# Negligence suboutline.

Comment: The prima facie negligence case.

Goble: DUTY, recognized by law -- the primary law-declaring component; BREACH, of a duty -- the primary evaluative component; CAUSE IN FACT -- the primary fact-finding component; SCOPE OF RESPONSIBILITY -- the primary liability-limiting component; ACTUAL DAMAGES, recognized by law as worthy of compensation.

Idaho Sup. Ct.: DUTY, recognized by law, requiring the Df. to conform to a certain standard of conduct; BREACH, of that duty; CAUSAL CONNECTION, between Df's. conduct and the resulting injuries; ACTUAL LOSS OR DAMAGE.

Restatement 2d of Torts @ 281: INTEREST INVADED, that is PROTECTED, against unintentional invasion; actor is NEGLIGENT to either the other or the other's class; actor's conduct is the LEGAL CAUSE of the invasion; the other hasn't acted to preclude the action (NO CONTRIBUTORY NEGLIGENCE).

## I. Duty

Comment: "Duty is the legal issue to be determined by the judge. It is a question of whether the government through the operation of the legal system imposes an obligation on a person (the defendant) to exercise reasonable care (or some more exacting standard) towards another person (the plaintiff) under the circumstances. Duties are based upon policies which may be drawn from a wide range of sources."

**A.** N.b.

1. Points for analysis: source, scope, and beneficiary.
2. Conduct is legal unless it is made illegal, e.g. through tort.
3. If I have a duty to you, you have a right against me, and vice versa.
4. Purpose: to judge the propriety of past conduct (retrospective role), and to channel behavior to socially acceptable conduct (prospective role).

**B. General rule**: forseeability + act = duty to exercise due care.

Comment: "The general rule is that everyone has a a duty to avoid invading another's right. 'Every person has a general duty to use due or ordinary care not to injure others by any agency set in operation by him, and to do his work, render services or use his property as to avoid such injury. The degree of care to be exercised must commensurate with the danger or hazard connected with the activity.' Whitt v. Jarnagin, 91 Idaho 181, 188 (1966)."

1. N.b., the line between misfeasance and nonfeasance is fuzzy (from *Kunz*).
2. *Wilson v. Boise City* (ID 1899, redirected creek): duty because city acted for its own benefit in rerouting a stream.
   - **a)** SO: act, SC: g/s/c, BN: land owners.
   - **b)** If the city had only acted to control the waters as they naturally flowed, no duty. But they rerouted the waters -- they acted -- and so they have a duty to protect landowners who might be affected.
3. *Keim v. Gilmore & Pittsburgh R.R.* (ID 1913, RR car sticking out too far): duty because Df. railway created a foreseeable risk by running its cars with jackarms sticking out further than usual.
   - **a)** SO: act, SC: "keep a lookout," BN: people near tracks.
   - **b)** "If Df. was going to pull a car over the road with projections on the sides extending further than normal, then it was clearly the duty of the operators to notify other employees and to keep a lookout for those who might be harmed."
4. *McKinley v. Fanning* (ID 1979, awning slip and fall): duty because owner created forseeable risk to pedestrians by installing an awning that was not safe.

**a)** SO: act, SC: g/s/c, BN: peds.

**b)** Owner contracted to build the awning, which drained onto the street and make the sidewalk slippery -- the owner acted. It put all pedestrians at risk, including the Pf., who just happened to be the lessee. The Pf's. failure to remove snow and ice on the sidewalk is a matter for contrib., not for duty determination.

**c)** DISSENT: owner owed duty to peds., but not to lessee, because restatement section that absolves lessor from liability to lessee for harm caused by conditions that arise after the lessee takes possession.

**(1)** But that section only absolves duty when the lessee was on the property -- the accident happened on the sidewalk. The dissent would be valid if the lease included the sidewalk, but it wouldn't.

**5.** *Idaho Northern R.R. v. Post Falls Lumber* (ID 1911, floating logs get jammed): Df. lumber co. owed a g/s/c duty, but RR owed a duty, too, because it had regraded the banks and built bridges across the stream. (N.b., RR would probably owe no duty if the stream was not used for floating logs.)

**6.** *Gibson v. Hardy* (ID 1985, slash piling): Df. slash piler owed g/s/c duty to all those with an interest in the timber at the work area, including the Pf. salvagers (who had an equitable interest, arising from their salvage contract).

**a)** SO: act, SC: g/s/c, BN: those with a right to the timber.

**b)** Cf. *Stanger v. Hunter* (ID 1930, roadster nonowner claims dmgs.): Pf. has no cause of action for dmgs. where he can't show any right or interest in the roadster, even though Pf. testified at trial that he was responsible for dmgs. to the car (faulty complaint is probably the reason for this, though).

**7.** *Turpen v. Granieri* (drunk wrestlers): Df. lessor owes no duty lessees' guest, who drank himself to death, because that injury is not sufficiently foreseeable and the guest created the risk in part.

**a)** Balancing factors for determining duty (from *Rife v. Long* 908 P.2d 143, 148).

**(1)** Foreseeability of harm to the Pf.

Comment: "Foreseeability is a flexible concept which varies with the circumstances of each case. Where the degree of result or harm is great, but preventing it is not difficult, a relatively low degree of foreseeability is required. Conversely, where the threatened injury is minor but the burden of preventing such injury is high, a higher degree of foreseeability may be required. Thus foreseeability is not to be measured by just what is more probable than not, but also includes whatever result is likely enough in the setting of modern life that a reasonable prudent person would take such into account in guiding reasonable conduct." Sharp v. W.H. Moore Inc., 118 Idaho 297, 300 (1990).

**(2)** Degree of certainty that the Pf. suffered injury.

**(3)** Closeness of the connection between the defendant's conduct and the injury suffered.

**(4)** Moral blame attached to the defendant's conduct.

**(5)** Policy of preventing future harm.

**(6)** Extent of the burden to the defendant.

**(7)** Consequences to the community of imposing the duty and consequent liability.

**(8)** Availability, cost, and prevalence of insurance for the risk involved.

**b)** Distinguish from *McKinley v. Fanning*.

**(1)** Landlord owes a duty to his tenants to keep the premises safe

**(2)** Landlord owes a duty to 3d parties to keep the area safe (e.g., *Mckinley*).

**(a)** In *McKinley*, landlord created the risk on his own; itc., landlord and the guest created the risk.

**c)** Cf. *Bromley v. Garey* (ID 1999, misfiring shotgun loaned): Df. owed a duty to tell Pfs. that the shotgun he loaned them misfired sometimes. Duty existed, and breach was judged, at the time Df. loaned the gun. But if the defect was obvious, or the Pfs. knew about it, no duty (Cf. *Robinson v. Williamsen Idaho Equipment*).

