product which allegedly injured plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose. Plaintiff asserts in her briefs that Eli Lilly and Company and five or six other companies produced 90 percent of the DES marketed. If at trial this is established to be the fact, then there is a corresponding likelihood that this comparative handful of producers manufactured the DES which caused plaintiff's injuries, and only a 10 percent likelihood that the offending producer would escape liability.

The Fordham Comment explains the connection between percentage of market share and liability as follows: "[If] X Manufacturer sold one-fifth of all the DES prescribed for pregnancy and identification could be made in all cases, X would be the sole defendant in approximately one-fifth of all cases and liable for all the damages in those cases. Under alternative liability, X would be joined in all cases in which identification could not be made, but liable for only one-fifth of the total damages in these cases. X would pay the same amount either way. Although the correlation is not, in practice, perfect~, it is close enough so that defendants' objections on the ground of fairness lose their value." (Fordham Comment, *supra*, at p. 994.)

If plaintiff joins in the action the manufacturers of a substantial share of the DES which her mother might have taken, the injustice of shifting the burden of proof to defendants to demonstrate that they could not have made the substance which injured plaintiff is significantly diminished. While 75 to 80 percent of the market is suggested as the requirement by the Fordham Comment, we hold only that a substantial percentage is required.

The presence in the action of a substantial share of the appropriate market also provides a ready means to apportion damages among the defendants. Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries. In the

present case, as we have seen, one DES manufacturer was dismissed from the action upon filing a declaration that it had not manufactured DES until after plaintiff was born. Once plaintiff has met her burden of joining the required defendants, they in turn may cross-complain against other DES manufacturers, not joined in the action, which they can allege might have supplied the injury-causing product.

Under this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products. Some minor discrepancy in the correlation between market share and liability is inevitable; therefore, a defendant may be held liable for a somewhat different percentage of the damage than its share of the appropriate market would justify. It is probably impossible, with the passage of time, to determine market share with mathematical exactitude. But just as a jury cannot be expected to determine the precise relationship between fault and liability in applying the doctrine of comparative fault or partial indemnity, the difficulty of apportioning damages among the defendant producers in exact relation to their market share does not seriously militate against the rule we adopt. As we said in *Summers* with regard to the liability of independent tortfeasors, where a correct division of liability cannot be made "the trier of fact may make it the best it can."

We are not unmindful of the practical problems involved in defining the market and determining market share, but these are largely matters of proof which properly cannot be determined at the pleading stage of these proceedings. Defendants urge that it would be both unfair and contrary to public policy to hold them liable for plaintiff's injuries in the absence of proof that one of them supplied the drug responsible for the damage. Most of their arguments, however, are based upon the assumption that one manufacturer would be held responsible for the products of another or for those of all other manufacturers if plaintiff ultimately prevails. But under the rule we adopt, each manufacturer's liability for an injury would be approximately equivalent to the damage caused by the DES it manufactured.

The judgments are reversed.

Questions to Ponder About *Sindell v. Abbott Labs*

A. The court says that under *Sindell*'s market-share liability, "each manufacturer's liability would approximate its responsibility for the injuries caused by its own products." But is this the case? Suppose a manufacturer only manufactured 0.01% of the DES sold in the relevant market. Would it be worth it for a plaintiff to sue such a manufacturer at all? If not, how might such a manufacturer end up "be[ing] held liable for the proportion of the judgment represented by its share of that market"?

B. *Sindell* allows recovery despite an absence of strict actual causation. What, if anything, does the *Sindell* court require in its absence?

C. Considering how the actual causation requirement has been relaxed in *Sindell* (as well as in *Kingston* and *Summers*), perhaps we should consider a deeper question: Why bother having actual causation as a general requirement in negligence cases? If the plaintiff can prove an injury deserving of compensation and prove culpable conduct on the part of the defendant deserving liability, then why not allow a cause of action on those bases alone?

Problem: Nighttime Hit and Run

Suppose a pedestrian is walking at night, legally crossing the road. The pedestrian is hit by a speeding taxicab, which then leaves the scene without stopping or even slowing down. Both an eyewitness and the pedestrian were able to see that the car was a taxicab, but neither were able to see the name of the taxicab company on the side. Investigation and discovery discloses that there are three cab companies in the town. On the night the pedestrian was hit, Ace Taxi Service was operating 41% of the cabs, Bravo Taxi Service was operating 34%, and Crystal Taxi Service was operating 25%. The pedestrian sues Ace, Bravo, and Crystal. Is this the kind of situation in which the plaintiff can use market-share liability as announced under *Sindell*? Why or why not?

8. Proximate Causation

"For the want of a nail the shoe was lost,
For the want of a shoe the horse was lost,
For the want of a horse the rider was lost,
For the want of a rider the battle was lost,
For the want of a battle the kingdom was lost,
And all for the want of a horseshoe-nail."

– Benjamin Franklin, 1758

Introduction

This chapter – like the one on actual causation – will do double duty. Proximate causation is not only an element of negligence, it is a requirement for torts generally, including, for example, the intentional torts of battery, trespass to land, and trespass to chattels, as well as strict liability. For now, we will be talking about proximate causation in the context of negligence. But when you move on to considering other tort causes of action, the same doctrine of proximate causation will apply. (And, once again, you may find that your criminal law course covers proximate causation as well. The concept, at root, is the same for torts and crimes, although the implications diverge.)

To meet the requirement of proximate causation, the plaintiff must show that the causal chain from the defendant's breach of duty to the injury suffered was not too attenuated or indirect. The point of proximate causation is that it places some outer bound on the scope of a defendant's liability for any given tortious act.

Generally, the touchstone is some version of foreseeability. If the plaintiff's injury is foreseeable at the time of the time of the defendant's duty-breaching conduct, then proximate causation is usually satisfied – although the details of the doctrine get considerably more complex.

The Place of Proximate Causation

Actual causation is a matter of strict, logical, cause-and-effect relationships. The element of *proximate causation*, on the other hand, is a judgment call about how long or attenuated the cause-and-effect relationship is. "Proximate" means "close." The label gets at the question of how close the breach of duty and injury are. The breach and injury need not be close in space or close in time – they could take place many miles and many days apart. But the breach and injury must be somehow close along the chain of causation that links one to the other.

The element of proximate causation is an outgrowth of the common-sense meaning of the word "cause." As we saw in the last chapter, there is a bewilderingly large number of events that are actual causes of an injury.

Suppose a pedestrian is injured when struck by a car. The car was being driven by a minister who was headed up a lonely stretch of mountain road to officiate at a small wedding ceremony. The bride and groom met a couple years ago when the groom was taken to the hospital after being injured by a negligently maintained lighting fixture, which dropped on him from the ceiling of a department store. The bride-to-be was the groom-to-be's treating physician, and after they met, they fell in love.

Now, can we say the department store's negligence caused the car accident? A good response might be: "Yes, but only if you are being silly about it." In terms of strict cause-and-effect, there is no question that the department store's negligence caused the accident. So the element of actual causation is met. But it still seems ridiculous to say that the department store "caused" the accident. That's where proximate causation comes in. In the language of tort, we would say that the department store's negligence was not a proximate cause of the automobile accident.

One way, then, of defining proximate causation is that it is a certain lack of silliness in saying that one thing is the "cause" of another. Proximate causation is one aspect of what we mean in everyday language when we talk about one thing being the cause of another

thing. Actual causation is the other. The point of separating them out for legal analysis is so that we can speak of the concepts more carefully and thoroughly, which should ultimately allow us to get at a more fair result.

The Label for Proximate Causation

Just as actual causation goes by many names (see "Some Notes About the Terminology of Causation" in the previous chapter), proximate causation is also cursed by having multiple labels. It is worth spending a little bit of time on the terminology question to avoid confusion later on.

Proximate cause is sometimes called "legal cause" and sometimes "scope of liability." The different labels have developed largely because many commentators believe "proximate causation" is a confusing misnomer.

Some critics of the label say that "proximate causation" is misleading because geographical proximity of the incident and injury is not required under the doctrine. Neither is proximity in time. Point taken. But "proximate" is apropos if you think not in terms of a physical closeness but instead in terms of a kind of metaphysical closeness – that is, closeness along the chain of causation that links the incident to the injury.

Others criticize the label "proximate causation" because, they say, the doctrine has nothing to do with causation. That, however, depends on how you define "causation." But that's only true if you define "causation" as the strict logical relationship between cause and effect – in other words, if you define proximate causation as actual causation. When we say "cause" in everyday speech, there is ordinarily both a proximate and an actual sense in which we are talking: We mean that there is a relatively direct cause-and-effect relationship. If the word "cause" in everyday speech did not include a kernel of the proximate causation concept, then it would not be absurd to say the Norman invasion of England "caused" you to be late to class.

Ultimately, whether it's a good label or not, you should think of "proximate causation" as a term of art. And like many other legal terms of art, you must learn the concept behind it without trying to derive its meaning from its constituent words.

Let's look at the other labels that are used for the proximate causation concept.

"Legal causation" is one. The "legal causation" label was championed by the authors of the Second Restatement of Torts. The term gets at the idea that the doctrine is an artificial limitation on the natural causal chain – a limitation that is construed to exist *by law*. The downside of "legal causation" as a label is that it sounds like it is the legal side of "factual causation." And that is not the case at all. The term "legal causation" also makes it sound like the doctrine is in the hands of the judge, as a "legal question," rather than in the hands of the jury, as a "factual issue." In fact, generally the opposite is true. Proximate causation is frequently taken to be mostly a factual issue for resolution by the jury.

"Scope of liability" is another label. This label has been championed by the authors of the Third Restatement of Torts. As a term of art, "scope of liability" avoids the problems people have with "proximate causation" and "legal causation." A problem, however, is that "scope of liability" does not sound like a term of art. Indeed, "scope of liability" is commonly used in a non-term-of-art sense. For instance, a lawyer might accurately say, as a way of talking about the statute of limitations, "Injuries that were suffered 10 years ago are outside the company's scope of liability." Such a statement has nothing to do with the proximate-causation concept. One might also talk about the "scope of liability" for patent infringement – and that would have nothing to do with the proximate-causation concept or even tort law. At the end of the day, however, the biggest problem with "scope of liability" is that it simply has not caught on, the efforts of the Restatement authors notwithstanding. When you see "scope of liability," be aware that the term may or may not be a synonym for proximate causation.

Having considered these different labels, the bottom line for you as a budding lawyer is that you need to be cognizant that when a court or commentator is talking about the concept of proximate causation, those words might not appear in the text.

Perhaps even more frustrating, you must be aware of the opposite problem: Courts often use the words "proximate causation" to refer to actual causation. This happens because court will sometimes say "proximate causation" to mean causation in general – with the actual and proximate varieties lumped together. And in many of these instances, the court will go on to speak exclusively of problems of actual causation. This leads to some confusing statements, such as, "To prove proximate cause a plaintiff must show that the result would not have occurred 'but for' defendant's action." *Mazda Motor Corp. v. Lindahl,* 706 A.2d 526, 532 (Del. 1998).

These complications can be extremely frustrating to new law students. But keep reading and thinking actively. You will soon become adroit enough with the concepts that you can see through to what the court is talking about no matter what labels are being thrown around.

The Relationship Between Proximate Causation and Duty of Care

Viewing all of the elements of a prima facie case for negligence together, you will find considerable practical and conceptual overlap between the duty-of-care element and the proximate causation element. Both proximate causation and duty of care function to circumscribe in a somewhat arbitrary way the range of situations where a plaintiff can recover from a defendant. In accomplishing this, both elements largely revolve around the idea of foreseeability. So why have both elements in the cause of action of negligence? What distinguishes the two?

These are excellent questions. Conceivably the elements of duty of care and proximate causation could be combined, or one absorbed into the other. But for whatever historical reasons there might be, negligence law developed the way it did, and we have the two elements.

Regardless of whether it is ideal to have duty of care and proximate cause separated, it is possible to articulate some helpful distinctions between the elements as they exist in modern negligence law.

First, the elements of duty of care and proximate causation can be distinguished in that they look at the injury-producing incident from different perspectives. The duty of care element gets at the question, "When must you be careful?" Proximate causation asks the question, "Assuming you weren't careful, just how much are you going to be on the hook for?"

This difference in perspective has driven the development of one element or the other when novel questions have arisen. For instance, the question in *Tarasoff v. University of California,* of whether a psychotherapist should be held liable for failing to warn third parties of a patient's dangerous propensities, was a question that was answered by evolving duty-of-care doctrine.

There is also a distinction between the duty-of-care element and the proximate-causation element in how and to what extent they are the province of the judge or the jury. It is sometimes said that duty of care is a question of law to be decided by a judge, while proximate causation is an issue of fact to be decided by the jury. This is fair as a broad generalization, but it is not categorically true. Both elements comprise judge-made legal doctrine that requires judicial interpretation, and both elements require factual evidence to prove. Nonetheless, as a functional matter in many cases, the duty-of-care element is a way for judges to limit the scope of negligence liability, while proximate causation gives juries a way to do the same.

Ultimately, the most important difference between the duty-of-care element and the proximate-causation element is that the duty-of-care element is distinct to the negligence cause of action, while the concept of proximate causation finds applicability across tort law, showing up as a general requirement for recovering compensatory damages. Proximate causation is also a prima facie element of other causes of action (e.g., strict liability). This difference is probably the most convincing reason for keeping the two elements doctrinally separate. The requirement of proximate causation is needed for the

other tort causes of action to prevent silly results. Suppose a vandal throws paint on a fence – actionable as trespass to land. After washing off the paint, the fence-owner plaintiff realizes she likes the color, so she decides to use it to repaint her living room. While on her way to a fourth paint store in a vain attempt to match the vandal's hue in an interior latex enamel, her car is struck by the getaway vehicle of a bank robber who is being chased by police. Proximate causation prevents the fence owner from successfully suing the vandal for personal injuries sustained in the crash. Without proximate causation, we might have a very silly result. Keep in mind that duty of care cannot be a barrier to this suit, because there is no duty-of-care element in a cause of action for trespass to land.

Meanwhile, we need the duty-of-care element to stop certain would-be negligence suits. Suppose a burglar breaks into a store at night and is injured when hit on the head by a negligently secured lighting fixture. Proximate causation will not prevent this suit, since the causal relation is entirely unattenuated. But the duty-of-care element is a showstopper for the burglar plaintiff, because burglars are not owed a duty of care.

In truth, the duty-of-care element is more important than just stopping unwanted negligence suits. The duty-of-care concept is the very essence of the negligence cause of action. The duty concept, and the inquiry of whether the defendant's duty was breached, is what distinguishes negligence from strict liability and the intentional torts. Strict liability has no element of breach of duty whatsoever, being limited in extent by the tightly circumscribed situations in which it is applicable. And the intentional torts are limited by the intent concept rather than duty.

Thus, while duty of care and proximate causation have a great deal of overlap, neither can be done away with without completely restructuring our entire system of tort doctrine from the ground up.

Case: Palsgraf v. Long Island Railroad

As discussed, there are some situations that present a duty-of-care issue, yet do not involve any question of proximate causation. Other situations do the opposite. Many cases, however, implicate both. The

following case implicates both concepts, and in so doing it provides a vehicle for discussing each and their relation to one another. It is such a good vehicle for considering these issues that it has become the most famous case in American tort law. It may even be the most famous case in the entire American common-law canon. In it, Judge Benjamin N. Cardozo and Judge William Shankland Andrews provide two very different views of the place of proximate causation.

Palsgraf v. Long Island Railroad

Court of Appeals of New York
May 29, 1928

248 N.Y. 339. Helen Palsgraf, Respondent, v. The Long Island Railroad Company, Appellant. Cardozo, Ch.J. Pound, Lehman and Kellogg, JJ., concur with Cardozo, Ch.J.; Andrews, J., dissents in opinion in which Crane and O'Brien, JJ., concur.

