

TORTS

“The American Recipe”

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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

EVIDENTIARY EFFECT OF R.I.L.

JUDGE DECIDES WHETHER R.I.L. APPLIES TO CASE

R.I.L. CREATES "PERMISSABLE INFERENCE" OF:
DUTY, BREACH and D's CAUSATION

CONTRAST:

REBUTTABLE PRESUMPTION
and
IRREBUTTABLE PRESUMPTION

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 & BREACH

EVIDENTIARY EFFECT OF N.P.S

JUDGE DECIDES WHETHER N.P.S. APPLIES TO CASE

N.P.S. CREATES "REBUTTABLE PRESUMPTION" OF
DUTY & BREACH

Martin v. Herzog (NY 1920)

IF JURY FINDS VIOLATION, THEN ONLY NEEDS TO DETERMINE:
CAUSE IN FACT, PROXIMATE CAUSE AND DAMAGES

CAN BE REBUTTED WITH STRONG PROOF OF "EXCUSE"

PROFESSIONAL NEGLIGENCE

MEDICAL MALPRACTICE

CUSTOM IS DETERMINATIVE

CUSTOM & DEVIATION MUST BE ESTABLISHED BY EXPERT

D FAILED TO ACT WITH THE MINIMUM COMPETENCE
EXERCISED BY OTHER DOCTORS IN GOOD STANDING (IN
THE SAME OR SIMILAR LOCALITY)

RARELY, D'S NEGLIGENCE IS SO APPARENT, EXPERT OPINION IS
NOT REQUIRED

MEDICAL MALPRACTICE (Cont'd)

DOCTRINE OF "INFORMED CONSENT"

FAILURE OF DOCTOR TO INFORM THE PATIENT OF THE "MATERIAL RISKS" OF THE TREATMENT WAS A BREACH OF DUTY THAT CAUSED PATIENT HARM, i.e., If Patient Had Known of Risk, He Would Have Taken a Different Course

WHO DETERMINES MATERIALITY? "PATIENT RULE"

Scott v. Bradford (OK 1979). THUS, NO EXPERTS

WHAT ARE MATERIAL RISKS? RISKS THAT WOULD LIKELY AFFECT A PATIENT'S DECISION.

MEDICAL MALPRACTICE (Cont'd)

DOCTRINE OF "INFORMED CONSENT"

SUMMARY

PL MUST PROVE:

1) HER DOCTOR FAILED TO DISCLOSE MATERIAL FACT

and

2) HAD SHE KNOWN OF FACT ,SHE WOULD HAVE REJECTED PROCEDURE

and

3) THE UNDISCLOSED RISK CAUSED HER HARM

LEGAL MALPRACTICE

“AN ATTORNEY WHO ACTS IN GOOD FAITH AND IN AN HONEST BELIEF THAT HIS ADVICE AND ACTS ARE WELL FOUNDED AND IN THE BEST INTERESTS OF HIS CLIENT, IS NOT ANSWERABLE FOR A MERE ERROR IN JUDGMENT.”

Hodges v. Carter, (NC 1954)

BUT MUST EXERCISE THE SKILL & DILIGENCE OF AN ORDINARY PRUDENT ATTORNEY - THUS, PL MUST HAVE EXPERT TESTIMONY

BIG HURDLE FOR PL?

MUST PROVE TWO CASES

IS THERE A DUTY OWED?

GENERAL RULE: ONE ENGAGED IN RISK-PRODUCING ACTIVITY OWES A DUTY TO AVOID CAUSING FORESEEABLE PERSONAL INJURIES TO FORESEEABLE PLAINTIFFS

Palsgraf v. Long Island R.R. Co. (NY 1928)

HOWEVER – THERE ARE OTHER CIRCUMSTANCES WHERE THERE IS NO DUTY OR A LIMITED DUTY.

FAILURE TO ACT a/k/a NONFEASANCE

E.g. NO DUTY TO RESCUE

L. S. Ayres & Co. v. Hicks (Ind 1942)

EXCEPTIONS TO "NO DUTY TO RESCUE" DOCTRINE

1) D CREATED NEED TO RESCUE

2) SPECIAL RELATIONSHIPS

COMMON CARRIER-PASSENGER

INNKEEPER-GUEST

EMPLOYER-EMPLOYEE

SCHOOL – STUDENT

BUSINESS – CUSTOMER

1) UNDERTAKING TO ACT & RELIANCE

2) CONTRACT

DUTY TO CONTROL 3RD PERSON

GENERAL RULE: NO DUTY ABSENT:

- 1) SPECIAL RELATIONSHIP, and
- 2) KNOWLEDGE OF NEED TO CONTROL

Parent & Child With Known Dangerous Propensity

Therapist & Patient Who Said He Will Hurt Someone

Suppliers of Liquor

Negligent Entrustment