**C. General nonfeasance exception**: forseeability only = no duty.

Comment: "The exception to the general rule is that there generally is no duty to prevent harm not of the actor's making. Stated slightly differently: there is no obligation to act to prevent a foreseeable risk of harm; there is no duty to rescue. This reflects a general presumption in the common law: although conduct may be prohibited, the common law has been reticent to require affirmative conduct."

**1.** The line between misfeasance and nonfeasance is fuzzy (from *Kunz*)

**2.** *Fagundes v. State* (ID 1989, radioless helicopter): the Df. state's conduct was a failure to act to prevent a foreseeable risk; and so, without something else, the state owes not duty.

**a)** "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" (Restatement 2d § 314).

**3.** *LeDeau v. No. Pac. Ry*. (ID 1911, falling boulder): RR has no duty to protect passengers from falling boulders because such a duty would be burdensome and possibly prohibitive.

**a)** The "act" of building the RR is not sufficient; i.e., there is no common carrier duty to remove boulders unless they are apparent and obvious.

**4.** *Peone v. Regulus Stud Mills* (ID 1987, worker hit by snag): Df. landowner owes no duty to employee of the independent contractor Df. hired because the contractor is in a better position to assess the risks.

**a)** Policy: placing liability on the contractor itc. helps keep costs and number of accidents low.

**D. Special nonfeasance exception**: foreseeability + something else.

Comment: "The no-duty position can produce harsh and unjust results and the Idaho courts have, therefore, created several exceptions by imposing duties to act in certain situations."

The exceptions usually turn on the amount of control Df. has over the Pf. or a 3d party.

**1. Assumption of duty**

Comment: "The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all. . . . If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward." Cardozo in Moch Co. v. Rensselaer Water, 159 N.E. 896 (1928).

**a)** *Farwell v. Keaton* (MI 1976, beat-up kid): friend of beatdown victim owed him a duty because he knew the victim was injured and tried to help, and because they were friends who had gone out together on a social venture.

**(1)** SO: assumption, SC: specific, BN: ???

**(2)** Foreseeability arose when they decide to get beers, but duty didn't. The duty arose when Df. tried to wake the victim and then left him in front of his parents' house, knowing the victim was badly injured.

**(3)** DISSENT: Df. owed no duty because, (a) nothing indicated that medical assistance was needed, and (b) there was no special relationship between the Df. and the victim, as the majority urged.

**b)** *Davis v. Potter* (ID 1932, hot water bottles): duty because doctor was in charge

**(1)** SO: assumption, SC: specific, BN: hospital patients

**(2)** Doctor assumed duty by being in room when the bottles and covers were replaced.

**c)** *Kunz v. Utah Power* (9th cir. 1975, flood control): because Pf. reasonably relied on Df's. flood control efforts, Df. assumed a duty to downstream ranchers that it coordinated with to continue these efforts (to prevent foreseeable risk).

Comment: "The line between malfeasance and nonfeasance is very thin and frequently almost imperceptible."

**(1)** Cf. *Burgess v. Salmon River Canal Co.* (ID 1991): dam operator that did not do any flood control or coordinate with other landowners did not assume a duty to them. Diversion of a river is by itself not enough does not indicate assumption of duty -- it's not overt enough.

**(a)** The dam operator here also has the duty to act reasonably in the operation of its dam, like in *Wilson*. It simply does not have a duty of flood control -- it would have to assume that.

**d)** *Udy v. Custer County* (rock throwing): past voluntary acts do not create an ongoing duty unless, perhaps, there was some sort of promise that future assistance would be forthcoming.

**(1)** Duty is usu. assumed only for the particular occasion. Otherwise, assuming a duty would be onerous and prohibitive.

**(2)** Distinguish from *Kunz* because here the Pfs. had not been relying on Df. to continue his assistance.

**2. Special relationships**: Df. ↔ Pf.

Comment: The scope of these kinds of duties is usually to protect or warn the Pf.

**a) Vulnerability**

**(1)** *Coghlan v. Beta Theta Pi* (ID 1999, drunk sorority girl): no special relationship where Pf. was not deprived of her ability to protect herself. Df. had control, but only limited control, over Pf. -- the same amount of control as the university itself had, and the university does not (any longer) have a duty to monitor students' drinking.

**(2)** *Harper v. Herman* (MN 1993, dive off boat): no special relationship where Df. did not have custody of Pf. such that Pf. was vulnerable. Also, Df. did not have considerable power of Pf's. welfare, and Df. was not making money off of Pf, either.

**(a)** Distinguish from common carrier cases where Pf. is vulnerable, i.e., deprived of opportunities to protect himself.

**b) Public callings**

**(1)** *Clark v. Tarr* (ID 1954, broke down bus): common carrier's bus driver who sent two passengers with a passing car after the bus broke down really just substituted conveyances -- the common carrier duty remained.

**(a)** See *Straley v. Idaho Nuclear* (ID 1972, atomic bus): even though Df's. bus service wasn't actually for Pf., enough unauthorized people used it often enough that Df. was charged with the common carrier duty.

**c) Custodians**

**(1)** *Rife v. Long* (ID 1995, kid walks into the back of a semi): Df. may have custody when Pf. is on school grounds, during the school day, but once he leaves those grounds after school is over, his parents have custody. Imposing a duty here would be too much of a burden for the school system.

**(2)** *Merritt v. State* (ID 1985, foster kid runaway): county that assumed custody over a foster kid has a duty to exercise reasonable care in protecting him.

**d) The government**

**(1)** *Riss v. City of New York* (NY 1968, ex-girlfriend gets lye in her face): the government has a duty to protect the public at large -- not specific individuals (or, i.e., no individual has a right to the government's protection). See also *Lundgren v. City of McCall* (ID 1991, drunks fire off fireworks).

**(a)** N.b., the government has a duty to protect those individuals that it actually has custody over (e.g., inmates). See *Merritt*.

**(b)** Distinguish from *S.H. Kress & Co. v. Godman*: in both of these cases, the Df. had special knowledge of a risk to the Pf. But here, Df. is the government has no custody at all over the Pf.

**e) Special knowledge**

**(1)** *S.H. Kress v. Godman* (boiler explodes): special relationship where Df. had knowledge of a risk to the Pf. and Pf. relied on Df's. knowledge.

**(a)** N.b., distinguish from government cases -- the government basically has immunity except where it has actual custody over the Pf.

**(b)** See *Galbraith v. Vangas, Inc.* (ID 1982, misinstalled water heater): through their contract, Df. gained a duty to the Pf.

**f) Professional relationships**: doctor-patient relationships lead to a duty to exercise the standard of care of similarly trained doctors in the same community.

**3. Special relationship:** Df. ↔ 3d party.

Comment: The scope of these kinds of duties is usually to control the 3d party (but see Tarasoff).

**a)** *Davis v. Potter* (ID 1931, hot water bottles): a second source of the doctor's duty is his relationship with his nurse -- he had a duty to control his nurse.