Chief Judge BENJAMIN N. CARDOZO:

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues.

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not

negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. "Proof of negligence in the air, so to speak, will not do" (Pollock, Torts [11th ed.], p. 455; *Martin v. Herzog*, 228 N.Y. 164, 170). "Negligence is the absence of care, according to the circumstances" (Willes, J., in *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679, 688). The plaintiff as she stood upon the platform of the station might claim to be protected against intentional invasion of her bodily security. Such invasion is not charged. She might claim to be protected against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue. These, from the point of view of the law, were the bounds of her immunity, with perhaps some rare exceptions, survivals for the most part of ancient forms of liability, where conduct is held to be at the peril of the actor (*Sullivan v. Dunham*, 161 N.Y. 290). If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to some one else. "In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury" (McSherry, C.J., in *W. Va. Central R. Co. v. State*, 96 Md. 652, 666). "The ideas of negligence and duty are strictly correlative" (Bowen, L.J., in *Thomas v. Quartermaine*, 18 Q. B. D. 685, 694). The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.

A different conclusion will involve us, and swiftly too, in a maze of contradictions. A guard stumbles over a package which has been left upon a platform. It seems to be a bundle of newspapers. It turns out to be a can of dynamite. To the eye of ordinary vigilance, the bundle is abandoned waste, which may be kicked or trod on with impunity. Is a passenger at the other end

of the platform protected by the law against the unsuspected hazard concealed beneath the waste? If not, is the result to be any different, so far as the distant passenger is concerned, when the guard stumbles over a valise which a truckman or a porter has left upon the walk? The passenger far away, if the victim of a wrong at all, has a cause of action, not derivative, but original and primary. His claim to be protected against invasion of his bodily security is neither greater nor less because the act resulting in the invasion is a wrong to another far removed. In this case, the rights that are said to have been violated, the interests said to have been invaded, are not even of the same order. The man was not injured in his person nor even put in danger. The purpose of the act, as well as its effect, was to make his person safe. If there was a wrong to him at all, which may very well be doubted, it was a wrong to a property interest only, the safety of his package. Out of this wrong to property, which threatened injury to nothing else, there has passed, we are told, to the plaintiff by derivation or succession a right of action for the invasion of an interest of another order, the right to bodily security. The diversity of interests emphasizes the futility of the effort to build the plaintiff's right upon the basis of a wrong to some one else. The gain is one of emphasis, for a like result would follow if the interests were the same. Even then, the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty. One who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger. Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform.

The argument for the plaintiff is built upon the shifting meanings of such words as "wrong" and "wrongful," and shares their instability. What the plaintiff must show is "a wrong" to herself, *i.e.*, a violation of her own right, and not merely a wrong to some one else, nor conduct "wrongful" because unsocial, but

not "a wrong" to any one. We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act and, therefore, of a wrongful one irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension (Seavey, Negligence, Subjective or Objective, 41 H. L. Rv. 6; *Boronkay v. Robinson & Carpenter*, 247 N.Y. 365). This does not mean, of course, that one who launches a destructive force is always relieved of liability if the force, though known to be destructive, pursues an unexpected path. "It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye" (*Munsey v. Webb*, 231 U.S. 150, 156). Some acts, such as shooting, are so imminently dangerous to any one who may come within reach of the missile, however unexpectedly, as to impose a duty of prevision not far from that of an insurer. Even today, and much oftener in earlier stages of the law, one acts sometimes at one's peril (Jeremiah Smith, Tort and Absolute Liability, 30 H. L. Rv. 328; Street, Foundations of Legal Liability, vol. 1, pp. 77, 78). Under this head, it may be, fall certain cases of what is known as transferred intent, an act willfully dangerous to A resulting by misadventure in injury to B (*Talmage v. Smith*, 101 Mich. 370, 374) These cases aside, wrong is defined in terms of the natural or probable, at least when unintentional. The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury. Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him. His conduct would not

have involved, even then, an unreasonable probability of invasion of her bodily security. Liability can be no greater where the act is inadvertent.

Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all (Bowen, L.J., in *Thomas v. Quartermaine*, 18 Q.B.D. 685, 694). Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. Affront to personality is still the keynote of the wrong. Confirmation of this view will be found in the history and development of the action on the case. Negligence as a basis of civil liability was unknown to mediaeval law. For damage to the person, the sole remedy was trespass, and trespass did not lie in the absence of aggression, and that direct and personal. Liability for other damage, as where a servant without orders from the master does or omits something to the damage of another, is a plant of later growth. When it emerged out of the legal soil, it was thought of as a variant of trespass, an offshoot of the parent stock. This appears in the form of action, which was known as trespass on the case. The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another. Thus to view his cause of action is to ignore the fundamental difference between tort and crime. He sues for breach of a duty owing to himself.

The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a

finding of a tort. We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary. There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforseeable invasion of an interest of another order, as, *e. g.*, one of bodily security. Perhaps other distinctions may be necessary. We do not go into the question now. The consequences to be followed must first be rooted in a wrong.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and the complaint dismissed, with costs in all courts.

Judge WILLIAM SHANKLAND ANDREWS, dissenting:

Assisting a passenger to board a train, the defendant's servant negligently knocked a package from his arms. It fell between the platform and the cars. Of its contents the servant knew and could know nothing. A violent explosion followed. The concussion broke some scales standing a considerable distance away. In falling they injured the plaintiff, an intending passenger.

Upon these facts may she recover the damages she has suffered in an action brought against the master? The result we shall reach depends upon our theory as to the nature of negligence. Is it a relative concept – the breach of some duty owing to a particular person or to particular persons? Or where there is an act which unreasonably threatens the safety of others, is the doer liable for all its proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger? This is not a mere dispute as to words. We might not believe that to the average mind the dropping of the bundle would seem to involve the probability of harm to the plaintiff standing many feet away whatever might be the case as to the owner or to one so near as to be likely to be struck by its fall. If, however, we adopt the second hypothesis we have to inquire only as to the relation between cause and effect. We deal in terms of proximate cause, not of negligence.

Negligence may be defined roughly as an act or omission which unreasonably does or may affect the rights of others, or which unreasonably fails to protect oneself from the dangers resulting from such acts. Here I confine myself to the first branch of the definition. Nor do I comment on the word "unreasonable." For present purposes it sufficiently describes that average of conduct that society requires of its members.

There must be both the act or the omission, and the right. It is the act itself, not the intent of the actor, that is important. In criminal law both the intent and the result are to be considered. Intent again is material in tort actions, where punitive damages are sought, dependent on actual malice – not on merely reckless conduct. But here neither insanity nor infancy lessens responsibility.

As has been said, except in cases of contributory negligence, there must be rights which are or may be affected. Often though injury has occurred, no rights of him who suffers have been touched. A licensee or trespasser upon my land has no claim to affirmative care on my part that the land be made safe. Where a railroad is required to fence its tracks against cattle, no man's rights are injured should he wander upon the road because such fence is absent. An unborn child may not demand immunity from personal harm.

But we are told that "there is no negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the plaintiff himself and not merely to others." (Salmond Torts [6th ed.], 24.) This, I think too narrow a conception. Where there is the unreasonable act, and some right that may be affected there is negligence whether damage does or does not result. That is immaterial. Should we drive down Broadway at a reckless speed, we are negligent whether we strike an approaching car or miss it by an inch. The act itself is wrongful. It is a wrong not only to those who happen to be within the radius of danger but to all who might have been there – a wrong to the public at large. Such is the language of the street. Such the language of the courts when speaking of contributory negligence. Such again and again their language in

speaking of the duty of some defendant and discussing proximate cause in cases where such a discussion is wholly irrelevant on any other theory. As was said by Mr. Justice Holmes many years ago, "the measure of the defendant's duty in determining whether a wrong has been committed is one thing, the measure of liability when a wrong has been committed is another." (*Spade v. Lynn & Boston R. R. Co.*, 172 Mass. 488.) Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B or C alone.

It may well be that there is no such thing as negligence in the abstract. "Proof of negligence in the air, so to speak, will not do." In an empty world negligence would not exist. It does involve a relationship between man and his fellows. But not merely a relationship between man and those whom he might reasonably expect his act would injure. Rather, a relationship between him and those whom he does in fact injure. If his act has a tendency to harm some one, it harms him a mile away as surely as it does those on the scene. We now permit children to recover for the negligent killing of the father. It was never prevented on the theory that no duty was owing to them. A husband may be compensated for the loss of his wife's services. To say that the wrongdoer was negligent as to the husband as well as to the wife is merely an attempt to fit facts to theory. An insurance company paying a fire loss recovers its payment of the negligent incendiary. We speak of subrogation – of suing in the right of the insured. Behind the cloud of words is the fact they hide, that the act, wrongful as to the insured, has also injured the company. Even if it be true that the fault of father, wife or insured will prevent recovery, it is because we consider the original negligence not the proximate cause of the injury. (Pollock, Torts [12th ed.], 463.)

In the well-known *Polemis Case* (1921, 3 K. B. 560), Scrutton, L. J., said that the dropping of a plank was negligent for it might injure "workman or cargo or ship." Because of either possibility the owner of the vessel was to be made good for his loss. The act being wrongful the doer was liable for its proximate results. Criticized and explained as this statement may have been, I think it states the law as it should be and as it is.

The proposition is this. Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain. We have never, I think, held otherwise. Indeed in the *Di Caprio* case we said that a breach of a general ordinance defining the degree of care to be exercised in one's calling is evidence of negligence as to every one. We did not limit this statement to those who might be expected to be exposed to danger. Unreasonable risk being taken, its consequences are not confined to those who might probably be hurt.

If this be so, we do not have a plaintiff suing by "derivation or succession." Her action is original and primary. Her claim is for a breach of duty to herself – not that she is subrogated to any right of action of the owner of the parcel or of a passenger standing at the scene of the explosion.

The right to recover damages rests on additional considerations. The plaintiff's rights must be injured, and this injury must be caused by the negligence. We build a dam, but are negligent as to its foundations. Breaking, it injures property down stream. We are not liable if all this happened because of some reason other than the insecure foundation. But when injuries do result from our unlawful act we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen and unforseeable. But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former.

These two words have never been given an inclusive definition. What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations, as does the existence of negligence itself. Any philosophical doctrine of

causation does not help us. A boy throws a stone into a pond. The ripples spread. The water level rises. The history of that pond is altered to all eternity. It will be altered by other causes also. Yet it will be forever the resultant of all causes combined. Each one will have an influence. How great only omniscience can say. You may speak of a chain, or if you please, a net. An analogy is of little aid. Each cause brings about future events. Without each the future would not be the same. Each is proximate in the sense it is essential. But that is not what we mean by the word. Nor on the other hand do we mean sole cause. There is no such thing.

Should analogy be thought helpful, however, I prefer that of a stream. The spring, starting on its journey, is joined by tributary after tributary. The river, reaching the ocean, comes from a hundred sources. No man may say whence any drop of water is derived. Yet for a time distinction may be possible. Into the clear creek, brown swamp water flows from the left. Later, from the right comes water stained by its clay bed. The three may remain for a space, sharply divided. But at last, inevitably no trace of separation remains. They are so commingled that all distinction is lost.

As we have said, we cannot trace the effect of an act to the end, if end there is. Again, however, we may trace it part of the way. A murder at Serajevo may be the necessary antecedent to an assassination in London twenty years hence. An overturned lantern may burn all Chicago. We may follow the fire from the shed to the last building. We rightly say the fire started by the lantern caused its destruction.

A cause, but not the proximate cause. What we do mean by the word "proximate" is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. Take our rule as to fires. Sparks from my burning haystack set on fire my house and my neighbor's. I may recover from a negligent railroad. He may not. Yet the wrongful act as directly harmed the one as the other. We may regret that the line was drawn just where it was, but drawn somewhere it

had to be. We said the act of the railroad was not the proximate cause of our neighbor's fire. Cause it surely was. The words we used were simply indicative of our notions of public policy. Other courts think differently. But somewhere they reach the point where they cannot say the stream comes from any one source.

Take the illustration given in an unpublished manuscript by a distinguished and helpful writer on the law of torts. A chauffeur negligently collides with another car which is filled with dynamite, although he could not know it. An explosion follows. A, walking on the sidewalk nearby, is killed. B, sitting in a window of a building opposite, is cut by flying glass. C, likewise sitting in a window a block away, is similarly injured. And a further illustration. A nursemaid, ten blocks away, startled by the noise, involuntarily drops a baby from her arms to the walk. We are told that C may not recover while A may. As to B it is a question for court or jury. We will all agree that the baby might not. Because, we are again told, the chauffeur had no reason to believe his conduct involved any risk of injuring either C or the baby. As to them he was not negligent.

But the chauffeur, being negligent in risking the collision, his belief that the scope of the harm he might do would be limited is immaterial. His act unreasonably jeopardized the safety of any one who might be affected by it. C's injury and that of the baby were directly traceable to the collision. Without that, the injury would not have happened. C had the right to sit in his office, secure from such dangers. The baby was entitled to use the sidewalk with reasonable safety.

The true theory is, it seems to me, that the injury to C, if in truth he is to be denied recovery, and the injury to the baby is that their several injuries were not the proximate result of the negligence. And here not what the chauffeur had reason to believe would be the result of his conduct, but what the prudent would foresee, may have a bearing. May have some bearing, for the problem of proximate cause is not to be solved by any one consideration.

It is all a question of expediency. There are no fixed rules to govern our judgment. There are simply matters of which we may take account. We have in a somewhat different connection spoken of "the stream of events." We have asked whether that stream was deflected – whether it was forced into new and unexpected channels. This is rather rhetoric than law. There is in truth little to guide us other than common sense.

There are some hints that may help us. The proximate cause, involved as it may be with many other causes, must be, at the least, something without which the event would not happen. The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attentuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or by the exercise of prudent foresight could the result be foreseen? Is the result too remote from the cause, and here we consider remoteness in time and space. (*Bird v. St. Paul F. & M. Ins. Co.*, 224 N.Y. 47, where we passed upon the construction of a contract – but something was also said on this subject.) Clearly we must so consider, for the greater the distance either in time or space, the more surely do other causes intervene to affect the result. When a lantern is overturned the firing of a shed is a fairly direct consequence. Many things contribute to the spread of the conflagration – the force of the wind, the direction and width of streets, the character of intervening structures, other factors. We draw an uncertain and wavering line, but draw it we must as best we can.

Once again, it is all a question of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.

Here another question must be answered. In the case supposed it is said, and said correctly, that the chauffeur is liable for the direct effect of the explosion although he had no reason to suppose it would follow a collision. "The fact that the injury

occurred in a different manner than that which might have been expected does not prevent the chauffeur's negligence from being in law the cause of the injury." But the natural results of a negligent act – the results which a prudent man would or should foresee – do have a bearing upon the decision as to proximate cause. We have said so repeatedly. What should be foreseen? No human foresight would suggest that a collision itself might injure one a block away. On the contrary, given an explosion, such a possibility might be reasonably expected. I think the direct connection, the foresight of which the courts speak, assumes prevision of the explosion, for the immediate results of which, at least, the chauffeur is responsible.

It may be said this is unjust. Why? In fairness he should make good every injury flowing from his negligence. Not because of tenderness toward him we say he need not answer for all that follows his wrong. We look back to the catastrophe, the fire kindled by the spark, or the explosion. We trace the consequences – not indefinitely, but to a certain point. And to aid us in fixing that point we ask what might ordinarily be expected to follow the fire or the explosion.

