

# TORTS

“The American Recipe”

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# ELEMENTS of NEGLIGENCE

1. DUTY TO PL – NECESSARY RELATIONSHIP BETWEEN PL & D
2. \*\*STANDARD OF CARE – REQUISITE LEVEL OF CONDUCT
3. \*\*BREACH OF DUTY – FAILURE TO MEET STANDARD
4. CAUSE IN FACT – BREACH OF DUTY RELATES TO INJURY
5. PROXIMATE CAUSE – POLICY RE EXTENT OF LIABILITY
6. INJURY – REQUISITE HARM

# DEFINING "STANDARD OF CARE"

THE REASONABLE PERSON – CHARACTERISTICS?

UNREASONABLENESS – BREACH OF DUTY

HOW TO MEASURE? U.S. v. Carroll Towing (2d Cir 1947)

HOW TO PROVE? RES IPSA LOQUITUR

SPECIAL STANDARDS OF CARE

PROFESSIONAL NEGLIGENCE – MEDICAL, LEGAL

LAND OCCUPIER – TRESPASSER, LICENSEE, INVITEE

# REASONABLE PERSON

## OBJECTIVE STANDARD

When 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.

O. W. Holmes, Jr., *The Common Law* (1881)

# CHARACTERISTICS OF THE REASONABLE PERSON

FORESEES Things Based on Experience & Common Knowledge

KNOWS Things That Are Common Knowledge in the Community

How Does Reasonable Person Act in and "EMERGENCY?"

That D Did Not Create

Sometimes, A Reasonable Person Will Anticipate an Emergency

What Are the PHYSICAL CHARACTERISTICS of the Reasonable Person?

What Is the MENTAL CONDITION of the Reasonable Person?

Does the Reasonable Person Possess Any SPECIAL SKILLS of D?

What Is the AGE of the Reasonable Person?

# WHEN DOES A D FAIL TO ACT AS A REASONABLE PERSON?

Merely Engaging in Risk-Producing Activity does Not Necessarily Equal Unreasonable Risk

“The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others [P], taken with the seriousness of the injury if it happens [L], and balanced against the interest which he must sacrifice to avoid the risk [B].”

Judge Learned Hand (1940)

# DETERMINING UNREASONABLE RISK

If  $B$  is less than  $P \times L =$  Unreasonable Risk

If  $B$  is greater than  $P \times L \neq$  Unreasonable Risk

$P =$  Probability of Harm

$L =$  Gravity of Harm Should It Occur

$B =$  Burden of Risk Avoidance

# PROOF OF BREACH OF DUTY

More Proof Than: An Accident Happened That Caused PI Injury.

Normally Circumstantial, Rather Than Direct, Evidence

RES IPSA LOQUITUR - "The Thing Speaks For Itself"

Formal Doctrine of Circumstantial Evidence

1. PI was probably injured as a result of negligence,  
and
2. It was probably D's negligence



# NEGLIGENCE PER SE

ADOPTION OF A STATUTE AS THE STANDARD OF CARE

PREREQUISITES:

PL MUST BE IN CLASS OF PROTECTED PERSONS

AND

PL MUST SUFFER TYPE OF HARM INTENDED TO BE PREVENTED

THE RESULT OF ADOPTION OF STATUTE BY COURT?

MAJ. RULE – CONCLUSIVE PROOF OF DUTY, STANDARD & BREACH