**b)** *Tarasoff v. Regents of UC* (CA 1976, patient kills girlfriend): the court assigns a duty to the psychiatrist to the Pf. to protect and warn(!!).

Comment: "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."

**(1) Considerations in creating a duty** where there was none before.

**(a)** Foreseeability of harm to the Pf.

**(b)** Degree of certainty that Pf. suffered an injury.

**(c)** Closeness of connection between the Df's. conduct and the Pf's. injury.

**(d)** Moral blame attached to the Df's. conduct.

**(e)** Policy of preventing future harm.

**(f)** Extent of the burden on the Df.

**(g)** Consequences to the community.

**(h)** Availability, cost, and prevalence of insurance for the risk involved.

**(2)** N.b., this duty is analogous to the duty to warn families of contagious diseases.

**c)** *Randi W. v. Muroc JUSD* (CA 1997, molesting teacher): Df's. misrepresentation was an affirmative act, and so Df. has a duty to exercise due care. Distinguish from the usual general rule cases because the actor itc. is malicious.

**d)** *Alegria v. Payonk* (bar-going 17yo drunk driver): Df's affirmative act -- serving the intoxicated 3d party -- created a duty to exercise due care. Also, the Df. had control -- over its alcohol.

**e)** *Reynolds v. Hicks* (drunk minor leaves wedding, hurts others): no duty.

**(1)** Was serving minor alcohol at wedding a criminal act?

**(a)** Statue reqs. "control" over the premises -- did Df.'s have control?

**(2)** *Hansen v. Friend* (drunk minor hurts himself): duty by social host derived from statute.

**(a)** Drunk minor who hurts himself has cause a/g social host who supplied the alcohol.

**(3)** Isn't this morally flipped???

**f)** *Vince v. Wilson* (bad grandnephew gets a car): negligent entrustment: duty where Df. supplies 3d party with a chattel and knows or should know that the 3d party could use it in a way causing unreasonable risk.

**(1)** Df. grandaunt can be liable for negl. entrustment.

**(2)** Df. car lot and Df. car lot owner can be liable if they knew of grandnephew's inexperience &c.

**4. Statutory duty**

**a)** Scope: as specified by statute, o/w as specified by ct.

**b)** Statutes create duty where there was none before (if there's already a duty, there is no need to find one in a statute)

**c)** *Wheeler v. Oregon R.R*. (tracks near Lake Cd'A): statute explicity provides for liability

**(1)** Scope: negl. per se

**(2)** Distinguish from Hansen v. Friend (drunk minor hurts himself) b/c itc statute is explicit on civil liability

**d)** *Carson v. City of Genesee* (defective sidewalk): statute silent on civil liability

**(1)** Scope: g/s/c

**(2)** cities owe duty of maintaining streets and sidewalks to the individuals it impliedly invites to travel on them

**e)** ???*Oppenheimer Industries v. Johnson Cattle* (brand inspector): regulation makes duty mandatory for the inspector

**(1)** Scope: specific -- in the regulation

**(2)** DISSENT: no defined class of beneficiaries-- public entity owes no duty to specific individuals (see Riss v. City of NY (lye in face))

**(a)** distinguish from Alegria v. Payonk (bar-going 17yo drunk driver) b/c Alegria Df. not a public entity

**(b)** MAJORITY (response on rehearing): not a duty to all individuals, only to the class of cattle ranchers

**f)** ???*Brooks v. Logan* (student suicide journal): statute silent on civil liability

**(1)** Source: statute assigns school dist. w/ duty to protect health of the pupils

**(2)** Alternative source?: in loco parentis

**(3)** Scope: g/s/c

**g)** *Uhr v. East Greenbush CSD* (scoliosis): no duty, statute silent

**(1)** Uhr ct. steps for finding duty in silent statute:

**(a)** is Pf. in class for whose benefit statute enacted?

**(b)** would private rgt. of action promote the legislative purpose?

**(c)** would creation of that rgt. be consisten w/ the legislative scheme?

**(2)** ID cts. considerations when statute is silent:

**(a)** is the class of beneficiaries identifiable?
**(b)** does the language make some conduct mandatory?
**(c)** is the class of duty assignees identifiable?

## E. Limited duty

Comment: "Limitations on the general rule reflect situations in which the courts fear that the potential liability is out of proportion to the culpability. Emotional harm is the paradigm: the amount of emotional distress that might result from any bit of careless conduct is unknowably large. Misrepresentation and economic loss present similar problems."

### 1. Land entrants

#### a) Invitees

**(1)** SO: entrant/occupier r'ship, SC: due care (plus a little, maybe), BN: invitees
**(2)** *Heins v. Webster County* (hospital santa slip and fall): why treat one person diff. than another?
**(a)** Pf. would could just as easily been an invitee (e.g. if he'd come to visit a patient instead of his employee daughter)
**(3)** *Keller v. Holiday Inns* (heavy gates in gift shop): exception to rule will not be treated as an exception
**(a)** usu., occupier has better knowledge of dangers, but itc maybe entrant had better knowledge
**(b)** rules are cheap but inflexible, stds. are expensive but precise -- ct. goes w/ cheap
**(c)** KNOWLEDGE and CONTROL ISN'T EVERYTHING
**(d)** Holiday Inns gets the invitee type duty b/c of their economic benefit

#### b) Licensees

**(1)** SO: entrant/occupier r'ship, SC: make safe the dangers posessor is aware of, BN: licensees
**(2)** *Carter v. Kinney* (bible study slip and fall): Pf. a licensee b/c no tangible benefit to Df.
**(a)** benefit causing invitee status usu. must be tangible, economic

#### c) Trespassers

**(1)** SO: entrant/occupier r'ship, SC: don't willfully/wantonly injure, BN: trespassers
**(2)** land possessor can NOT be liable in negl. to a trespasser
**(3)** *Ellis v. Ashton Power* (9yo electrocuted on canal): trespassers tolerated -> constructive notice (see Negri (dirty baby food))

### 2. Emotional distress

### 3. Relational interests

#### a) Wrongful death

#### b) Familial relations

### 4. Economic loss

#### a) Goods

**(1) Privity**
**(2) No privity**

#### b) Service

**(1) Privity**
**(2) No privity**

# II. Breach

Comment: 'Breach is the basic carelessness issue which characterizes the action for negligence; it is often loosely referred to as the negligence element because it poses the central question of negligence law: "Was it reasonable for the defendant, under all of the circumstances, to engage in the conduct which caused the injury? This has two aspects: (1) was a risk foreseeable and (2) if so, was the defendant's conduct reasonable in the face of the foreseeable risk? The breach element employs the mythical "reasonable person." Green has called this element "an intellectual gyroscope" because the conduct which it requires "adjusts automatically commensurate with the danger." This element is the central law applying function of the tribunal.'