This last suggestion is the factor which must determine the case before us. The act upon which defendant's liability rests is knocking an apparently harmless package onto the platform. The act was negligent. For its proximate consequences the defendant is liable. If its contents were broken, to the owner; if it fell upon and crushed a passenger's foot, then to him. If it exploded and injured one in the immediate vicinity, to him also as to A in the illustration. Mrs. Palsgraf was standing some distance away. How far cannot be told from the record – apparently twenty-five or thirty feet. Perhaps less. Except for the explosion, she would not have been injured. We are told by the appellant in his brief "it cannot be denied that the explosion was the direct cause of the plaintiff's injuries." So it was a substantial factor in producing the result – there was here a natural and continuous sequence – direct connection. The only intervening cause was that instead of blowing her to the ground the concussion smashed the weighing machine which in turn fell upon her. There was no remoteness in time, little in space. And

surely, given such an explosion as here it needed no great foresight to predict that the natural result would be to injure one on the platform at no greater distance from its scene than was the plaintiff. Just how no one might be able to predict. Whether by flying fragments, by broken glass, by wreckage of machines or structures no one could say. But injury in some form was most probable.

Under these circumstances I cannot say as a matter of law that the plaintiff's injuries were not the proximate result of the negligence. That is all we have before us. The court refused to so charge. No request was made to submit the matter to the jury as a question of fact, even would that have been proper upon the record before us.

The judgment appealed from should be affirmed, with costs.

Questions to Ponder About *Palsgraf*

A. Who do you think is right? Judge Cardozo or Judge Andrews?

B. Putting legal doctrine aside for a moment, do you think that it would be fair for Palsgraf to recover from the L.I.R.R.? What goes into your thinking?

C. If Judge Andrews had carried the day, what do you think would have happened on remand? That is, assuming the breach of duty was established and the case had gone to a jury on the issue of proximate causation, do you think the jury would have found that the guard's negligent action was a proximate cause of Palsgraf's injuries? If you were on the jury, would you find proximate causation?

A Different Version of the *Palsgraf* Case

The event that injured Helen Palsgraf was covered by many papers, including on the front pages of *The New York Times*, *The New York World*, and *The New York Herald Tribune*. The story that comes out of these reports paints something of a different picture than what is found in Judge Cardozo's opinion.

On Sunday, August 24, 1924, three men were carrying bundles on the crowded platform at East New York Station. One of them dropped a large, unwieldy package. The package may have been closely similar

to an unexploded package later found at the scene; that bundle contained six firework/explosive devices, each of which was four inches in diameter and a foot and a half long. The package that caused the explosion fell between the car and the platform and detonated with tremendous force, knocking over 30 or 40 people and setting off a stampede. "There was a terrific roar, followed by several milder explosions, and a short lived pyrotechnic display," according to the *Long Island Daily Press.*

The *New York Times* report said that "pieces of the big salute bomb shot up to the platform." The blast, which could be heard several blocks away, according to the paper, damaged the roadbed, ripped away part of the passenger platform, and overthrew a penny scale more than 10 feet away.

The damage to the scale, which included its glass smashed and its mechanism wrecked, was reported by three newspapers. According to the *New York Times* and the *Long Island Daily Press*, the distance from the detonation site to the scale was more than ten feet.

Thirteen people were reported injured, with three sent to the hospital. Injuries included cuts and burns. Helen Palsgraf was reported in the list of injured as suffering from shock.

All of these details and more are compiled in a wonderful law review article: William H. Manz, *Palsgraf: Cardozo's Urban Legend?,* 107 DICK. L. REV. 785 (2003).

More Questions to Ponder About *Palsgraf*

A. Does the version of facts reported in the newspapers change your view of whether there was a breach of the duty of care?

B. Do the newspaper accounts change your mind as to whether you would be inclined to find proximate causation? Do you think this view of the facts would make a difference to the jury? In what way?

C. To the extent that Judge Cardozo's recitation of the facts differs from that in the newspapers, why do you think that is? Here are two possibilities out of many: Perhaps Judge Cardozo cut the story down to its essentials, omitting irrelevant detail. Alternatively, perhaps the

story in the record that came before the Court of Appeals lacked the detail found in the papers. What other explanations could there be?

D. One seemingly significant fact is how far away Palsgraf was from the detonation point. Judge Cardozo describes the distance by saying, "at the other end of the platform, many feet away." Judge Andrews describes it as being "some distance away … apparently twenty-five or thirty feet." The papers said more than 10 feet. Are these descriptions consistent? If all of them are plausibly interchangeable, to what extent do they create different mental pictures?

E. If you could develop some additional detail about the facts that would help illuminate the breach and/or proximate cause issues in this case, what would you want to find out?

Various Tests for Proximate Causation

Trying to pin down blackletter rules for proximate causation is a frustrating task, because there is tremendous variability in how courts approach proximate causation. Various tests have been articulated, but it is not easy to say when a certain test applies. The different formulations are applied in a haphazard fashion in different cases – frequently even within the same jurisdiction. Thus, it is not always possible to say that a given state follows a certain test in a certain kind of case. Nonetheless, it is worth reviewing the different tests, because doing so will give you a feel for the different ways courts articulate their analysis of proximate causation questions.

The Direct Test and Intervening Causes

An older test for proximate causation, now largely disused, is the **direct test**. Despite its obsolescence, the direct test is helpful to know, because the concepts and terms it introduces help define more modern tests.

Today, the touchstone for proximate causation is foreseeability. The direct test, however, is not concerned with foreseeability at all. With the direct test, you ask whether the accused act led directly to the injury without there being an "intervening cause" between the two. An **intervening cause** is some additional force or conduct that is necessary in order to complete the chain of causation between the

breaching conduct and the injury. The intervening cause could be the actions of a third party, or it could be some natural event. A good way to conceptualize the direct test is to start at the harm, and then work backward to see if there are any forces that served as a more immediate cause of the harm than the defendant's conduct.

> ***Example: Cash from Above I –*** Suppose an elderly man is proceeding down a sidewalk in the city. On a balcony above, an obnoxious rich woman decides to start throwing $20 bills into the air. The flutter of gently descending cash causes a mad rush on the street, and the man is trampled. He sues the profligate boor on the balcony who touched off the stampede. Were the woman's actions a proximate cause of the man's injuries? Under the direct test, the answer is no. The man will be unable to show proximate causation under the direct test because the money-grabbers represent an intervening cause.
>
> ***Example: Cash from Above II –*** Same facts as in the previous paragraph, except that this time, no one else was on the street, and instead of being trampled, the man was injured when he slipped on slick piles of banknotes that had accumulated on the sidewalk. Is proximate causation satisfied under the direct test? Yes. There is no intervening cause between the negligent action and the injury, so the direct test for proximate causation is satisfied.

The leading example of the direct test is *In re Polemis & Furness Withy & Company Ltd.*, 3 K.B. 560 (Court of Appeal of England 1921). The freighter *Polemis* was being unloaded in the port of Casablanca. A worker dropped a wooden plank into the ship's hold. The friction of the plank striking inside the hold caused a spark that ignited a cloud of accumulated fuel vapor. The ensuing fire completely destroyed the *Polemis*. In the case, it was stipulated as unforeseeable that a falling plank of wood could cause a fire. But there was no question that dropping the plank was a negligent act – i.e., a breach of the duty of care. After all, it was easily foreseeable that the falling plank could have struck and damaged something below by mechanical force. The court analyzed whether the dropping of the plank was a proximate

cause of the unforeseeable fire. The *Polemis* court used the direct test. Under the direct test, proximate causation was satisfied. Lord Justice Bankes wrote: "The fire appears to me to have been directly caused by the falling of the plank. Under these circumstances I consider that it is immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated."

Suppose that, instead of the facts unfolding as they did in the case, the plank fell so as to awkwardly wedge itself across a walkway in the hold. And suppose that another worker came along, tripped over the plank, and dropped a lantern – igniting a fire. Under those facts, the direct test would not be satisfied.

There is a philosophical problem with the direct test that is hard to ignore: Every cause and effect relationship in real-world experience can be said, at some level, to involve intervening causes. Maybe on the *Polemis* it was the wafting of the fuel vapor through the air and the travel of air molecules around the plank that allowed it to hit at the perfect angle to make the spark. Clearly, for the direct test to work, many such would-be intervening causes must be ignored. Selecting what counts as an intervening cause thus requires some artificial characterization. One way to state the direct test so that it does not rely on the troublesome concept of intervening causes, is to use the concept of a "set stage." The formulation works like this: If it can be said that the defendant was acting on a "set stage" – where everything was lined up and waiting for the defendant's conduct to touch off the sequence of events that led to the plaintiff's injury – then proximate causation is established under the direct test.

But keep in mind, the direct test is mostly obsolete at this point.

Foreseeability and Harm-Within-the-Risk

Today, foreseeability is the touchstone for proximate causation analysis. To apply the **foreseeability test**, you take an imaginary trip back in time to the point at which the defendant is about to breach the duty of care. You then look forward and ask, "What might go wrong here?"

In the foreseeability view of proximate causation, intervening causes are not a problem. Consider the *Cash From Above I* example. Is it foreseeable that throwing cash off a balcony could cause a stampede? Yes, it is. Therefore, the foreseeability test for proximate causation is satisfied.

Perhaps the leading case on using foreseeability to determine proximate causation is *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co,* [1961] A.C. 388 (Privy Counsel 1961) – a case which is better known as "*Wagon Mound No. 1*." This case famously rejected the direct-causation test of *Polemis*. In *Wagon Mound No. 1,* the steam ship *Wagon Mound* was docked in the Port of Sydney, Australia. Owned by Caltex – a venture of what is today Chevron – the *Wagon Mound* was discharging its cargo of gasoline and taking on oil to use as fuel for its engines. During this operation, the *Wagon Mound* spilled a large amount of fuel oil into the water. Caltex made no attempt to disperse the oil, and the *Wagon Mound* soon unberthed and went on its way. Within a few hours, the *Wagon Mound*'s oil had spread over a substantial portion of the bay and had become thickly concentrated near the property of Morts Dock, a ship-repairing business that was doing welding that day on the *Corrimal*. Some bits of molten metal from the welding operation fell into the water and ignited some cotton waste that was floating on top of the oil. (Sydney is one of the main ports for Australia's cotton exports.) The burning cotton waste in turn ignited the oil. The ensuing fire burned a large portion of Morts Dock and the *Corrimal*.

The court made the finding that "the defendant did not know and could not reasonably be expected to have known that [fuel oil] was capable of being set afire when spread on water." While this seems unbelievable, the court took pains to note that this finding was based on "a wealth of evidence" including testimony of one Professor Hunter, "a distinguished scientist."

The court discussed *Polemis* extensively and rejected its direct-test view of proximate causation, positing instead that foreseeability is key. Viscount Simonds wrote for the court, "[T]he essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen˜. It is a departure from this

sovereign principle if liability is made to depend solely on the damage being the 'direct' or 'natural' consequence of the precedent act. Who knows or can be assumed to know all the processes of nature? But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was 'direct' or 'natural', equally it would be wrong that he should escape liability, however 'indirect' the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done˜. Thus foreseeability becomes the effective test."

Since it was held unforeseeable that spilling a large quantity of fuel oil could lead to a destructive fire, Caltex won for want of proximate causation.

Another, related test that can be applied is the **harm-within-the-risk test**. Here, proximate cause is a question of germaneness: Is the kind of harm suffered by the plaintiff the kind that made the defendant's action negligent in the first place? The harm-within-the-risk test can be thought of as a way of focusing and re-articulating the foreseeability test.

The *Polemis* case illustrates how the foreseeability test and the harm-within-the-risk test can reach a different result than the direct test. The fire aboard the *Polemis* was not foreseeable. Likewise, an inferno is not the kind of harm that makes it risky to drop a wooden plank into a cargo hold. Thus, in the *Polemis* case, the plaintiff could show proximate causation under the direct test, but would not have been able to under the foreseeability test or the harm-within-the-risk test. Under the *Polemis* facts, the direct test is more generous for plaintiffs than the foreseeability test or the harm-within-the-risk test.

The *Cash From Above I* example shows that, under different facts, the opposite may be true – the foreseeability test and harm-within-the-risk test can be more generous for plaintiffs than the direct test. It is foreseeable that throwing money into the air will cause a stampede, and the risk of stampede is what makes such boorish behavior risky. Thus the foreseeability test is satisfied. The direct test is not satisfied, however, since the people rushing in represent intervening causes.

As you can see, the foreseeability test and the harm-within-the-risk test are both quite different from the direct test. But, you may be wondering, is there any practical difference between the foreseeability test and harm-within-the-risk test? That is, will the two tests ever produce different results? The answer is yes, although rarely.

Most of the time, the foreseeability test and the harm-within-the-risk test will yield the same results. A worker spills a bucket of soapy water onto a public sidewalk. A pedestrian comes along and slips, suffering a broken wrist. Is it foreseeable that a person would slip on a puddle of soapy water? Yes. Is slipping the kind of harm that makes it dangerous to spill soapy water? Yes.

To illustrate the potential difference between the foreseeability test considered alone and its harm-within-the-risk elaboration, let's take the facts from *Berry v. Sugar Notch Borough,* 191 Pa. 345 (Pa. 1899). On a violently windy day, a trolley was speeding down the street. Suddenly a large chestnut tree fell on the trolley. The plaintiff, a trolley passenger, was injured. The tree – probably already weak with disease – fell when it did on account of the wind. The trolley, meanwhile, was under the tree at the moment if fell because of the speed the trolley was travelling. (The case does not say exactly how fast the trolley was travelling, except that it was considerably in excess of the modest speed limit of eight miles per hour. And while this rate of speed does not shock the conscience from a 21st Century perspective, we can stipulate that it was negligently fast for a trolley in the late 1800s.) The question is whether the trolley's speeding was a proximate cause of the injury suffered by the plaintiff. Now, it is clear that the speeding did not cause the tree to fall. The tree was going to fall when it did, regardless of what the trolley was doing. On the other hand, there is no question that if the trolley had been going at a slower, safer speed, it would not have been hit by the tree. After all, if the trolley had been going slower, it would not have gotten to the place where the tree fell at the time it fell.

In trying to decide the issue of proximate causation here, we see that we get different results depending on whether we use the foreseeability test or the harm-within-the-risk test.

For the foreseeability test, we ask the foreseeability question: Was the harm foreseeable? In this case, we must ask whether it was foreseeable that a tree would fall on the trolley if it drove too fast. This is a hard question to answer. In some sense it is foreseeable. Certainly it is *imaginable*. Trees do fall in windstorms. So the foreseeability test appears to be passed, although in way that feels unsatisfying.

Now let's ask the harm-within question: Is the possibility of getting hit by a falling tree the sort of thing that makes it risky to drive a trolley too fast? Certainly not.

So in the *Sugar Notch* case, the foreseeability test provides a halting yes or is equivocal. The harm-within-the-risk test, however, provides a clear answer of no.

Objects of Foreseeability

The foreseeability concept does a lot to illuminate what is meant with the doctrine of proximate causation. But foreseeability needs some additional elaboration. In particular, we need to scrutinize exactly what is being focused on in the foreseeability inquiry. Is proximate causation wanting if the plaintiff is unforeseeable? Or what if it is the type, manner, or extent of harm that is unforeseeable?

Unforeseeable Plaintiffs

The general rule is that if the plaintiff is unforeseeable, then proximate causation will not be satisfied. That is, if it was unforeseeable that the plaintiff could have been injured by the accused conduct, then the defendant wins because proximate causation fails.

Unforeseeable Type of Harm

Now, let us assume we have a foreseeable plaintiff – meaning a plaintiff who could be foreseeably harmed by the defendant's conduct, but let's suppose that the *type* of harm suffered is a surprise. Does the unforeseeability of the type of harm cause a failure of proximate causation? Probably the best that can be said about this is that there is really no general rule; instead, courts look at this on a case-by-case basis.

Example: Bonked by a Shotgun – Suppose the defendant negligently leaves an old rifle, loaded and with the safety off, lying in the backyard of her house with a group of three-year-old children. When one kid plays with it, banging it against a rock, the wooden stock comes apart and drives splinters deep into another child's hand, causing nerve damage. Some harm in such a scenario is foreseeable – in particular, a gunshot wound. But nerve damage caused by splinters? That is not foreseeable. So, is there proximate causation? Courts would differ.

