. The petitioner appealed, and the barge owner appealed and filed assignments of error.

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 No. 17 sprang a leak about the same time; she too anchored at the *Montrose*'s command and sank on the next morning after her crew also had been rescued. The cargoes and the tugs maintain that the barges were not fit for their service; the cargoes and the barges that the tugs should have gone into the Delaware Breakwater, and besides, did not handle their tows properly.

The evidence of the condition of the barges was very extensive, the greater part being taken out of court. As to each, the fact remains that she foundered in weather that she was bound to withstand. A March gale is not unusual north of Hatteras; barges along the coast must be ready to meet one, and there is in the case at bar no adequate explanation for the result except that these were not well-found. The test of seaworthiness, being ability for the service undertaken, the case might perhaps be left with no more than this. As to the cargoes, the charters excused the barges if 'reasonable means' were taken to make them seaworthy; and the barge owners amended their answers during the trial to allege that they had used due diligence in that regard. As will appear, the barges were certainly not seaworthy in fact, and we do not think that the record shows affirmatively the exercise of due diligence to examine them. The examinations at least of the pumps were perfunctory; had they been sufficient the loss would not have occurred.~

A more difficult issue is as to the tugs. We agree with the judge that once conceding the propriety of passing the Breakwater on the night of the eighth, the navigation was good enough. It might have been worse to go back when the storm broke than to keep on. The seas were from the east and southeast, breaking on the starboard quarter of the barges, which if tight and well found should have lived. True they were at the tail and this is the most trying position, but to face the seas in an attempt to

return was a doubtful choice; the masters' decision is final unless they made a plain error. The evidence does not justify that conclusion; and so, the case as to them turns upon whether they should have put in at the Breakwater.

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.

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 salving 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.