## A. Standard of Care

### 1. The general standard

Comment: "When I use the word 'negligence' in these instructions, I mean the failure to use ordinary care in the management of one's property or person. The words 'ordinary care' mean the care a reasonably prudent person would use under circumstances similar to those shown by the evidence.

"Negligence may thus consist of the failure to do something which a reasonably careful person would do, under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under the circumstances. That is for you to decide." IDJI 210.

**a) Risk-utility analysis**

**(1) Risk**

**(a)** Forseeability of harm (probability -- approximately, 'P' in the Hand formula).

Comment: "One owes a duty to every person to use reasonable care to avoid injury in any situation in which it could be reasonably anticipated or foreseen that failure might result in such injury." Alegria v. Payonk (ID 1980).

**(b)** Gravity of harm (magnitude -- approximately, 'L' in the Hand formula).

Comment: "Where the danger is exceedingly small and trivial, it may not be negligent at all to disregard it. Where it is exceedingly great and obvious, it would be negligence per se to incur the hazard. In other cases it would be open to question whether incurring the hazard would be consistent with ordinary care, and in cases of this kind the question of negligence is one for the determination of the jury." Carson v. City of Genesee (ID 1903).

**i)** Social value of interest exposed to risk by the conduct

**ii)** Nature of the potential harm

**(2) Utility** (roughly, 'B' in the Hand formula).

**(a)** Social value of the interest advanced by Df.'s conduct.

**i)** See *LeDeau v. No. Pac. Ry.* (ID 1911, rock falls into train car): the value of having a RR is significant, and the cost of eliminating the risk would likely be high, considering the rock country.

**ii)** See *Adams v. Bullock* (NY 1919, boy swings wire over trolley): the trolley is franchised by the state, and the cost of eliminating the risk would probably be high, considering that the risk is foreseeable all along the line.

**(b)** Availability of less risky alternatives.

**i)** See *York v. Pac. & No. Ry* (ID 1902, turntable case): the risk is unnecessary -- the turntable could easily be locked.

**ii)** See *Braun v. Buffalo Gen. Elec.* (NY 1911, wires over vacant lot): the risk is unnecessary -- the wires could have been replaced with sufficiently insulated wires.

**(3) Applications**

**(a)** *Adams v. Bullock* (NY 1919, boy swings wire over trolley): no breach

where the risk was not very foreseeable and was not unnecessary.

**i)** The trolley operator was not negligent in simply operating the trolley in the way it did -- it was franchised by the state to do so in the way it was.

**ii)** Even so, the trolley operator owes a duty to reduce the risks involved, but there was nothing especially unsafe at this point in the trolley line. In fact, the accident could have happened anywhere on the line, and in any case this type of thing is not very foreseeable at all.

**iii)** Still, even though this was not very foreseeable, if the risk was unnecessary, then the trolley operator is negligent. Here the risk is basically necessary, since trolley wires cannot be insulated, and the trolley operator was under no duty to put them underground.

**iv)** *Braun v. Buffalo Gen. Elec.* (NY 1911, old wires over vacant lot): distinguish from *Adams* -- the risk was more foreseeable and more unnecessary.

**v)** *LeDeau v. No. Pac. Ry.* (ID 1911, rock falls into train car): essentially the same as *Adams* -- an unforeseeable risk that was basically unavoidable.

**(b)** *United States v. Carroll Towing* (2d cir. 1947, bargee): breach where B < PL.

**i)** Posner's "amoral" view: B < PL is, really, an economic costs and benefits analysis -- where the cost to society of preventing a risk (as measured by the costs of safety equipment and other measures) exceeds the benefit to society of the endangered behavior (as adjusted by the the likelihood that it will actually be damaged), then society should forego preventing that risk.

**ii)** Holmes's more "moral" view: people should not be liable for the harm they cause unless they have chosen, in the face of the risks they create, to proceed and so endanger society (i.e., they decide to behave unreasonably).

**b) The reasonable person**

**(1) Objectivity, generally**

**(a)** Individual experience: the standard will not be lowered based on individual experience, but can be raised. (See "Learners," below.)

**i)** See *Hartman v. Gas Dome Oil Co.* (ID 1931): no defense that actor did not know the dangers involved with oil and gas equipment -- by manipulating these dangerous machines, actor took on the responsibility to inform himself of the dangers.

**(b)** Community custom: the standard will not be lowered to the community standard if the community standard is for negligent conduct.

**i)** See *Rumpel v. Oregon Short Line* (ID 1894): no defense that everybody in town crawled through train cars as a short cut -- that's negligent, no matter what everybody else does.

**(2) Specific adjustments**

**(a)** Children: much more subjective than usual -- generally, children are held to the care expected of a child of the same age, knowledge, experience, and discretion.

**i)** But, when the child is doing something that is usu. done only by adults (e.g., driving a car, piloting a speedboat, flying a plane) the child will be held to the standard of ordinary care. See *Goodfellow v. Coggburn* (ID 1977).

**a.** Others can't know if the operator of a car, or something, is a child, usu.

**b.** Some activities are so dangerous that the operator has to bear the risk regardless of youth or inexperience.

**(b)** Learners: a little more subjective than usual -- learners are held to the ordinary care standard, but there prior training and experience should be taken into account.

**i)** See *T-Craft Aero Club v. Blough* (ID 1982): student pilot held to ordinary

care, with accounting for his lack of experience.

**ii)** Some activities are so dangerous that the operator has to bear the risk regardless inexperience.

**(c)** Physical attributes

**i)** Superior abilities: the Restatement says (§ 289(b)) actors must exercise the superior attributes they actually have.

**ii)** Handicaps: generally, physical handicaps are accounted for. See *Prosser and Keeton on Torts*. Distinct defects (e.g., blindness) are accounted for, but the actor has to, as well, consider his defect in choosing his conduct.

**(d)** Mental deficiencies: generally, mental deficiencies are not accounted for.

**i)** Insanity: there is no general rule, but usu. insanity does not excuse one from exercising ordinary care. If distinct, debilitating insanity exists that prevents the actor from complying with the specific rule against what he's done, then some courts would excuse it.

**ii)** Garden variety fools: are not excused from ordinary care. See *Vaughn v. Menlove* (Eng. 1837, idiot haystacker): accounting for deficiencies in judgment would "leave so vague a line as to afford no rule at all."

**(e)** The elderly, the infirm, and the suddenly disabled: where the actor retains some control of what he's doing, he must exercise ordinary care. See *Roberts v. Ramsbottom* (Eng. 1979, elderly driver has a stroke and keeps driving) (distinguish from *Hammontree* on the greater foreseeability itc.).