Unforeseeable Manner of Harm

Let's now assume that we have a foreseeable plaintiff, injured by a foreseeable type of harm, but the manner of the harm is somehow surprising and unforeseeable. The general rule in such cases is that an unforeseeable manner of harm does not preclude recovery on the basis of proximate causation. There is, however, some give in the doctrine. If the manner of harm is truly extraordinary then the proximate causation limitation might be engaged.

Example: The Lucky/Unlucky Motorist – The defendant's negligent driving causes the plaintiff's car to skid off the road. Luckily, the plaintiff is fine. But the car is stuck in the mud. Although the car is undamaged, the plaintiff cannot drive it out and will need to seek help. Walking to a nearby town to get help, the plaintiff is struck by a car driven by a third person. In a suit by the plaintiff against the driver who rode the plaintiff's car off the road, is proximate causation satisfied? The plaintiff was clearly foreseeable, since driving a car negligently exposes nearby motorists and pedestrians to danger. The type of harm – getting struck by a car – is perfectly foreseeable. The manner of harm, however, is unforeseeable. Who would have guessed that the plaintiff would be hurt not by the defendant's car, but by someone else's car? Yet a court could find proximate causation to be established. Since the plaintiff and the type of harm were foreseeable, and since the manner of harm was not truly extraordinary, proximate cause may be satisfied.

Unforeseeable Extent of Harm

What if it is the extent of the harm that is unforeseeable? Suppose someone in the cafeteria, horsing around, throws a small bottled water to a friend. A bystander is struck and killed. Did the thrower proximately cause the bystander's death? The general rule is that an unforeseeable extent of harm will not cause a failure of proximate causation. Alternatively stated, under the eyes of the law, the extent of the harm, no matter how great, is considered to be foreseeable – even if it really is not. This doctrine is called the **eggshell-plaintiff rule**, named for a hypothetical plaintiff who has a skull as thin as an eggshell, for whom a slight rap on the head could cause massive brain damage. This doctrine is quite strictly applied in personal injury cases. With property damage, however, there is some loosening of the rule, so that foreseeability and harm-within-the-risk tests might be applied to provide a proximate-cause limitation on liability – even in cases where the causal connection is tight.

Superseding Causes

Since the direct test of proximate causation is no longer the prevailing law, intervening causes are generally not a problem. However, a remnant of the direct test remains in the doctrine regarding "superseding causes." By definition, a **superseding cause** is an intervening cause that breaks the proximate-cause relationship. The term is conclusory – a court does not determine whether or not something is a superseding cause in order to find out whether it breaks the proximate-cause connection. Rather, a court decides whether or not an intervening cause breaks the proximate-cause relationship, and, if it does, then it is dubbed a superseding cause.

The doctrine of superseding cause comes up when, after the defendant has undertaken some negligent conduct, something else comes along that gives the court or jury the sense that the something else is "the" cause of the plaintiff's injury. Technically, as we discussed with regard to actual causation, there is no such thing as "the" cause. Every event has a virtually infinite number of causes, so no single one can be "the" cause. Nonetheless, the doctrine of

superseding cause is invoked when circumstances exist such that it just seems wrong to leave the defendant holding the bag.

A classic example comes from the facts of *Loftus v. Dehail,* 133 Cal. 214 (Cal. 1901). In that case, Isaac and Alice Dehail owned a lot in a busy section of Los Angeles. A house had been standing on the lot, but the Dehails had it demolished, leaving an open cellar. The Dehails left the lot in this condition, making no effort to fence off the open pit. Seven-year-old Bessie May Loftus was injured when she fell in. The court held that the Dehails' failure to fence in the pit was not "the" proximate cause. Why? It turns out Bessie was pushed. The superseding cause in this instance was Bessie's four-year-old brother who, "in a fit of temper," tipped her into the pit. "His act was the proximate cause of the injury," the court concluded. (It should be noted that while *Loftus* is a good example of the concept, the *Loftus* case itself almost certainly could come out differently today.)

Jurisdictions differ with regard to what kinds of actions can rise to the level of a superseding cause. There are some general observations that can be made, however. First, negligence is not normally superseded by someone else's negligence. Suppose a careless driver, who has passenger in the car, loses control on a mountain road and skids to a stop such that the car is teetering over the edge of a cliff. A careless trucker, driving too fast, fishtails around the bend and nicks the car, causing it to tip off the cliff. The passenger is injured by the fall. The carelessness the driver of the car will be deemed a proximate cause of the injury, notwithstanding the intervening force of the fishtailing truck.

A particular recurring situation is where injuries are made worse by medical malpractice committed in the course of the treatment of the original injury. The rule on this is quite clear: Medical malpractice is always considered foreseeable. In other words, incompetent medical treatment will not be considered a superseding force. Suppose a careless restaurant worker burned a patron while flambéing cherries tableside for a dessert dish. If the injuries had been treated competently, the patron would have recovered entirely in a couple weeks. Unfortunately the patient received substandard burn care, which led to an infection that necessitated an amputation. The

restaurant's carelessness in this case will be considered a proximate cause of the amputation injury. The same applies to ambulance accidents.

On the other hand, criminal interveners are usually superseding causes. If a sociopath breaks into the hospital and puts poison in an IV, the inept flambéer will not be liable for the poisoning. Note that there is an important exception to the rule that criminal intervenors are superseding causes: If an intervening criminal act was foreseeable, or if the defendant otherwise had a duty to protect the plaintiff from a criminal act, then the criminal act will not be considered a superseding cause. If a negligently installed door lock on an apartment in high-crime area allows an assailant to enter a plaintiff's apartment, the criminal act is not considered a superseding cause, and the landlord's negligence will be held a proximate cause of the plaintiff's injury.

Case: Ryan v. New York Central Railroad

The following case provides an additional venue to think about proximate causation issues. It is also a fascinating vehicle for thinking about the interaction of law and industrial progress.

Ryan v. New York Central Railroad

Court of Appeals of New York
March 1866

35 N.Y. 210. James Ryan v. New York Central Railroad Company. Hunt, J., De Grey, Ch. J.

Judge WARD HUNT:

On the 15th day of July, 1854, in the city of Syracuse, the defendant, by the careless management, or through the insufficient condition, of one of its engines, set fire to its woodshed, and a large quantity of wood therein. The plaintiff's house, situated at a distance of one hundred and thirty feet from the shed, soon took fire from the heat and sparks, and was entirely consumed, notwithstanding diligent efforts were made to save it. A number of other houses were also burned by the spreading of the fire. The plaintiff brings this action to recover

from the railroad company the value of his building thus destroyed. The judge at the Circuit nonsuited the plaintiff, and the General Term of the fifth district affirmed the judgment.

The question may be thus stated: A house in a populous city takes fire, through the negligence of the owner or his servant; the flames extend to and destroy an adjacent building: Is the owner of the first building liable to the second owner for the damage sustained by such burning?

It is a general principle that every person is liable for the consequences of his own acts. He is thus liable in damages for the proximate results of his own acts, but not for remote damages. It is not easy at all times to determine what are proximate and what are remote damages. In *Thomas* v. *Winchester* (2 Seld., 408) Judge Ruggles defines the damages for which a party is liable, as those which are the natural or necessary consequences of his acts. Thus, the owner of a loaded gun, who puts it in the hands of a child, by whose indiscretion it is discharged, is liable for the injury sustained by a third person from such discharge (5 Maule & Sel., 198.) The injury is a natural and ordinary result of the folly of placing a loaded gun in the hands of one ignorant of the manner of using it, and incapable of appreciating its effects. The owner of a horse and cart, who leaves them unattended in the street, is liable for an injury done to a person or his property, by the running away of the horse, for the same reason. The injury is the natural result of the negligence. If the party thus injured had, however, by the delay or confinement from his injury, been prevented from completing a valuable contract, from which he expected to make large profits, he could not recover such expected profits from the negligent party, in the cases supposed. Such damages would not be the necessary or natural consequences, nor the results ordinarily to be anticipated, from the negligence committed. (6 Hill, 522; 13 Wend., 601; 3 E. D. Smith, 144.) So if an engineer upon a steamboat or locomotive, in passing the house of A., so carelessly manages its machinery that the coals and sparks from its fires fall upon and consume the house of A., the railroad company or the steamboat proprietors are liable to pay the value of the property thus destroyed. Thus far the law is settled and

the principle is apparent. If, however, the fire communicates from the house of A. to that of B., and that is destroyed, is the negligent party liable for his loss? And if it spreads thence to the house of C., and thence to the house of D., and thence consecutively through the other houses, until it reaches and consumes the house of Z., is the party liable to pay the damages sustained by these twenty-four sufferers? The counsel for the plaintiff does not distinctly claim this, and I think it would not be seriously insisted that the sufferers could recover in such case. Where, then, is the principle upon which A. recovers and Z. fails?

It has been suggested that an important element exists in the difference between an intentional firing and a negligent firing merely; that when a party designedly fires his own house or his own fallow land, not intending, however, to do any injury to his neighbor, but a damage actually results, that he may be liable for more extended damages than where the fire originated in accident or negligence. It is true that the most of the cases where the liability was held to exist, were cases of an intentional firing. The case, however, of *Vaughn* v. *Menlove* (32 Eng. C. L., 613) was that of a spontaneous combustion of a hay-rick. The rick was burned, the owner's buildings were destroyed, and thence the fire spread to the plaintiff's cottage, which was also consumed. The defendant was held liable. Without deciding upon the importance of this distinction, I prefer to place my opinion upon the ground that, in the one case, to wit, the destruction of the building upon which the sparks were thrown by the negligent act of the party sought to be charged, the result was to have been anticipated the moment the fire was communicated to the building; that its destruction was the ordinary and natural result of its being fired. In the second, third or twenty-fourth case, as supposed, the destruction of the building was not a natural and expected result of the first firing. That a building upon which sparks and cinders fall should be destroyed or seriously injured must be expected, but that the fire should spread and other buildings be consumed, is not a necessary or an usual result. That it is possible, and that it is not unfrequent, cannot be denied. The result, however, depends, not

upon any necessity of a further communication of the fire, but upon a concurrence of accidental circumstances, such as the degree of the heat, the state of the atmosphere, the condition and materials of the adjoining structures and the direction of the wind. These are accidental and varying circumstances. The party has no control over them, and is not responsible for their effects.

My opinion, therefore, is, that this action cannot be sustained, for the reason that the damages incurred are not the immediate but the remote result of the negligence of the defendants. The immediate result was the destruction of their own wood and sheds; beyond that, it was remote.

Judgment affirmed.

Thoughts About *Ryan* in Historical Context

The *Ryan* case has never been explicitly overruled by the New York courts, although in 1890 a trial court stated that the authority of *Ryan* had been "considerably shaken by subsequent cases." *Nary v. New York, O. & W. Ry. Co.,* 55 Hun 612, 9 N.Y.S. 153 (Sup. Ct. 1890). One way of viewing *Ryan* is that it represents a particular historical moment when the industrial revolution was rapidly building wealth for society, and the courts felt an urge to protect firms, such as railroads, that were the engines of progress. Justice Leibson of the Supreme Court of Kentucky wrote in 1984, "It may well be that the 19th century judicial mind perceived of the need for courts to tilt the scales of justice in favor of defendants 'to keep the liabilities of growing industry within some bounds.'" *Hilen v. Hays,* 673 S.W.2d 713, 718 (Ky.1984), quoting Prosser, The Law of Torts.

If courts once regularly bent the law to protect industry, *Palsgraf* may represent a point of transition, when the courts became less solicitous of corporate defendants, who, it might be thought, were capable of fending for themselves.

Some people would say that today's era is one of renewed judicial deference to corporate interests. Others, of course, have the exact opposite view.

9. Existence of an Injury

"No harm, no foul."
– Chick Hearn, sportscaster for the L.A. Lakers, circa 1960–2000

In General

The existence of an injury is an element of the prima facie case for negligence. Even if a defendant had a duty and breached a duty, there is no negligence claim unless there is some compensable harm. Another way of stating the same idea is that "damages" is an essential element of the prima facie case for negligence.

Not all causes of action require an injury or damages. For instance, the intentional tort of trespass to land has no such requirement. If someone trespasses on your land, you can sue them whether or not they caused you any sort of loss. So, if someone trespasses by walking on your land, and then walks off, having not disturbed even a stalk of grass, you can win a lawsuit against them. In such a lawsuit, you would be entitled to "nominal damages" – meaning damages in name only – commonly a single dollar. So why would anyone pursue such a lawsuit? Except under rare circumstances, there's no point. Yet, if they want to, they can.

Negligence is not like that. There must be damages in order to form a prima facie case. And the damages must be of a certain kind. Generally speaking, they must be compensatory damages occasioned by physical damage "to person or property," meaning to a person's body or a person's tangible property.

In the context of damages, "compensatory" means damages that compensate someone for an actual loss. It is not possible, for instance, to sue someone for negligence just out of a desire to punish them for being careless. Punitive damages will not suffice to make out a prima facie case for negligence. (Assuming you have compensatory damages, and thus can make out a prima facie case for negligence, you can then argue for punitive damages as a way of

increasing the amount of the award – but that's a subject for later in this book.)

The requirement that the damages be for physical injury to the person or property excludes many possible claims. Notably, mental anguish, by itself, is not the kind of injury that is sufficient to establish a negligence case. Also, purely economic damages will not suffice. So, if someone's carelessness causes you to not get a job, then, without more, there is no negligence case. Now, if you lose your job because you are in the hospital, and if you are in the hospital thanks to a car accident for which you can establish all the elements of negligence, then you can recover for both the lost job as well as the hospital bills. But without the physical injury that sends you to the hospital, you have no case in negligence.

The doctrine regarding the existence of a compensable injury in the negligence case is sometimes put under the heading of whether there is a duty of care – that is, the first prima facie element of negligence we dealt with in this book. Whether courts look at it as a question of duty or as a separate element of the negligence case, the point is that without proving harm – and harm of the right kind – the plaintiff has not put forth a complete claim.

It should be emphasized that, as a practical matter, almost no one would want to pursue a lawsuit unless there is the prospect of substantial damages. Lawsuits are expensive, after all. The amount of damages, however, is a subject for a later chapter. For now, the question is whether there is an injury sufficient to establish a prima facie case.

Bear in mind that most of the time the existence of a compensable injury is a slamdunk in a negligence case. If it's not, then the only remaining questions are usually factual, not legal. For instance, a plaintiff in an automobile accident case might allege a "soft tissue injury" – one in which no bones were broken. How to prove such an injury can be a thorny problem for plaintiffs' attorneys in the trial court. But such situations do not present any tricky matters of legal doctrine. This chapter concerns the relatively rare situations in which there is a legal question on the matter of the existence of an injury.

Ahead, we will first look at so-called "loss of a chance" situations, in which there is room to argue whether an injury actually exists. Then we will look briefly at cases of pure economic harm and cases of pure emotional harm.

Loss-of-a-Chance Situations

The following case looks at a situation in which the injury inquiry turns into something of a philosophical question – where the injury, if there is one, is a change in the odds.

Case: Herskovits v. Group Health

The following case looks at an unusual but occasionally recurring situation in which the existence of an injury becomes a philosophically challenging question, one that is not answerable merely by uncovering facts.

Herskovits v. Group Health

Supreme Court of Washington
May 26, 1983

99 Wn.2d 609. Edith E. Herskovits, as Personal Representative, Appellant, v. Group Health Cooperative of Puget Sound, Respondent. No. 48034-6. En Banc. Dore, J. Rosellini, J., concurs. Pearson, J. (concurring). Williams, C.J., and Stafford and Utter, JJ., concur with Pearson, J. Brachtenbach, J. (dissenting). Dimmick, J., concurs with Brachtenbach, J. Dolliver, J. (dissenting).

Justice FRED H. DORE:

This appeal raises the issue of whether an estate can maintain an action for professional negligence as a result of failure to timely diagnose lung cancer, where the estate can show probable reduction in statistical chance for survival but cannot show and/or prove that with timely diagnosis and treatment, decedent probably would have lived to normal life expectancy.

Both counsel advised that for the purpose of this appeal we are to *assume* that the respondent Group Health Cooperative of Puget Sound and its personnel negligently failed to diagnose Herskovits' cancer on his first visit to the hospital and

proximately caused a 14 percent reduction in his chances of survival. It is undisputed that Herskovits had less than a 50 percent chance of survival at all times herein.~

The complaint alleged that Herskovits came to Group Health Hospital in 1974 with complaints of pain and coughing. In early 1974, chest X-rays revealed infiltrate in the left lung. Rales and coughing were present. In mid-1974, there were chest pains and coughing, which became persistent and chronic by fall of 1974. A December 5, 1974, entry in the medical records confirms the cough problem. Plaintiff contends that Herskovits was treated thereafter only with cough medicine. No further effort or inquiry was made by Group Health concerning his symptoms, other than an occasional chest X-ray. In the early spring of 1975, Mr. and Mrs. Herskovits went south in the hope that the warm weather would help. Upon his return to the Seattle area with no improvement in his health, Herskovits visited Dr. Jonathan Ostrow on a private basis for another medical opinion. Within 3 weeks, Dr. Ostrow's evaluation and direction to Group Health led to the diagnosis of cancer. In July of 1975, Herskovits' lung was removed, but no radiation or chemotherapy treatments were instituted. Herskovits died 20 months later, on March 22, 1977, at the age of 60.~

Other jurisdictions have~ generally [held] that unless the plaintiff is able to show that it was *more likely than not* that the harm was caused by the defendant's negligence, proof of a decreased chance of survival is not enough to take the proximate cause question to the jury. These courts have concluded that the defendant should not be liable where the decedent more than likely would have died anyway.

The ultimate question raised here is whether the relationship between the increased risk of harm and Herskovits' death is sufficient to hold Group Health responsible. Is a 36 percent (from 39 percent to 25 percent) reduction in the decedent's chance for survival sufficient evidence of causation to allow the jury to consider the possibility that the physician's failure to timely diagnose the illness was the proximate cause of his death? We answer in the affirmative. To decide otherwise would be a

blanket release from liability for doctors and hospitals any time there was less than a 50 percent chance of survival, regardless of how flagrant the negligence.~

[O]nce a plaintiff has demonstrated that defendant's acts or omissions~ have increased the risk of harm to another, such evidence furnishes a basis for the fact finder to go further and find that such increased risk was in turn a substantial factor in bringing about the resultant harm. The necessary proximate cause will be established if the jury finds such cause. It is not necessary for a plaintiff to introduce evidence to establish that the negligence resulted in the injury or death, but simply that the negligence increased the risk of injury or death. The step from the increased risk to causation is one for the jury to make.~

Where percentage probabilities and decreased probabilities are submitted into evidence, there is simply no danger of speculation on the part of the jury. More speculation is involved in requiring the medical expert to testify as to what would have happened had the defendant not been negligent.~

We reject Group Health's argument that plaintiffs *must show* that Herskovits "probably" would have had a 51 percent chance of survival if the hospital had not been negligent. We hold that medical testimony of a reduction of chance of survival from 39 percent to 25 percent is sufficient evidence to allow the proximate cause issue to go to the jury.

Causing reduction of the opportunity to recover (loss of chance) by one's negligence, however, does not necessitate a total recovery against the negligent party for all damages caused by the victim's death. Damages should be awarded to the injured party or his family based only on damages caused directly by premature death, such as lost earnings and additional medical expenses, etc.

We reverse the trial court and reinstate the cause of action.

Justice JAMES M. DOLLIVER, dissenting:

The majority states the variations from 39 percent to 25 percent in the decedent's chance for survival are sufficient evidence to "consider the possibility" that the failure of the physician to

diagnose the illness in a timely manner was the "proximate cause of his death." This reasoning is flawed. Whether the chances were 25 percent or 39 percent decedent would have survived for 5 years, in both cases, it was more probable than not he would have died. Therefore, I cannot conclude that the missed diagnosis was the proximate cause of death when a timely diagnosis could not have made it more probable the decedent would have survived. "'It is legally and logically impossible for it to be probable that a fact exists, and at the same time probable that it does not exist.'" *Cooper v. Sisters of Charity, Inc.,* 27 Ohio St. 2d 242, 253 (1971).

Justice VERNON ROBERT PEARSON, concurring:

I agree with the majority that the trial court erred in granting defendant's motion for summary judgment. I cannot, however, agree with the majority's reasoning in reaching this decision.~ In an effort to achieve a fair result by means of sound analysis, I offer the following approach.~

The issue before the court, quite simply, is whether Dr. Ostrow's testimony~ established that the act complained of (the alleged delay in diagnosis) "probably" or "more likely than not" caused Mr. Herskovits' subsequent disability. In order to make this determination, we must first define the "subsequent disability" suffered by Mr. Herskovits. Therein lies the crux of this case, for it is possible to define the injury or "disability" to Mr. Herskovits in at least two different ways. First, and most obviously, the injury to Mr. Herskovits might be viewed as his death. Alternatively, however, the injury or disability may be seen as the reduction of Mr. Herskovits' chance of surviving the cancer from which he suffered.

Therefore, although the issue before us is primarily one of causation, resolution of that issue requires us to identify the nature of the injury to the decedent. Our conception of the injury will substantially affect our analysis. If the injury is determined to be the death of Mr. Herskovits, then under the established principles of proximate cause plaintiff has failed to make a prima facie case. Dr. Ostrow was unable to state that probably, or more likely than not, Mr. Herskovits' death was

caused by defendant's negligence. On the contrary, it is clear from Dr. Ostrow's testimony that Mr. Herskovits would have probably died from cancer even with the exercise of reasonable care by defendant. Accordingly, if we perceive the death of Mr. Herskovits as the injury in this case, we must affirm the trial court, unless we determine that it is proper to depart substantially from the traditional requirements of establishing proximate cause in this type of case.

If, on the other hand, we view the injury to be the reduction of Mr. Herskovits' chance of survival, our analysis might well be different. Dr. Ostrow testified that the failure to diagnose cancer in December 1974 probably caused a substantial reduction in Mr. Herskovits' chance of survival. The~ standard of proof is therefore met.

~I turn to consider how other jurisdictions have dealt with similar cases.

One approach, and that urged by defendant, is to deny recovery in wrongful death cases unless the plaintiff establishes that decedent would probably have survived but for defendant's negligence. This approach is typified by *Cooper v. Sisters of Charity, Inc.*, 27 Ohio St. 2d 242 (1971). The court in that case affirmed a directed verdict for defendant where the only evidence of causation was that decedent had a chance "maybe some place around 50%" of survival had defendant not been negligent. The court said: "In an action for wrongful death, where medical malpractice is alleged as the proximate cause of death, and plaintiff's evidence indicates that a failure to diagnose the injury prevented the patient from an opportunity to be operated on, which failure eliminated any chance of the patient's survival, the issue of proximate cause can be submitted to a jury only if there is sufficient evidence showing that with proper diagnosis, treatment and surgery the patient probably would have survived."

On the other hand, plaintiff cites seven cases in support of her position.~ To summarize, in *Hicks v. United States* the decedent was deprived of a probability of survival; in *Jeanes v. Milner*, 428 F.2d 598 (8th Cir. 1970), the decedent's chance of survival was

reduced from 35 percent to 24 percent; in *O'Brien v. Stover*, 443 F.2d 1013 (8th Cir. 1971), the decedent's 30 percent chance of survival was reduced by an indeterminate amount; in *McBride v. United States*, 462 F.2d 72 (9th Cir. 1972), the decedent was deprived of the probability of survival; in *Kallenberg v. Beth Israel Hosp.*, 45 A.D.2d 177 (N.Y. App. Div. 1974), the decedent was deprived of a 20 percent to 40 percent chance of survival; in *Hamil v. Bashline* the decedent was deprived of a 75 percent chance of survival; and in *James v. United States*, 483 F. Supp. 581 (N.D. Cal. 1980), the decedent was deprived of an indeterminate chance of survival, no matter how small.

The three cases where the chance of survival was greater than 50 percent (*Hicks, McBride*, and *Hamil*) are unexceptional in that they focus on the death of the decedent as the injury, and they require proximate cause to be shown beyond the balance of probabilities. Such a result is consistent with existing principles in this state, and with cases from other jurisdictions cited by defendant.

The remaining four cases allowed recovery despite the plaintiffs' failure to prove a probability of survival. Three of these cases (*Jeanes, O'Brien*, and *James*) differ significantly from the *Hicks, McBride*, and *Hamil* group in that they view the reduction in or loss of the chance of survival, rather than the death itself, as the injury. Under these cases, the defendant is liable, not for all damages arising from the death, but only for damages to the extent of the diminished or lost chance of survival. The fourth of these cases, *Kallenberg*, differs from the other three in that it focuses on the death as the compensable injury. This is clearly a distortion of traditional principles of proximate causation. In effect, *Kallenberg* held that a 40 percent possibility of causation (rather than the 51 percent required by a probability standard) was sufficient to establish liability for the death. Under this loosened standard of proof of causation, the defendant would be liable for all damages resulting from the death for which he was at most 40 percent responsible.

My review of these cases persuades me that the preferable approach to the problem before us is that taken (at least

implicitly) in *Jeanes, O'Brien*, and *James*. I acknowledge that the principal predicate for these cases is the passage of obiter dictum in *Hicks*, a case which more directly supports the defendant's position. I am nevertheless convinced that these cases reflect a trend to the most rational, least arbitrary, rule by which to regulate cases of this kind.~

These reasons persuade me that the best resolution of the issue before us is to recognize the loss of a less than even chance as an actionable injury. Therefore, I would hold that plaintiff has established a prima facie issue of proximate cause by producing testimony that defendant probably caused a substantial reduction in Mr. Herskovits' chance of survival.~

I would remand to the trial court for proceedings consistent with this opinion.

Questions to Ponder About *Herskovits*

A. Do you agree with the implication of Justice Dolliver's dissent that Justice Dore's doctrinal prescription is fundamentally illogical?

B. According to both Justice Dore and Justice Pearson, the Herskovits estate should be able to prevail against Group Health despite it being the case that Mr. Herskovits would likely have died regardless. But the two justices look at the issue as funneling down to different elements of the prima facie case. For Justice Dore, this is a matter of causation. (Although Justice Dore says "proximate causation," he is actually referring to a question posed by the but-for test of actual causation.) For Justice Pearson, this is a question of the existence of an injury. Which do you think is the better way to look at it and why?

The Thorny Question of Calibrating Damages in *Herskovits,* and Some More Questions to Ponder

Assuming there should be recovery, what should be the measure of damages? Justice Dore's opinion is ambiguous on this point.

We will discuss the question of the measurement of compensatory damages in general later in the book. But the *Herskovits* case presents

a unique question about calibrating damages, so it's worth pondering for a moment how it might be done.

Perhaps the simplest thing that a court could do is to award the Herskovits estate damages in the same way as would be done for a "normal" wrongful death case. So if Mr. Herskovits had been killed by a negligently dropped anvil, for instance, and if the damages in that case were $1 million, then the damages in this case would be $1 million as well. Let's call this the *unreduced approach*.

Justice Dore's opinion, however, seems to invite some reduction in the amount of damages, although his opinion is ambiguous on how this would be accomplished.

Let's consider some alternatives of how damages could be reduced.

One approach – let's call this the *percentage-difference approach* – would be to start with the number that would be the compensatory damages for death in a "normal" case. Let's again assume that is $1 million. Based on expert testimony, Mr. Herskovits's chance of survival would have been 39% with a timely diagnosis, 25% without. So we could say that since the best-case scenario was 39%, then the baseline figure for damages should be 39% of $1 million, or $390,000. Given the negligent delay in diagnosis, the chance of survival dropped to 25%, which is equivalent to $250,000. The difference between the baseline case and the negligence case is $140,000. (Notice that this is the same as subtracting 25% from 39%, which gives 14%, and then multiplying this by $1 million.) So, under this approach, the measure of damages would be $140,000.

Another approach would be to ask the hypothetical question of how much would someone be willing to pay for the increased chance of survival. In this approach, we don't worry at all about the $1 million baseline figure. Let's call this the *what-would-you-pay approach*. We know that the negligence scenario left Mr. Herskovits with a 25% chance of survival. Had he been diagnosed earlier, he would have had a 39% of survival. From Mr. Herskovits's perspective, if he could somehow magically pay for the removal of the negligence, his chances of surviving would increase 56%. (That is, 39% is 56% higher than

25%.) So the question is, how much would a person pay for a 56% increased chance of surviving cancer?

Another approach – we can call this the *unguided approach* – would be to just tell the jury that they can reduce damages as they find appropriate.

The trial court could dictate an approach in the form of jury instructions. Or, in the absence of specific instructions, the attorneys could argue these approaches to the jury.

Some questions to ponder on these approaches:

A. Should damages in cases such as *Herskovits* be susceptible to reduction?

B. Which of the approaches outlined above seems, as an abstract matter, to be more fair?

C. Can you think of any other ways to reduce damages?

D. If you were the court, would you dictate one of these measures of damages, or would you leave the matter to the attorneys' arguments before the jury and the jury's deliberations?

E. If you were the plaintiff's attorney, and the jury instructions said nothing about the question of reducing damages, what would you argue to the jury about damages?

F. Assuming the judge instructed the jury that damages must be reduced, but didn't specify how, what would you argue to the jury?

G. If you were the defendant's attorney, and the jury instructions said nothing about the question of reducing damages, what would you argue to the jury about damages?

Now here's a more philosophical question:

H. If it is sensible to reduce damages in a *Herskovits*-type situation, then why not in "normal" negligence cases? Remember that the dilemma of *Herskovits* is that if the injury is *death,* then the estate cannot satisfy the but-for test by a preponderance of the evidence in order to prove actual causation, since the death probably would have happened even if the breach of the duty of care (the "negligence")

had not happened. If it has been shown that it was slightly more likely than not that an earlier diagnosis would have saved Mr. Herskovits (say 50.0000001%), then the defendant would be liable for the full measure of damages for his death. So, why not reduce damages in that situation as well. Couldn't the case be made that anytime the jury is not 100% sure that an injury was caused, then damages should be reduced by the percentage by which they jury is unsure? Why not do this for every element of the prima facie case? In fact, why not throw out the preponderance of the evidence standard altogether, and just have the jury assign a percentage by which they are sure of each element, and then adjust damages accordingly?

Pure Economic Loss

In general, pure economic loss – that is, unaccompanied by any physical damage to the plaintiff's person or property – will not suffice as an injury to create a prima facie case for negligence.

> ***Example: A Tale of Two Factories –*** A couple of billionaire balloon enthusiasts negligently allow their balloon to become entangled in electric power lines, causing a massive power outage to two factories. One factory makes popsicles. The other factory makes lugnuts. Both factories lose money because of the loss of productivity during the blackout, but only the popsicle factory suffers physical damage – namely the melting of its inventory of popsicles. In this case, the popsicle factory can recover, but the lugnut factory cannot. There are also workers, at both factories, who lose out on wages while the factories are closed during the blackout. The losses suffered by these workers are purely economic, and so they cannot recover.

Despite the general rule, which is very robust, there are occasional situations in which the courts have allowed recovery for pure economic loss.

One somewhat ad hoc approach that has been used in a few jurisdictions to allow negligence plaintiffs to recover for pure economic loss is an idea of **particular foreseeability**. In *People Express Airlines, Inc. v. Consolidated Rail Corp.,* 495 A.2d 107 (N.J.