**2. Particularized standards**: accounting for the circumstances.

**a) The trial tribunal**: who particularizes?

**(1)** The judge: see *B & O R.R. v. Goodman* (SCOTUS 1927, train xing): "when the standard is clear it should be laid down once and for all by the Courts." (Holmes.)

**(a)** Judicial economy: "the quest for perfect decisionmaking comes at a price since many of the costs of a trial are borne by society."

**(2)** The jury: see *Pokora v. Wabash Ry.* (SCOTUS 1934, train xing): a single standard just doesn't work -- it will almost certainly lead to absurd results in some cases, and that is why we leave the application of the standard to the "judgment of a jury." (Cardozo.)

**(a)** The jury can apply the law without changing it, because juries' decisions are not precedent. *Akins v. Glens Falls Sch. Dist.* (NY 1981).

**(b)** The jury is a communitarian entity -- it is more diverse than a single judge, or even an appellate court, and brings with it perhaps a larger picture of "reasonableness." *Adams v. Zalasky* (ID 1938). See *Andrews v. United Airlines* (9th cir. 1994, overhead bins): jurors would best know about modern air travel and what responsibilities airlines ought to have.

**(3)** Both, really: see *McPheters v. Peterson* (ID 1985, child hit in intersection): the judge should guide jury, esp. in selecting the proper instructions. I.e., use IDJI where it "adequately, accurately, and clearly states the law."

**(4)** N.b., the appellate court: should not decide as if it was a jury, but should decide whether it would be a miscarriage of justice to allow a jury's verdict to stand.

**b) Statutes**

**(1) Explicit statutory cause of action**: express provision for civil liability.

**(a)** Where a statute expressly provides for civil liability in certain circumstances, there's basically strict liability: the statute "does not rest

the liability for damages on the contingency that the injury sustained was the result of the failure to ring the bell . . . but declares absolutely that were the bell is not wrung, and damages are sustained, the company is liable." *Wheeler v. Oregon R.R.* (ID 1909).

**i)** N.b., the statute might expressly provide that the statute shall not be used in negligence actions. See IC § 49-686(2)

**(2) Statutory silence**: civil liability isn't mentioned.

Comment: Courts use statutes even when they are silent on civil liability because, for one thing, the legislature is more democratic than the courts and so the statutory scheme is good way of determining the people's will.

**(a)** *Martin v. Herzog* (NY 1920, buggy without lights): Pf's. violation of a statute requiring lights on vehicles at night "*is* negligence," it's not just evidence of it.

**(b) Statutory purpose doctrine**: a method for determining relevancy.

**i) Type of statute**: statutes not concerned with health or safety are not relevant to negligence.

**a.** Licensing statutes are generally considered to be purposed to produce revenue for the state, not for health and safety.

**ii) Clarity of the standard of conduct**: the statute has to spell out the applicable standard of conduct.

**a.** No standard at all: see *Brizendine v. Nampa Meridian* (ID 1976): statute imposing a duty to "carefully keep and maintain canal banks in good repair" doesn't define a standard of conduct -- the jury wouldn't know what is and isn't due care.

**1)** A statute that doesn't specify a standard of conduct is no help to courts, so courts don't use them.

**2)** See also *Esterbrook v. State* (ID 1993): statute that says DOT "may" deny certain applications does not mean DOT was negligent by approving one like that.

**3)** But see *Johnson v. Emerson* (ID 1982): statute imposing a duty to not "drive a vehicle at a speed greater than is reasonable and prudent under the circumstances" is specific enough for a negligence *per se* instruction.

**b.** An ambiguous standard: where the standard of conduct specified by a statute isn't clear, it will not be used. See *Ahles v. Tabor* (ID 2001).

**iii) Type of risk**: the risk protected by the statute must be like the risk in question.

**a.** See *Stephen v. Stearns* (ID 1984): statute requiring a handrail on stairs was meant to reduce the risk of falls.

**b.** See *Munns v. Swift Transportation* (ID 2002): statute requiring drivers to stop after an accident was meant to facilitate information exchange, not to protect other drivers from colliding with the accident; and *Orthman v. Idaho Power* (ID 2000): statute making it a crime to tamper with electrical meters is meant to prevent theft of electricity, not reduce the risk of electrocutions.

**iv) Class of interests**: the class of interests protected must include the Pf.

**a.** See *Quillin v. Colquhoun* (ID 1926): statute setting the speed limit in front of schoolhouses was not meant to protect people other than schoolchildren. N.b., generally, this requirement is interpreted more liberally -- even in Idaho.

**v)** And in Idaho, the statutory violation must be a proximate cause of the injury (but that kind of thing doesn't go here, really).

**(c) When the statute satisfies the doctrine**

**i) Violation**

**a.** Negligence per se: if you violated the statute you breached your duty (unless you fall into some exception). This is the rule in Idaho, see IDJI 211.

**1)** N.b., this means the jurors may have a limited role: they get to find the facts, and evaluate whether the Df. violated the statute -- they don't get to determine if the conduct was reasonable or not.

**b.** Evidence of negligence: if you violated the statute, that's pretty good evidence that you violated your duty.

**c. Excuses for violation**

**1)** IDJI 211 excuses: compliance was impossible, the actor had no control over what made him violate the statute, there was an emergency (that the actor didn't create) that make him violate the statute, or there something that provides a specific excuse.

**2)** See *Tedla v. Ellman* (NY 1939, ragpickers walking on the wrong side of the road): statute that requires pedestrians to walk on the right side of the road is meant to protect them, so it is not negligence when someone walks on the left side because it would be much more dangerous to walk on the right.

**ii) Statute doesn't satisfy the doctrine**

**a.** An aid in determine what's reasonable: e.g., a city building code might be useful in demonstrating what a reasonable builder would have done.

**1)** See *Clinkscales v. Carver* (CA 1943): ordinance that had no effect because it wasn't published properly is still good as evidence of what's reasonable and so is applicable, except where it would impose liability without fault. N.b., this case also stands for the idea that the judge employs the statutory purpose doctrine, not the jury in any way.

**iii) Compliance**

**a.** With statute: see *Probart v. Idaho Power* (ID 1953, crane operator electrocuted): compliance is prima facie evidence of the absence of negligence; for Pf. to prevail he's got to "go farther" and show some actionable negligence.

**b.** No statute: just because there's no statute requiring something doesn't mean you don't have to have it. See *Fleenor v. Oregon Short Line* (ID 1909): no statute requiring flagman and gates at an xing just means there is no negligence *per se*. The jury may still determine that Df. was negligent based on the common law.

# B. Proof

## 1. Elements

**a) Conduct**: what did the Df. actually do?

**(1)** N.b., is the primary factual hurdle in proving breach.

**(2)** N.b., sometimes, proof of conduct is enough to prove breach by itself (e.g., driving 90 mph down Main Street in Moscow -- the other elements of breach are obvious).

**b) Risk**: was the Df's. conduct risky?

**c) Foreseeability**: going into it, could the Df. foresee the risk?

Comment: "The actor's conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward 'with the wisdom born of the event.'" Prosser and Keeton on Torts.

**d) Alternative**: could Df. have chosen reasonably safer alternative conduct?

**e) Notice** of the alternative: did Df. know, or should he have known, about the safer

alternatives?

**(1) Constructive notice**

**(a)** N.b., legal ownership alone is not sufficient for constructive notice, but it may be a strong factor in that determination. Consider control and notice.

**(b)** *McDonald v. Safeway Stores* (ID 1985, ice cream): circumstantial evidence proves that Df. should have known ice cream was on the floor and to clean it up.

**i)** *Negri v. Stop and Shop* (NY 1985, dirty baby food): circumstantial evidence proves that Df. should have known baby food was on the floor and to clean it up.

**ii)** *Tommerup v. Albertson's* (ID 1980): no reason for Df. to know about cupcake wrapper on the ground in the parking lot -- it appeared to be an isolated event.

**iii)** *Jasko v. Woolworth Co.* (CO): selling pizza on wax paper where there's a terrazzo floor is so risky -- and wax paper on the floor isn't an isolated incident -- that no actual or constructive notice is required.

**(c)** *Gordon v. American Museum* (NY 1986, hot dogs in wax paper): no constructive notice where the wax paper wasn't dirty, nobody had seen it. General knowledge of litter isn't enough either.

**i)** Prior activities: *Moody v. Haymarket Associates* (ME 1999): evidence of an accident-free workplace is not relevant to what a janitor did on a particular day.

**ii)** Business practice: *Randall v. K-Mart* (2d cir. 1998): constructive notice not required where the conduct is a business practice, e.g., self-service vending, that creates a foreseeable risk.

**(d)** *Robinson v. Williamsen Equipment* (ID 1972, truck tips over): Df. had no reason to know there were devices available that would make the product safer for the buyer's purpose, and so no constructive (or actual) notice.

**2. Res ipsa loquitur**

Comment: "It adds nothing to the law, has no meaning which is not more clearly expressed for us in English, and brings confusion to our legal discussions. It does not represent a doctrine, is not a legal maxim, and is not a rule." C.J. Bond, dissenting in Potomac Edison v. Johnson (MD 1930).

"If that phrase had not been in Latin, nobody would have called it a principle." Lord Shaw, Ballard v. No. British Ry. (Eng. 1923).

**a) Elements**

**(1) Ordinarily caused by negligence**

**(a)** See *Western Stockgrowers v. Edwards* (ID 1995): fact that it a grassland was dry and that it was windy isn't enough to infer that Df. caused a fire by driving past in his car. Lots of things could have happened.

**(b)** See *S.H. Kress & Co. v. Goodman* (ID 1979): fact that a boiler exploded after a repairer had worked on it wasn't enough to infer that the repairer did something negligent that caused the explosion. Lots of things could have happened.

**(c)** See *Inouye v. Black* (CA 1965): fact that a wire implanted in Pf's. neck fragmented wasn't enough to infer negligence on the part of the surgeon. The wire could have had hidden flaws from the manufacture, or the hospital could have stored it incorrectly, or other things.

**(d)** Uncommon knowledge: even when common knowledge might not be enough to infer negligence, res ipsa may apply if Pf. can provide some

sufficient basis for a lay jury to conclude that the accident would not normally happen without negligence.

**(2) Df. controlled the instrumentality**

Comment: Control is relevant to res ipsa because it demonstrates that it is "more likely than not" that the Df. was responsible for whatever happened.

**(a)** See *Jerome Drug v. Winslow* (ID 1986): where the origin of a fire couldn't be established, there was no known instrumentality, so no way to say Df. had control of it. Even if the instrumentality had been electrical wiring, the wiring ran between the Pf's. and Df's. stores, and so it wouldn't be clear that Df. and not Pf. had control of the wiring.

**(b)** See *Splinter v. City of Nampa* (ID 1953): no res ipsa against city in gas explosion because the city did not have control of the gas tank or fittings inside the Pf's. building.

**(c)** *Ybarra v. Spangard* (CA 1944, injury while under): a "striking departure from the idea of exclusive control." Multiple defendants held all negligent through res ipsa.

**i)** Df's., as health care providers, held a special responsibility to the Pf's. safety: "explain or pay," see common carrier cases.

**b) Effects**

**(1)** IDJI 215: res ipsa, when satisfied, creates a permissible inference of negligence on the part of the Df.

**(2) Procedural effects**

**(a)** Burden of going forward: shifts to the Df. -- once res ipsa seems satisfied, Pf. can rest and Df. will have to rebut if he thinks he needs to (n.b., sometimes the inference is so strong that Df. better rebut; in such cases Df. basically gets the burden of proof).

**(b)** Burden of proof: no effect -- Pf. retains the burden of proof (except in CA, et al., where when res ipsa is satisfied, negligence is presumed -- the Df. gets the burden of proof).

**c)** *Byrne v. Boadle* (Eng. 1863, barrel falls): "a barrel could not roll out of a warehouse without some negligence, and to say that a Pf. who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. . . . If there are any facts inconsistent with negligence it is for the Df. to prove them."

**(1)** N.b., consider control and notice.

**(2)** Distinguish from *Gordon v. American Museum* on Df's. control of the instrumentality: in *Gordon*, many people had hot dogs and wax paper, not just the Df. vendor. Here, it was just the warehouse that had custody of the barrels.

**(a)** See *Larson v. St. Francis Hotel* (CA 1948, chair thrown out a window on V-J Day): no res ipsa because Df. hotel had no control over the chair -- it had leased the room. This is like *Gordon* -- there is no notice and no control.

**(b)** See *Connolly v. Nicollet Hotel* (MN 1959, wild celebration in hotel): Df. was negligent since it knew what was going on but did not do very much to stop the partiers. Here, there is actual notice, so Df. must exercise control (but, n.b., this is not res ipsa -- see "Notice," below).

**i)** Hypos: If the wild celebration breaks out spontaneously in an unleased ballroom, the hotel has no notice and so need not exercise its control. If the celebration broke out but has been going on for an hour, the hotel may have

notice and so must exercise some control.

**(3)** *C.C. Anderson Stores v. Boise Water* (ID 1962, water mains burst): Df. had control over its mains (primarily, if not only, because it owned them), but Pf. does not show that Df. had notice of their deficiency.

**(a)** Negligence might be found in either faulty installation or faulty manufacture of the mains -- if faulty manufacture, Df. would be negligent if it failed to find defects after a reasonably good inspection of them. Without evidence that its inspection was less than reasonable, there is no constructive notice; see *Negri* and parts of *Gordon*.