1985), the defendant railroad negligently caused a fire that forced the evacuation of an airport terminal, resulting in a slew of cancelled flights. The court allowed the airline to recover from the railroad for the financial loss suffered on account of the cancelled flights because the airline, as a plaintiff, was "particularly foreseeable." The same court rejected claims from everyone else – including travelers who lost business deals. Even though such losses were foreseeable, they were not, in the view of the court, *particularly foreseeable*.

Another situation in which courts have allowed negligence claims for pure economic loss is against **accountants**. An accountancy's client can sue for a negligent audit, for example, even though the only losses are economic. Moreover, third parties who relied on information provided by accountants are sometimes able to recover under a negligence theory. This type of suit can arise when a non-client makes an investment decision based on the client's negligently audited books. The extent to which such non-clients can recover for pure economic loss from differs by jurisdiction and circumstance.

Finally, **attorneys** can be sued for negligence – professional malpractice, that is – when clients suffer purely economic losses. In addition, third parties can also sometimes recover from an attorney, despite the lack of a client relationship. A common situation for such recovery is in the context of a negligently handled will. If it is clear that a person was intended as a beneficiary, and would, but for the attorney's negligence, have received a bequest, the intended beneficiary is often able to recover from the attorney. Without allowing non-clients a cause of action in situations like this, attorneys drafting wills could effectively have total immunity from malpractice, since it is virtually always the case that the client will be deceased when the malpractice is uncovered. Outside of the will context, it is rare that non-clients can recover against attorneys. You may learn more about attorney liability for professional malpractice in a separate course called Professional Responsibility.

Mental Anguish and Emotional Distress

The general rule is that emotional or mental distress will not suffice as an injury for purposes of pleading a prima facie case for

negligence. There are myriad exceptions, however. Much of the development of doctrine of allowing claims for pure emotional distress involve parents seeking compensation for emotional distress related to the death or grievous bodily injury of a child. Pregnancy and childbirth are recurrent contexts as well. Much of the impetus for the development of doctrine in this area likely has to do with the fact that the death of a child – for reasons to be explored later – will ordinarily give rise to little or nothing in damages under the common law of torts.

At the outset, it is important to keep in mind that mental suffering is generally recoverable if it is occasioned by a physical injury. The loss of a limb, for instance, may cause compensable emotional harm. That much is clear. Our question here is to what extent can a mental/emotional harm itself provide the injury that is required for a prima facie case for negligence.

Historically, the courts loosened the requirement of a physical injury in cases of severe emotional distress to allow lawsuits where, despite the lack of a physical injury, there was at least a physical *impact* associated with the event that gave rise to the emotional distress. Requiring an impact, however, led to results such as the one in *Micthell v. Rochester Railway Co.,* 45 N.E 354 (N.Y. 1896), where a woman was denied recovery – for lack of an impact – where a team of runaway horses almost trampled her, though never touched her, and the stress of the event resulted in her having a miscarriage.

Later courts became willing to allow a claim for emotional distress where accompanied by some physical manifestation of the stress. And some courts broadened the impact exception to embrace situations where there was some risk of impact to the plaintiff, or where the plaintiff was within the "zone of danger" of an incident. Either of these rules, of course, would have aided the plaintiff in *Mitchell.*

Today, many cases support what can be thought of as an independent tort of **negligently inflicted emotional distress** – sometimes abbreviated "NIED." Particularly influential in this regard was the case of *Dillon v. Legg,* 68 Cal. 2d 728 (Cal. 1968), which

allowed recovery to a person not within the zone of danger. In that case, Margery M. Dillon witnessed her daughter Erin be fatally struck by an automobile negligently driven by the defendant. Erin, who was five, had started out ahead of her mother, legally crossing a road, when hit. The *Dillon* court set out three factors to be considered:

> "(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship."

Under *Dillon,* these were only factors to be considered – that is, they were guidelines for assessing whether the plaintiff's emotional trauma would be considered legally "foreseeable." Many states followed California's lead, recognizing some form of NIED in the mold of *Dillon,* often with various tweaks.

Meanwhile, two decades later, in the case of *Thing v. La Chusa,* 48 Cal.3d 644 (Cal. 1989), the California Supreme Court narrowed the scope of the NIED action it had pioneered by recasting its own *Dillon* guidelines into hard rules:

> "[A] plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress – a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances."

Here are the facts of *Thing v. La Chusa,* as recited by the court:

> "On December 8, 1980, John Thing, a minor, was injured when struck by an automobile operated by defendant James V. La Chusa. His mother, plaintiff Maria Thing, was nearby, but neither saw nor heard the accident. She became aware of the injury to her son when told by a daughter that John had been struck by a car. She rushed to the scene where she saw her bloody and unconscious child, who she believed was dead, lying in the roadway. Maria sued defendants, alleging that she suffered great emotional disturbance, shock, and injury to her nervous system as a result of these events, and that the injury to John and emotional distress she suffered were proximately caused by defendants' negligence."

In *Thing,* the California Supreme Court denied recovery on the basis of the test it articulated:

> "The undisputed facts establish that plaintiff was not present at the scene of the accident in which her son was injured. She did not observe defendant's conduct and was not aware that her son was being injured. She could not, therefore, establish a right to recover for the emotional distress she suffered when she subsequently learned of the accident and observed its consequences. The order granting summary judgment was proper."

Today, there is great variation across jurisdictions as to whether tort law allows any claim at all for pure emotional harm or for NIED. Even in jurisdictions were claims are allowed, the differences among courts are considerable.

10. Affirmative Defenses to Negligence

"Offense sells tickets, but defense wins championships."
– attributed to Paul William "Bear" Bryant

In General

There are three ways for a defendant to win a negligence case. First, and easiest, the defendant can just stand by as the plaintiff fails to put on evidence to prove each of the prima facie elements. If that happens at trial, the defendant can successfully move for a directed verdict – thereby winning the case without putting on a single witness or, theoretically, even without asking a single question of any of the plaintiff's witnesses. Assuming the plaintiff puts on a prima facie case, the second way for a defendant to win is to make out a rebuttal defense. A rebuttal defense is established by offering evidence to rebut the plaintiff's evidence for one or more of the prima facie elements established by the plaintiff. But the defendant need not rebut a prima facie case: The third and final way for a defendant to win is to prove an affirmative defense.

Even if a plaintiff makes out a prima facie case, and even if the defendant has no rebuttal evidence whatsoever, the defendant can still obtain victory by proving an affirmative defense. Sometimes an affirmative defense will effect a complete victory for the defendant. Other times, an affirmative defense will effect a partial victory, shielding the defendant from some portion of the damages.

When it comes to affirmative defenses, the burden of proof is on the defendant. That is why it is called an "affirmative" defense – proving it up is the affirmative obligation of the defendant. In comparison, the first two ways for defendants to win – pointing out the failure of proof on the prima facie case or rebutting an element – can be thought of as "negative" defenses. There, the defense is premised on what the plaintiff lacks. With an affirmative defense, the defendant

has to burden of putting all the needed evidence in front of the factfinder.

The standard of proof for an affirmative defense is the same as for the plaintiff's prima facie case – preponderance of the evidence. And, like a cause of action, an affirmative defense may be broken down into elements. Where an affirmative defense is structured as a series of elements, the defendant will have to prove each one of the elements by a preponderance of the evidence.

Keep in mind that an affirmative defense trumps the plaintiff's prima facie case. Even if a plaintiff went far beyond its burden of proving every element by a mere preponderance of the evidence – suppose, for instance that a plaintiff proved every element to a 100% certainty – it only takes an affirmative defense with each element proved by a mere preponderance of the evidence to block the plaintiff's recovery.

There are three main affirmative defenses that are particular for negligence claims: contributory negligence, comparative negligence, and assumption of the risk. They are the subject of this chapter.

The first two affirmative defenses – contributory negligence and comparative negligence – work by pointing the finger back at the plaintiff and blaming the plaintiff's injury on the plaintiff's own negligence. Contributory negligence and comparative negligence are alternatives to one another. Most jurisdictions have the defense of comparative negligence. The few that do not have the contributory negligence defense.

The defense of assumption of the risk is just what it sounds like: The plaintiff agreed to shoulder the risk that something would go wrong, so when it does, the plaintiff cannot come to the defendant for compensation.

Plaintiff's Negligence

If the plaintiff's own negligence worked to bring about the harm the plaintiff complains about, then the defendant can use the plaintiff's negligence as a defense. Depending on the jurisdiction, the defense will either be of the contributory-negligence type or the comparative-

negligence type. Within either type, there are a myriad of possible differences between jurisdictions.

All of tort law is subject to differences from one jurisdiction to another. But there is probably no more important and fundamental set of differences in common-law doctrine than those having to do with the affirmative defense premised on the plaintiff's negligence. If you were a personal-injury attorney or an insurance-defense attorney moving to a new state, the first thing you would want to learn is how the law regards the plaintiff's negligence as a defense.

The first and most important distinction is whether the jurisdiction recognizes the comparative negligence defense or the contributory negligence defense. Contributory negligence is the older doctrine, and it is more defendant friendly. Comparative negligence – also called "comparative fault" – is the newer doctrine, and it is more plaintiff friendly. Under contributory negligence, if the plaintiff was a little bit negligent, then the plaintiff loses. Under comparative negligence, the plaintiff's negligence is not necessarily a bar to recovery, but it will at least serve to reduce the total amount of the award.

Contributory Negligence

The doctrine of contributory negligence holds that if the defendant can prove that the plaintiff's own negligence contributed to the injury that the plaintiff complains of, then the defendant is not liable. To be more exact, proving a case for contributory negligence involves proving that the plaintiff's conduct fell below the standard of care a person is expected adhere to for one's own good, and that such conduct was an actual and proximate cause of the injury that the plaintiff is suing on.

To break the defense of contributory negligence into elements, we can start with the elements of negligence. To review, those are: owing a duty, breaching the duty, actual causation, proximate causation, and the existence of an injury. For purposes of contributory negligence, we can throw a couple of those elements out. It generally goes without saying that a person owes a duty to one's self, so there is no need to have the existence of duty as an element. Similarly, there is no point in discussing the existence of an injury, since the occasion

for asserting the defense will never come up unless there is an injury. So we can break contributory negligence down into three elements: (1) breach of the duty of care, (2) actual causation, and (3) proximate causation. In practice, issues of contributory negligence generally revolve around the breach element.

Contributory negligence was once available as a defense everywhere. Now it exists only in five American jurisdictions – Maryland, the District of Columbia, Virginia, North Carolina, and Alabama. Curiously, you'll note, all of those jurisdictions are contiguous except Alabama. And interestingly enough, the state of Tennessee – which connects Alabama to Virginia and North Carolina – is the most recent convert from contributory negligence to comparative fault. Tennessee broke the contiguous swath when it switched in 1992.

The reason for the decline in contributory negligence is that it is perceived as being too harsh on plaintiffs. With the defense of contributory negligence, a plaintiff who is found to have been even slightly negligent will be completely barred from any recovery, even against a defendant who was colossally negligent. Imagine that it's late at night on a stretch of two-lane highway. The driver of a car momentarily takes his eyes off the road while adjusting his car's air conditioning vents, and at that moment is hit head on by an overloaded truck with no lights whose driver was simultaneously under the heavy influence of alcohol, cocaine, and heroin, and – at the moment of the collision – was attempting to learn juggling by watching an instructional video on a laptop set on the dashboard and practicing the moves with a set of steak knives. The collision causes the driver of the car to be grievously injured and permanently disabled, while the truck driver walks away without a scratch. What is the result in a contributory negligence jurisdiction? No recovery for the plaintiff.

Case: Coleman v. Soccer Association

The following case shows contributory negligence in action and fleshes out the debate over its continued existence.

Coleman v. Soccer Association of Columbia

Court of Appeals of Maryland
July 9, 2013

432 Md. 679. James COLEMAN v. SOCCER ASSOCIATION OF COLUMBIA. No. 9, Sept. Term, 2012. ELDRIDGE, J. (Retired, Specially Assigned); GREENE, J., wrote a concurrence joined by BATTAGLIA, McDONALD and RAKER (Retired, Specially Assigned), JJ.; HARRELL, J., dissented.

Judge JOHN C. ELDRIDGE:

Thirty years ago, in *Harrison v. Montgomery County Bd. of Educ.,* 295 Md. 442, 444 (1983), this Court issued a writ of certiorari to decide "whether the common law doctrine of contributory negligence should be judicially abrogated in Maryland and the doctrine of comparative negligence adopted in its place as the rule governing trial of negligence actions in this State." In a comprehensive opinion by then Chief Judge Robert C. Murphy, the Court in *Harrison,* declined to abandon the doctrine of contributory negligence in favor of comparative negligence, pointing out that such change "involves fundamental and basic public policy considerations properly to be addressed by the legislature."

The petitioner in the case at bar presents the same issue that was presented in *Harrison*, namely whether this Court should change the common law and abrogate the defense of contributory negligence in certain types of tort actions. After reviewing the issue again, we shall arrive at the same conclusion that the Court reached in *Harrison*.~

The petitioner and plaintiff below, James Kyle Coleman, was an accomplished soccer player who had volunteered to assist in coaching a team of young soccer players in a program of the Soccer Association of Columbia, in Howard County, Maryland. On August 19, 2008, Coleman, at the time 20 years old, was assisting the coach during the practice of a team of young soccer players on the field of the Lime Kiln Middle School. While the Soccer Association of Columbia had fields of its own, it did not have enough to accommodate all of the program's young soccer

players; the Association was required to use school fields for practices. At some point during the practice, Coleman kicked a soccer ball into a soccer goal. As he passed under the goal's metal top rail, or crossbar, to retrieve the ball, he jumped up and grabbed the crossbar. The soccer goal was not anchored to the ground, and, as he held on to the upper crossbar, Coleman fell backwards, drawing the weight of the crossbar onto his face. He suffered multiple severe facial fractures which required surgery and the placing of three titanium plates in his face. Coleman instituted the present action by filing a complaint, in the Circuit Court for Howard County, alleging that he was injured by the defendants' negligence. ⌙In his first amended complaint, Coleman named four defendants: the Soccer Association of Columbia, the Columbia Soccer Club, the Howard County Government, and the Howard County Board of Education. On August 16, 2010, Coleman filed a notice of voluntary dismissal as to the Howard County Government. Subsequently, on October 5, 2011, the parties stipulated to dismissal with prejudice of the Columbia Soccer Club. On October 24, 2011, the Howard County Board of Education was also dismissed with prejudice from the suit, leaving the Soccer Association of Columbia as the sole remaining defendant during the trial.⌝ The defendant and respondent, the Soccer Association of Columbia, asserted the defense of contributory negligence.

At the ensuing jury trial, the soccer coach who had invited Coleman to help coach the soccer players testified that he had not inspected or anchored the goal which fell on Coleman. The coach also testified that the goal was not owned or provided by the Soccer Association, and he did not believe that it was his responsibility to anchor the goal. During the trial, the parties disputed whether the goal was located in an area under the supervision and control of the Soccer Association and whether the Soccer Association was required to inspect and anchor the goal. The Soccer Association presented testimony tending to show that, because the goal was not owned by the Soccer Association, the Soccer Association owed no duty to Coleman. The Soccer Association also presented testimony that the condition of the goal was open and obvious to all persons. The

Association maintained that the accident was caused solely by Coleman's negligence.

Testimony was provided by Coleman to the effect that players commonly hang from soccer goals and that his actions should have been anticipated and expected by the Soccer Association. Coleman also provided testimony that anchoring goals is a standard safety practice in youth soccer.

At the close of evidence, Coleman's attorney proffered a jury instruction on comparative negligence.

The proffered jury instruction read as follows:

> "A. Comparative Negligence—Liability
>
> "If you find that more than one party has established his/her burden of proof as to negligence, as defined by the court, you must then compare the negligence of those parties. The total amount of negligence is 100%. The figure that you arrive at should reflect the total percentage of negligence attributed to each party with respect to the happening of the accident. A comparison of negligence is made only if the negligence of more than one party proximately caused the accident."

The judge declined to give Coleman's proffered comparative negligence instruction and, instead, instructed the jury on contributory negligence.

The jury was given a verdict sheet posing several questions. The first question was: "Do you find that the Soccer Association of Columbia was negligent?" The jury answered "yes" to this question. The jury also answered "yes" to the question: "Do you find that the Soccer Association of Columbia's negligence caused the Plaintiff's injuries?" Finally, the jury answered "yes" to the question: "Do you find that the Plaintiff was negligent and that his negligence contributed to his claimed injuries?"

In short, the jury concluded that the Soccer Association of Columbia was negligent and that the Soccer Association's negligence caused Coleman's injuries. The jury also found that

Coleman was negligent, and that his negligence contributed to his own injuries. Because of the contributory negligence finding, Coleman was barred from any recovery. The trial court denied Coleman's motion for judgment notwithstanding the verdict and subsequently entered judgment in favor of the Soccer Association of Columbia.~

The General Assembly's repeated failure to pass legislation abrogating the defense of contributory negligence is very strong evidence that the legislative policy in Maryland is to retain the principle of contributory negligence.~ For this Court to change the common law and abrogate the contributory negligence defense in negligence actions, in the face of the General Assembly's repeated refusal to do so, would be totally inconsistent with the Court's long-standing jurisprudence.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT JAMES COLEMAN.

Judge GLENN T. HARRELL, JR., dissenting:

Paleontologists and geologists inform us that Earth's Cretaceous period (including in what is present day Maryland) ended approximately 65 million years ago with an asteroid striking Earth (the Cretaceous–Paleogene Extinction Event), wiping-out, in a relatively short period of geologic time, most plant and animal species, including dinosaurs. As to the last premise, they are wrong. A dinosaur roams yet the landscape of Maryland (and Virginia, Alabama, North Carolina and the District of Columbia), feeding on the claims of persons injured by the negligence of another, but who contributed proximately in some way to the occasion of his or her injuries, however slight their culpability. The name of that dinosaur is the doctrine of contributory negligence. With the force of a modern asteroid strike, this Court should render, in the present case, this dinosaur extinct. It chooses not to do so. Accordingly, I dissent.

My dissent does not take the form of a tit-for-tat trading of thrusts and parries with the Majority opinion. Rather, I write for a future majority of this Court, which, I have no doubt, will

relegate the fossilized doctrine of contributory negligence to a judicial tar pit at some point.~

Under the doctrine of contributory negligence, a plaintiff who fails to exercise ordinary care for his or her own safety, and thus contributes proximately to his or her injury, "is barred from all recovery, regardless of the quantum of a defendant's primary negligence." *Harrison v. Montgomery Cnty. Bd. of Ed.,* 295 Md. 442, 451 (1983). Contributory negligence is the "neglect of duty imposed upon all men to observe ordinary care for their own safety," *Potts v. Armour & Co.,* 183 Md. 483, 490 (1944), and refers not to the breach of a duty owed to another, but rather to the failure of an individual to exercise that degree of care necessary to protect him or her self. An "all-or-nothing" doctrine, contributory negligence operates in application as a total bar to recovery by an injured plaintiff.

The doctrine is of judicial "Big Bang" origin, credited generally to the 1809 English case of *Butterfield v. Forrester* (1809) 103 Eng. Rep. 926 (K.B.). In Butterfield, the court considered whether a plaintiff, injured while "violently" riding his horse on a roadway, by a pole negligently placed in the roadway, could recover damages. Denying recovery, Lord Ellenborough penned the first recognized incantation of contributory negligence, declaring, "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.".~

Whatever the initial justifications attributed to its birth, contributory negligence has been a mainstay of Maryland law since its adoption in *Irwin v. Sprigg,* 6 Gill 200 (1847). Since that time, Maryland courts applied the doctrine of contributory negligence to bar recovery in negligence actions by at-fault plaintiffs. Exceptions evolved, however, to allow recovery in specific instances. For example, the defense of contributory negligence is not available against claimants under five years of age, in strict liability actions, and in actions based on intentional conduct. Additionally, the doctrine of last clear chance

developed, to allow a plaintiff to recover, despite his or her contributory negligence, if he or she establishes "something new or sequential, which affords the defendant a fresh opportunity (of which he fails to avail himself) to avert the consequences of his original negligence."

The all-or-nothing consequences of the application of contributory negligence have long been criticized nationally by scholars and commentators. See, e.g., *Hilen v. Hays,* 673 S.W.2d 713, 717 (Ky.1984) ("A list of the critics of contributory negligence as a complete bar to a plaintiff's recovery reads like a tort hall of fame. The list includes, among others, Campbell, Fleming, Green, Harper and James, Dreton, Leflar, Malone, Pound and Prosser."); Prosser, Comparative Negligence, supra, at 469 ("Criticism of the denial of recovery was not slow in coming, and it has been with us for more than a century."); 2 Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, The Law of Torts, § 218 at 763 (2d ed. 2011) ("The traditional contributory negligence rule was extreme not merely in results but in principle. No satisfactory reasoning has ever explained the rule.").~

Respondent and its Amici count as a strength of the doctrine of contributory negligence its inflexibility in refusing to compensate any, even marginally, at-fault plaintiff. They argue that, in so doing, contributory negligence encourages personal responsibility by foreclosing the possibility of recovery for potential, negligent plaintiffs, and thus cannot possibly be outmoded. To the contrary, that the doctrine of contributory negligence grants one party a windfall at the expense of the other is, as courts and commentators alike have noted, unfair manifestly as a matter of policy. See, e.g., *Kaatz v. State,* 540 P.2d 1037, 1048 (Alaska 1975) ("The central reason for adopting a comparative negligence system lies in the inherent injustice of the contributory negligence rule."); *Hoffman v. Jones,* 280 So.2d 431, 436 (Fla.1973) ("Whatever may have been the historical justification for [the rule of contributory negligence], today it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to

produce the loss."); Lande & MacAlister, supra, at 4 ("The 'all or nothing' system [of contributory negligence], disconnected from a party's degree of fault, is unfair and counterintuitive."); Prosser, Comparative Negligence, supra, at 469 (characterizing contributory negligence as "outrageous" and an "obvious injustice" that "[n]o one has ever succeeded in justifying ..., and no one ever will"). Moreover, if contributory negligence encourages would-be plaintiffs to exercise caution with respect to themselves, then so too does the doctrine of comparative fault by reducing the plaintiff's recoverable damages. Unlike contributory negligence, however, comparative fault deters also negligence on the part of the defendant by holding him or her responsible for the damages that he or she inflicted on the plaintiff. See Lande & MacAlister, supra, at 5–6 (noting that, although contributory negligence systems "burden[ ] only plaintiffs with the obligation to take precautions," comparative negligence provides a "mixture of responsibility" that is "the best way to prevent most accidents"); Prosser, Comparative Negligence, supra, at 468 ("[T]he assumption that the speeding motorist is, or should be meditating on the possible failure of a lawsuit for his possible injuries lacks all reality, and it is quite as reasonable to say that the rule promotes accidents by encouraging the negligent defendant."). Thus, Respondent's contention that contributory negligence encourages personal responsibility, and is therefore preferable to comparative negligence, is unpersuasive.~

As noted above, the widespread acceptance of contributory negligence as a complete defense is attributed principally to (1) the desire to protect the nations' newly-developing industry from liability and plaintiff-minded juries,~ and (2) "the concept prevalent at the time that a plaintiff's irresponsibility in failing to use due care for his own safety erased whatever fault could be laid at defendant's feet for contributing to the injury." *Scott v. Rizzo,* 96 N.M. 682 (1981). Neither of these justifications, however, carry weight in present-day Maryland. In today's society, there has been no need demonstrated to protect any "newly-developing" industry at the expense of injured litigants. Industry generally in this nation is no longer fledgling or so

prone to withering at the prospect of liability. See, e.g., *Alvis v. Ribar,* 85 Ill.2d 1, 52 Ill.Dec. 23, (1981) ("There is no longer any justification for providing the protective barrier of the contributory negligence rule for industries of the nation at the expense of deserving litigants."); *Frummer v. Hilton Hotels Int'l, Inc.,* 60 Misc.2d 840, (N.Y.Sup.1969) ("Courts now do not feel any need to act as a protector of our nation's infant industries, for their infancy has long since passed.... In an age where a defendant may through various means, such as insurance, readily protect himself from a ruinous judgment, the solicitude of nineteenth century courts for defendants is certainly out of place...."). Moreover, tilting the scales to favor industry is inconsistent with modern conceptions of justice, which focus instead on proportional responsibility and fundamental fairness. *See Hilen v. Hays,* 673 S.W.2d 713, 718 (Ky.1984) ("It may well be that the 19th century judicial mind perceived of the need for courts to tilt the scales of justice in favor of defendants to keep the liabilities of growing industry within some bounds. But assuming such a rule was ever viable, certainly it no longer comports to present day morality and concepts of fundamental fairness."~ Rather, the array of Amici lined up in support of the continuation of contributory negligence is populated by the entrenched and established business interests who seek to maintain an economic advantage.~

Our statements in *Harrison* did not circumscribe, however, our authority to alter judicially-created common law rules in the face of repeated legislative inaction on the subject. Although we have declined frequently to effect changes in decisional doctrine upon observing repeated legislative inaction, see, e.g., *Potomac Valley Orthopaedic Assocs. v. Md. State Bd. of Physicians,* 417 Md. 622, 639–40 (2011) ("Our conclusion is confirmed by the fact that, in 2007, 2008, 2009, and 2010, the General Assembly 'rejected efforts to achieve legislatively that which we [are being] asked to grant judicially.'"~); *Moore v. State,* 388 Md. 623, 641 (2005) ("Legislative inaction is very significant where bills have repeatedly been introduced in the General Assembly to accomplish a particular result, and where the General Assembly has persistently refused to enact such bills."), we determined, on

multiple occasions, that legislative inaction may not be a sufficient premise from which to draw a positive legislative intent in certain situations. See, e.g., *City of Balt. Dev. Corp. v. Carmel Realty Assocs.,* 395 Md. 299, 329 (2006) (cautioning against drawing a positive inference from legislative inaction because "the General Assembly may well have ... decided not to enact the amendment for a myriad of other reasons"); *Goldstein v. State,* 339 Md. 563, 570 (1995) ("[T]he mere fact that the General Assembly has declined to adopt a particular proposal does not preclude this Court from incorporating the substance of that proposal into the common law...."); *Automobile Trade Assoc. of Md., Inc. v. Ins. Comm'r,* 292 Md. 15, 24 (1981) ("[T]he fact that a bill on a specific subject fails of passage in the General Assembly is a rather weak reed upon which to lean in ascertaining legislative intent."); *Cicoria v. State,* 89 Md.App. 403, 428 n. 9 (1991) (noting that "[t]rying to determine what the legislature intended (or did not intend) by rejecting those bills is no easy assignment" and declining to draw either a positive or negative inference from the rejected bills).

Although the *Harrison* court opted to defer to the Legislature, the opinion in that case gives no indication that such deference was unlimited. No acknowledgment was advanced that we lack the authority to alter a long-standing common law rule where the Legislature declines to enact proposed legislation.~ Further, we did not characterize the inaction of the General Assembly as a conclusive, definitive declaration of public policy – to the contrary, we specifically stated that legislative inaction is "not conclusive" and merely "indicative of an intention to retain the doctrine of contributory negligence."~

Declining to perpetuate unmindful deference to the Legislature on such a topic would not be without precedent. For example, as noted above, this Court stated repeatedly its intention to defer to legislative action on the topic of interspousal immunity before acting. Decades later, after noting the Legislature's continued stasis on the subject, we rescinded our deference and modernized an outdated common law rule.~

C.J. Bell has authorized me to state he joins in this opinion.

Questions to Ponder About *Coleman v. Soccer Association*

A. What should be made of the Maryland legislature not providing for a system of comparative negligence by statute? Are you persuaded that this is a good reason for the court not to act? Should drawing an inference from legislative inaction depend on particulars – such as how often bills were introduced, whether committee hearings were ever held, or whether there was a floor vote?

B. If the Maryland courts adopted a comparative negligence rule, the Maryland legislature could overrule it with a simple statute. Is this a persuasive reason to disregard the legislature's prior inaction in deciding whether the Maryland courts should overrule themselves?

C. From the perspective of people favoring comparative negligence, do you think this case was a good vehicle for trying overturn Maryland law?

D. What qualities, in general, would make a case a good vehicle for attempting to effect a change in the law?

Last Clear Chance Doctrine

Contributory negligence can be harsh. But the bare doctrine of contributory negligence doctrine is not the whole story. Perhaps because of its harshness, various subversions have evolved ameliorate contributory negligence in favor of plaintiffs in certain circumstances. The most important of these, mentioned in *Coleman*, is the doctrine of last clear chance.

The idea of last clear chance is that if, despite the plaintiff's negligence, the defendant has a last clear chance to avoid the injury, then the defendant must seize that chance to prevent the harm. If the defendant doesn't, the defendant will be liable, the plaintiff's negligence notwithstanding.

Last clear chance applies when there is a particular temporal sequence to the plaintiff's and defendant's negligence: First, the plaintiff does something negligent, creating some perilous situation. Next, the defendant has a chance to avoid injury to the plaintiff by being careful. Then, the defendant omits to take the precaution, and injury

results. This chronological order is essential – without it, last clear chance doctrine will not apply.

A good example of last clear chance is the case credited with introducing it: *Davies v. Mann,* 152 Eng. Rep. 588 (Court of Exchequer 1842). In *Davies,* a donkey was left in a highway fettered by its fore feet. This means of tying up the animal – called "an illegal act" in the opinion – prevented the animal from being able to get out of the way of traffic. The defendant, driving a horse-drawn wagon along the highway at a high rate of speed, ran over and killed the donkey. The court held:

> "[A]lthough the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

Keep in mind that last clear chance doctrine is relevant only in a jurisdiction following contributory negligence. In a comparative fault jurisdiction, the more blameworthy kind of negligence involved when a tortfeasor disregards an opportunity to avoid harm is swept up into the general comparative fault rubric of apportioning blame.

Other Subversions of Contributory Negligence

In addition to last clear chance doctrine, there are other subversions to contributory negligence that are favorable to plaintiffs. Some of these, recognized in Maryland, are discussed in Judge Harrell's dissent in *Coleman*. Common subversion are that contributory negligence is not available against very young plaintiffs (in Maryland, under five years of age), in cases of willful, wanton or reckless negligence, or in cases of intentional conduct. Also, while the reasonable-person standard of care is not generally adjusted downward for persons with mental illness of cognitive limitations when those persons are defendants, the standard may be lowered in the context of the contributory negligence defense to prevent the defense from barring recovery. Along the same lines, negligence actions based on

negligence per se doctrine may be impervious to a defense of contributory negligence if the statute upon which the suit is based is one specifically designed to protect persons who are unable to protect themselves – such as children, intoxicated persons, or persons with mental illness or cognitive disabilities.

Comparative Negligence

At the time of this writing, 46 states have overturned the common-law doctrine of contributory negligence in favor of some form of comparative negligence. About a dozen have done so as the result of a court decision, with the remainder having introduced comparative negligence by way of a statutory reform.

Comparative negligence – also commonly called "comparative fault" because it has applications in tort law beyond negligence claims – is a partial defense. It allows a defendant to escape some portion of the damages under certain circumstances on account of the plaintiff's negligence. Generally the jury is required to determine the relative fault between the parties in the form of percentages. The reduction in damages is then done by multiplying the total damages by the relevant percentage. So if a jury finds that the plaintiff is 1% at fault, that the defendant is 99% at fault, and that the plaintiff suffered $100,000 in damages, then the plaintiff's recovery will be reduced by $1,000, meaning that the defendant will be liable for $99,000.