**3. Custom**: the applicability of trade practices.

**a) Conformance**

**(1)** "In determining whether conduct is negligent, the customs of the community, or of others in like circumstances, are factors to be taken into account, but are not controlling where a reasonable man would not follow them." Restatement § 295A. I.e., "what is usually done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." *Texas & Pac. Ry. v. Behymer* (SCOTUS 1903) (Holmes).

**(a)** N.b., evidence of custom can help on all of the elements of proof of breach.

**i)** Alternatives: court can be wary of any assertion that there were other feasible ways of doing things; and even if Pf. can show a feasible alternative, custom might be evidence that it was reasonable for Df. not to know about it; and even so still, a custom that involves large fixed costs may cause a court to think hard about finding that custom unreasonable. Morriss, 42 Colum. L. Rev. 1147 (1942).

**a.** On the other hand, evidence that Df. fell below custom can show that there is a feasible alternative, that the Df. should have known about it, and that there will be no large social cost in finding the Df. negligent for not following custom.

**(2)** *Low v. Park Price Co.* (ID 1972, stolen tranny): the fact that most garages stored cars in unfenced areas was admissible as evidence, and demonstrated that Df. had exhibited reasonable care.

**(a)** Pf's arguments

**i)** The custom was negligent as a matter of law (an attempt to keep the custom evidence out).

**ii)** The custom is not good evidence of what is reasonable care (the argument after the custom evidence is let in).

**(b)** The fact that Df. could have afforded to take better measures to protect Pf's. does not demonstrate that Df. did not take reasonable care. (However, the cost of better measures might be relevant -- but the fact that Df. could afford it is not.)

**(c)** See *Hansen v. Standard Oil* (ID 1935): evidence that welder relied on his employer to prepare an oil tank, as per custom, was admissible, and jury could (and did) find that reliance on the custom was reasonable.

**(3)** See *The T.J. Hooper* (SCOTUS cert. denied 1932): even though it was customary for tugs not to carry radios, that was unreasonable.

**b) Nonconformance**

**(1)** *Trimarco v. Klein* (NY 1982, shower glass shatters): jury is allowed to consider the custom of replacing shower glass with shatterproof glass.

**(a)** App. Div. should not have dismissed based on the fact that there was "no notice of danger" that would have suggested to the landlord that he should have replaced the old glass.

**(b)** See *Levine v. Russell Blaine Co.*: if Pf. could show that custom of using smooth ropes for dumbwaiters was meant to prevent rope burns, then custom was admissible.

**c) Professional malpractice**

**(1) Medical malpractice**

**(a)** Common law standards: the standard of the local medical community.

**i)** Distinguished from custom as it applies in negligence actions against other industries.

**a.** In the ordinary case, the burden of showing the nature and relevance of the custom is on the proponent of that relevance.

**b.** But in medical malpractice actions, the burden of showing the nature and relevance of the custom is always on the Pf. -- the Pf. usu. uses expert testimony to do this.

**(b) Idaho statutes**: changes to what is required to prove noncompliance.

**i)** Standard of care: the Idaho medical malpractice statutes (IC §§ 6-1001 - 6-1013) do not change the standard of care -- it is still the standard of "health care practice in the community" where the care was or should have been provided.

**a.** IC § 6-1012: individual health care providers are to be judged in comparison with similarly trained and qualified providers of the same class, in the same community; the individual's specialized training, specialization, and experience should be taken into account.

**ii)** Procedure: the Idaho statutes do change the procedure by which malpractice must be proved. They change the burden of going forward (i.e., how has to prove what and how it has to be proved), and make it extremely difficult to prove malpractice.

**a.** First, a copy of the claim, in general terms, must be sent to the state Board of Medicine, and a copy sent to the health care provider.

**b.** Then, the claim goes to a hearing panel.

**1)** One board-appointed doctor.

**2)** One bar-appointed lawyer (the chairman).

**3)** One panel-appointed layperson.

**4)** In claims against hospitals, one administrator of an Idaho acute-care hospital.

**c.** And a hearing takes place.

**1)** Parties may only be present when testifying (this protects each party's case and further confidentiality).

**2)** The panel's decision is not binding, and is not seen by the courts.

**3)** The hearing is meant to encourage settlement (but, n.b., the insurers have been categorically refusing to settle).

**d.** After the hearing, Pf. must wait at least 30 days before bringing any action in court.

**e.** At suit, testimony as to custom should be direct and convincing (no inferences allowed). N.b., that the legislature could have changed the requirement to clear and convincing. See *Maxwell v. The Women's Clinic* (ID 1981).

**f.** *Maxwell v. The Women's Clinic* (ID 1981, dr. burnt a hole in Pf.): to survive summary judgment, Pf. must produce direct testimony of the

standard in place, and of noncompliance with that standard. I.e., it must be offered by either the Pf. or Df.

**g.** See *Pearson v. Parsons* (ID 1988): lays out the steps required to prove malpractice as established by IC §§ 6-1012 and 6-1013.

**1)** Must be judged in comparison with similarly trained providers from the same community.

**2)** Expert witnesses must be knowledgeable and competent.

**3)** Expert witnesses must actually hold an opinion about the applicable standard.

**4)** Expert witnesses' opinions must be rendered with reasonable medical certainty.

**5)** Expert witnesses must have both professional expertise and actual knowledge of the applicable standard.

**h.** Conspiracies of silence: where no doctors will testify against another.

**1)** See *Grover v. Smith* (ID 2002): if Pf. doesn't even contact a local dr., summary judgment is appropriate. Out-of-area drs. can become familiar with local standards by inquiring about them and reviewing them. Also, local medical communities can not choose to adhere to a lower standard of care than is generally followed in the state or in the nation.

### (2) Informed consent

#### (a) Idaho statutes (§§ 39-4301 - 39-4306)

**i)** Who can give consent?

**a.** Any individual of ordinary intelligence who is sufficiently aware of his condition.

**b.** If not, then a parent or guardian can, unless the person previously refused to give consent.

**c.** If neither, then any competent relative can, or any competent individual at all (e.g., a principal or teacher).

**d.** If none of the above, the the attending doctor can if delay would significantly endanger the individual.

**ii)** Who can get consent? the attending doctors can, of course, or attending employees can if they have an attending doctor's permission.

**iii)** Written consent is presumed to be valid. Its validity can be rebutted with clear and convincing evidence of maliciousness or fraud in its procurement. (N.b., this changes the common law: previously, consent given for something other than what was done meant that what was done was a battery.)

**iv)** Consent is valid if the individual was sufficiently aware of his condition: this means that the doctor who got the consent must have told the individual the information that's appropriate considering the circumstances and the standards of the local medical community.

**a.** See *Sherwood v. Carter* (ID 1991): it it's shown that the doctor did not say all he should have, the patient has to show that a reasonable person would not have given consent had she known what she should have known.

## III. Cause in Fact

Comment: "Causation is a factual question for the trier of fact (classically a jury) to determine. It is a question of whether there actually is in fact a causal relation between the defendant's conduct and the plaintiff's injury. It is not necessary that the defendant's conduct be the sole cause of the harm -- since this is impossible."

### A. Single actor

1. **Multiple possible causes**
   - **a)** *Stubbs v. City of Rochester* (NY 1919, tainted water): a single Df., but multiple possible causes -- Pf. must negative all other causes such that it is more likely than not that Df. did it.
     - **(1)** Pf's. arguments
       - **(a)** 58 people got sick in the area -- but couldn't it have been the milk, not the water?
       - **(b)** 50 more cases in that year -- but isn't the entire population exposed to the cause no matter what it is?
       - **(c)** All the sicknesses occurred during the same time, during the period where the water was tainted.
     - **(2)** N.b., proportional recovery: where there is a background risk, not caused by the Df., it's been proposed to compensate Pf. for his damages less the background risk.
   - **b)** *Adams v. Bunker Hill* (ID 1906, ore conveyer operator): a single Df., but multiple possible causes -- Pf. must show that it is more likely than not that Df. did it. Once the Pf. produces sufficient evidence that Df. might have done it, Df. then gets the burden of going forward.
     - **(1)** See *Splinter v. City of Nampa* (ID 1953, restaurant explodes): where the evidence could go either way -- i.e., it's 50/50 -- the Pf. has not established his case.
     - **(2)** *Dent v. Hardware Mutual Casualty* (ID 1964, bridge abutment): where expert testifies that it could go either way, the Pf. has not established his case.
     - **(3)** See *Henderson v. Cominco* (ID 1973, pesticide case): crop death seemed random, and so it was too speculative to say the pesticide rather than the farming, conditions, or disease that caused it.
       - **(a)** Distinguish from *Thomas Helicopters v. San Tan Ranches* (ID 1981, cropdusting): where the Pf's. crops dies in stripes, the crop death is nonrandom enough to be more likely than not the Df's. fault.
   - **c)** *Zuchowicz v. United States* (2d cir. 1998, danocrin causes PPH): it is enough to show that a negligent act is deemed wrong because it increased the risk of the accident in question and that that kind of accident did, in fact, happen.
   - **d)** Counterfactuals: questions of fact plus more.
     - **(1)** *Alberts v. Schultz* (NM 1999, gangrene): lost chances recoverable, but the cause has to be demonstrated.
       - **(a)** Lost chances: Pfs. can recover for lost chances (but, n.b., that the Pf. recovers the value of the lost chance, not the value of the damage caused by the condition itself). Pf. must show that the harm he suffered was in fact made worse by the lost chance, and that Df. more likely than not caused the exacerbation.
         - **i)** Distinguish lost chances cases from future harm cases.
     - **(2)** See *Stephens v. Stearns* (ID 1984, no handrail): where Pf. fell and

there was no handrail, as mandated, Pf. wins, because she probably wouldn't have fallen if there was a handrail. It helps Pf. that the point of the mandate was to prevent falls, probably.

**(3)** See *Leliefeld v. Johnson* (ID 1983, bulldozer hits car): the fact that a bulldozer didn't have a permit for extra-width wasn't the cause -- the accident would have happened permit or no.

**e)** Harm in the future

**2. Multiple actual causes**

**a)** *Woodland v. Portneuf-Marsh Valley Irrigation* (ID 1915, flooded land): divisible damage. Where Df. was not solely responsible for flooding, but was responsible in part along with other non-negligent actors, Df. is liable for his contribution.

**(1)** Distinguish *Fouche v. Chrysler Motors* (ID 1984, torn aorta), because the damage is not divisible in *Fouche*.

**b)** *Blaine v. Byers* (ID 1967, preexisting injury): eggshell Pf. Df. takes Pf. as he finds him -- if Df. aggravates preexisting condition, then Df. is liable for that.

**B. Multiple actors**

**1. One cause, at least**

**a)** *Summers v. Tice* (CA 1948, buckshot): double breach, single cause. Burden shifts to Dfs. to exculpate themselves individually, if they can't they're each liable for the whole damage.

**(1)** Distinguish from *Ybarra*, where there was only a single breach, and a single cause.

**b)** *Hackworth v. Davis* (ID 1964, hit front the front and back): single or double breach, single or double cause. Each actor whose negligence was a substantial factor in the injury is liable. Pf. can recover if the jury finds that the Df's. negligence was a substantial factor, but must also determine whether Df's. negligence was the sole cause or combined with another's negligence to cause the injury.

**c)** *Garcia v. Joseph Vince Co.* (CA 1978, defective saber): single breach, single cause. Pf. must be able to tie the breach to the cause.

**(1)** Would seem to be nearly the same as *Ybarra*, but there the burden of proof for causation was shifted to the Dfs (as in *Summers*).

**d)** *Hymowitz v. Eli Lilly & Co.* (NY 1989, DES): several liability only, apportioned on a market-share basis.

**2. Two causes, for sure**

**a)** *Fussell v. St. Clair* (ID 1991, dead baby): single breach, double cause. The "substantial factor", rather than the "but for," test should be used.

**b)** *In re Estate of Eliasen* (ID 1983, slayer statute): single breach, double cause. An act which accelerates death, causes death. This a good example of what happens when cause-in-fact and scope-of-responsibility are confused.

## IV. Scope of Responsibility

Comment: "Aka 'proximate cause.' This element centers on the limitation of liability for harms

actually caused by the defendant's conduct. The law has concluded that an individual should not be liable for all harms which causally follow from her conduct; this element is the primary limiting factor. The issues considered under this heading are closely related to those considered under duty. Courts tend to become metaphysical in the presence of the questions surrounding this element; it is the least coherent."

## V. Damages

Comment: "The plaintiff must suffer actual harm -- that is, harm which is legally recognized as worthy of compensation. Because of the historical relationship between negligence and action in case, plaintiffs cannot recover nominal damages in a negligence action."

## VI. N.b., the trial tribunal

**A. Law declaring**: what law is applicable?

**1.** The judge does this, primarily by selecting the proper jury instructions (and so the Pf. and Df. play a role here, as well, by suggesting jury instructions).

**2.** There is also a fact finding element to law declaring, which is usu. done by the Pf. -- he finds and argues what law he thinks is applicable.

**B. Fact finding**: what happened?

**1.** The jury is mainly responsible for determining what the facts are.

**2.** But the judge plays a role: he can exclude irrelevant evidence, or determine that the evidence simply is not sufficient for the juries to consider it (e.g., no reasonable jury could find for the Pf.).

**C. Law applying**: how does this law apply to these facts?

**1.** Traditionally, this task is for the jury. But see *Goodman*.

**2.** Law-applying is not simply fact-finding -- it is evalutation (e.g., "reasonableness" is not a fact).