That is a simple example, but comparative negligence gets much more complicated. The complications arise from the many variables that allow the doctrine to be very different from one jurisdiction to the next. As a result, there are myriad versions of comparative negligence.

The first and most important variable is whether there is a threshold quantum of the plaintiff's negligence beyond which the defendant has a complete, rather than partial, defense. The version called **pure comparative negligence** has no threshold. This approach is followed in 12 states. Whatever percentage the plaintiff is negligent, that is the percentage by which the plaintiff's recovery is reduced. For instance, if the plaintiff is determined to be 99% negligent, then the recovery is reduced by 99%, and the plaintiff can only recover 1% of

the compensatory damages from the defendant. In such a case, the plaintiff is, in the judgment of the factfinder, almost entirely to blame for her or his own injury, yet a small amount of recovery is still possible.

The perception among some courts and lawmakers that it would be unfair to allow recovery in such a situation – where the plaintiff is mostly to blame – has led to a form of the doctrine known as **modified comparative negligence** (also known as "partial comparative negligence.") In this form, if the plaintiff's negligence meets or exceeds some threshold, then the plaintiff is entirely barred from any recovery. In essence, there is a reversion to contributory negligence. How this threshold works differs greatly among jurisdictions.

In some jurisdictions the plaintiff is allowed recovery – subject to reduction – so long as the plaintiff's fault is *not more than* the defendant's fault. Other jurisdictions say that the plaintiff is allowed recovery – subject to reduction – so long as the plaintiff's fault is *less than* the defendant's fault. Notice that either way, the threshold is 50%. The difference is what happens in the event of a tie, where the jury determines that both the plaintiff and the defendant are each equally at fault, assigning 50% of the responsibility to each.

The more popular version of modified comparative negligence is the more plaintiff-friendly one – the one in which the plaintiff can still recover if fault is apportioned 50/50. By one count, 22 states use this version. The more defendant-friendly rule – where equal fault means the plaintiff is denied all recovery – is the choice of 11 states.

So we have two main versions of modified comparative negligence, distinguished by what happens in the event that the plaintiff and the defendant are equally at fault. What are these alternative versions called? Putting labels on the rules is a potential source of extreme confusion. Some sources use the label "50% rule" to refer to the rule where defendant wins a complete victory in the event of tie. Indubitably it makes sense to call this the "50% rule," since the plaintiff is barred from recovering if adjudged 50% at fault. But other sources use the label "50% rule" to denote the rule that allows a

plaintiff recovery in the event of a tie. This too makes perfect sense, since under the rule the plaintiff can be up to 50% at fault without being barred.

Unfortunately, it is very hard to know what someone is talking about when they use the phrase "50% rule" (or, for that matter, "49% rule," or "51% rule"). You might distinguish them by calling one the "50% bar rule" and the other the "50% allowed rule." The safest way to distinguish the two, however, may be to call them the plaintiff-wins-the-tie rule and the defendant-wins-the-tie rule. It's inelegant, but unambiguous.

None of this would matter much if ties were rare. But they are not. If you ask a jury to assign proportional blame between two negligent parties, the easiest and most obvious answer will often be to say that they are both equally at fault. So what happens in the event of a tie may amount to a huge difference in the overall effect of tort law in a given jurisdiction.

Even once the labels are straightened out, there is still a problem grouping states together in this way. One of the 22 states counted in the plaintiff-wins-in-tie rule was Michigan. But in Michigan, under Michigan Compiled Laws § 600.2959, a plaintiff who is more to blame than the defendant is barred just from noneconomic damages. So a more-than-half negligent plaintiff in Michigan could recover a percentage of medical bills and lost wages while being barred from all pain-and-suffering damages.

But wait. There are yet more complications. Up to this point, we have spoken only of situations in which there is one defendant. What if there are multiple defendants? Is the negligence threshold applied by comparing the plaintiff to each individual defendant, or to all defendants considered collectively? You will not be surprised to find out that jurisdictions differ. Most states consider defendants collectively – employing the threshold by comparing the plaintiff's percentage of the blame to the percentage of all the defendant's considered collectively. A few states apply the threshold on a defendant-by-defendant basis.

Statutes: Comparative Negligence

The following statutes show some of the variety of implementations of the comparative negligence defense.

Kentucky Revised Statues
Title XXXVI, Chapter 411

411.182 Allocation of fault in tort actions – Award of damages – Effect of release.

(1) In all tort actions, including products liability actions, involving fault of more than one (1) party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:

(a) The amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(b) The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.

(2) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(3) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under subsection (4) of this section, and shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(4) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable, shall discharge that person from all liability for contribution, but it shall not be considered to discharge any other persons liable upon the same

claim unless it so provides. However, the claim of the releasing person against other persons shall be reduced by the amount of the released persons' equitable share of the obligation, determined in accordance with the provisions of this section.

Minnesota Statutes
Chapter 604, Section 01

604.01 COMPARATIVE FAULT; EFFECT.

Subdivision 1. Scope of application. Contributory fault does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, in injury to person or property, or in economic loss, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.

Subd. 1a. Fault. "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent or primary assumption of risk, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity under section 340A.801. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. The doctrine of last clear chance is abolished.

Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.

Subd. 2. Personal injury or death; settlement or payment. Settlement with or any payment made to an injured person or to others on behalf of such injured person with the permission of such injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment or on whose behalf payment was made.

Subd. 3. Property damage or economic loss; settlement or payment. Settlement with or any payment made to a person or on the person's behalf to others for damage to or destruction of property or for economic loss does not constitute an admission of liability by the person making the payment or on whose behalf the payment was made.

Subd. 4. Settlement or payment; admissibility of evidence. Except in an action in which settlement and release has been pleaded as a defense, any settlement or payment referred to in subdivisions 2 and 3 shall be inadmissible in evidence on the trial of any legal action.

Subd. 5. Credit for settlements and payments; refund. All settlements and payments made under subdivisions 2 and 3 shall be credited against any final settlement or judgment; provided however that in the event that judgment is entered against the person seeking recovery or if a verdict is rendered for an amount less than the total of any such advance payments in favor of the recipient thereof, such person shall not be required to refund any portion of such advance payments voluntarily made. Upon motion to the court in the absence of a jury and upon proper proof thereof, prior to entry of judgment on a verdict, the court shall first apply the provisions of subdivision 1 and then shall reduce the amount of the damages so determined by the amount of the payments previously made to or on behalf of the person entitled to such damages.

Maine Revised Statutes
Title 14, §1

§156. Comparative negligence

When any person suffers death or damage as a result partly of that person's own fault and partly of the fault of any other person or persons, a claim in respect of that death or damage may not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof must be reduced to such extent as the jury thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

When damages are recoverable by any person by virtue of this section, subject to such reduction as is mentioned, the court shall instruct the jury to find and record the total damages that would have been recoverable if the claimant had not been at fault, and further instruct the jury to reduce the total damages by dollars and cents, and not by percentage, to the extent considered just and equitable, having regard to the claimant's share in the responsibility for the damages, and instruct the jury to return both amounts with the knowledge that the lesser figure is the final verdict in the case.

Fault means negligence, breach of statutory duty or other act or omission that gives rise to a liability in tort or would, apart from this section, give rise to the defense of contributory negligence.

If such claimant is found by the jury to be equally at fault, the claimant may not recover.

In a case involving multiparty defendants, each defendant is jointly and severally liable to the plaintiff for the full amount of the plaintiff's damages. However, any defendant has the right through the use of special interrogatories to request of the jury the percentage of fault contributed by each defendant. If a defendant is released by the plaintiff under an agreement that precludes the plaintiff from collecting against remaining parties that portion of any damages attributable to the released defendant's share of responsibility, then the following rules apply.

1. General rule. The released defendant is entitled to be dismissed with prejudice from the case. The dismissal bars all

related claims for contribution assertable by remaining parties against the released defendant.

2. Post-dismissal procedures. The trial court must preserve for the remaining parties a fair opportunity to adjudicate the liability of the released and dismissed defendant. Remaining parties may conduct discovery against a released and dismissed defendant and invoke evidentiary rules at trial as if the released and dismissed defendant were still a party.

3. Binding effect. To apportion responsibility in the pending action for claims that were included in the settlement and presented at trial, a finding on the issue of the released and dismissed defendant's liability binds all parties to the suit, but such a finding has no binding effect in other actions relating to other damage claims.

Some Problems on Applying Comparative Negligence Statutes

For the following problems, apply what you have learned from the foregoing statutes as well as from the case of *Coleman v. Soccer Association of Columbia*.

A. The law firm of Lorisbarn & Lindern has built a successful boutique litigation practice representing plaintiffs on a contingency fee basis in personal-injury negligence actions arising from accidents involving personal all-terrain vehicles or ATVs. In the kinds of cases L&L takes on, the plaintiff's negligence is often an issue and there are often multiple defendants. The firm is now considering opening up an office in a new state. The firm has determined that Kentucky, Maine, Maryland, and Minnesota all represent approximately equal opportunities in terms of the saturation of the market for contingency-fee plaintiff's representation and financially lucrative cases. The firm has decided that a key factor in its determination of where to open a new practice will be the state's doctrine regarding the impact of the plaintiff's negligence on the recovery of damages. All else being equal, how would you rank the states in order of desirability for L&L? To support your conclusion, how would you

describe the differences among those states in terms of their treatment of a plaintiff's negligence?

B. Suppose a jury privately determines, in the course of deliberations, that the total amount of damages suffered by a plaintiff is $100,000, and that the apportionment of fault among the parties is as follows: Plaintiff: 50%; Defendant: 50%. The jury then returns a verdict in accordance with that determination – including filling out any special interrogatories or verdict forms as instructed. How much will the plaintiff receive from the defendant in Kentucky? In Maine? In Maryland? In Minnesota?

C. Suppose a jury privately determines, in the course of deliberations, that the total amount of damages suffered by a plaintiff is $100,000, and that the apportionment of fault among the parties is as follows: Plaintiff: 40%; Defendant X: 20%; Defendant Y: 20%; Defendant Z: 20%. The jury then returns a verdict in accordance with that determination – including filling out any special interrogatories or verdict forms as instructed. How much will the plaintiff receive from Defendant X in Kentucky? In Maine? In Maryland? In Minnesota?

Assumption of the Risk

The affirmative defense of assumption of the risk provides that defendants can avoid liability where plaintiffs have voluntarily taken the chance that they might get hurt. One way to think about assumption of the risk is in relation to the prima facie elements of a negligence claim. Where plaintiffs assume the risk, they relieve defendants of their duty of due care.

Implied vs. Express Assumption of the Risk

The label "assumption of the risk" is applied by courts to many different situations, and it may differentially engage different requirements and limitations. There are two broad categories, however, that form an important division: implied and express. Implied assumption of the risk comes about when plaintiffs, by their conduct or actions, show that they have assumed the risk. Express assumption of the risk results from an explicit agreement in words – written or oral – assuming the risk.

The Elements of Assumption of the Risk

Assumption of the risk – whether of the implied or express type – can be broken down into two elements: (1) The plaintiff must **know and appreciate** the risk, including its nature and severity. (2) The plaintiff must take on the risk in an entirely **voluntary** way.

These requirements are quite strict.

Knowledge – To show knowledge it is generally not enough for the defendant to show that the plaintiff should have known about the risk. There generally must be proof that the plaintiff actually knows about the risk. And it is not just knowledge that is required, but real understanding and appreciation. In other words, plaintiffs have to really know what they are getting into. To put it in more formal terms, the standard is a *subjective* one – looking at what the person actually understood, rather than an objective one, which would look at what the person should have understood given the circumstances.

Contrast the doctrine of assumption of the risk with the objective reasonable person standard in the prima face case for negligence. The reasonable person standard, being objective, will not bend to a defendant's lack of understanding or awareness. So, it is readily possible for an inattentive or hapless person to blunder into negligence liability. In fact, the more inattentive you are, the most likely negligence liability becomes. By contrast, the more witless you are, the harder it is to assume the risk. A plaintiff, who, because of a lack of experience or intelligence is incapable of understanding the risk, cannot assume it.

There are limits to the subjectivity of assumption of the risk. In the sports context, there is less tolerance for claims of ignorance. Plaintiffs hit by foul balls as spectators at baseball games tend to be held to a more objective standard. The same goes for participants in sports activities.

Voluntariness – The standard for voluntariness is quite strict as well. There must be a genuine choice if a plaintiff is to be held to having assumed the risk. If it is the case that the plaintiff was compelled by circumstance and had no reasonable choice other than to confront

the risk, then it does not count as voluntary for purposes of assumption-of-the-risk doctrine. Similarly, if a plaintiff's only choice to avoid the risk is to forego a legal right – such as enjoying one's own property – then the there is no voluntariness. In the celebrated case of *Marshall v. Ranne,* 511 S.W.2d 255 (Tex. 1974), a plaintiff who was attacked and bitten by his neighbor's boar was held not to have assumed the risk by walking out of his own house.

Relationship with Contributory and Comparative Negligence

There is considerable practical and conceptual overlap between the defense of assumption of the risk and the defenses of contributory or comparative negligence. But assumption of the risk is conceptually distinguishable in that a plaintiff that assumes the risk might be acting reasonably. By definition, in a contributory/comparative negligence situation, the plaintiff is not acting reasonably. On the other hand, plaintiffs might be quite reasonable in assuming the risk if they have determined that rewards outweigh the downside of the potential for injury.

Since the move from contributory negligence to the flexible system of comparative fault, many courts have held that the assumption of the risk doctrine is absorbed to some extent into comparative fault doctrine. The extent of the continuing viability of assumption of the risk depends in large part about whether we are talking about implied or express assumption of the risk. The trend has been to abrogate the defense of implied assumption the risk. On the other hand, express assumption of the risk generally remains viable as a defense.

Case: Murphy v. Steeplechase Amusement Co.

The following case is an example of implied assumption of the risk.

Murphy v. Steeplechase Amusement Co.

Court of Appeals of New York
April 16, 1929

250 N.Y. 479. James Murphy, an Infant, by John Murphy, His Guardian ad Litem, Respondent, v. Steeplechase Amusement Co., Inc., Appellant. Submitted March 25, 1929. Decided April

16, 1929. Court below: Appellate Division of the Supreme Court in the First Judicial Department affirmed judgment for plaintiff entered upon a verdict. Murphy v. Steeplechase Amusement Co., Inc., 224 App. Div. 832 (1928). This court: Counsel: Gardiner Conroy and Reginald S. Hardy for appellant-defendant. Charles Kennedy for respondent-plaintiff. Judges: Cardozo, Ch. J. Pound, Crane, Lehman, Kellogg and Hubbs, JJ., concur; O'Brien, J., dissents.

Chief Judge BENJAMIN N. CARDOZO:

The defendant, Steeplechase Amusement Company, maintains an amusement park at Coney Island, New York.

One of the supposed attractions is known as "The Flopper." It is a moving belt, running upward on an inclined plane, on which passengers sit or stand. Many of them are unable to keep their feet because of the movement of the belt, and are thrown backward or aside. The belt runs in a groove, with padded walls on either side to a height of four feet, and with padded flooring beyond the walls at the same angle as the belt. An electric motor, driven by current furnished by the Brooklyn Edison Company, supplies the needed power.

Plaintiff, a vigorous young man, visited the park with friends. One of them, a young woman, now his wife, stepped upon the moving belt. Plaintiff followed and stepped behind her. As he did so, he felt what he describes as a sudden jerk, and was thrown to the floor. His wife in front and also friends behind him were thrown at the same time. Something more was here, as every one understood, than the slowly-moving escalator that is common in shops and public places. A fall was foreseen as one of the risks of the adventure. There would have been no point to the whole thing, no adventure about it, if the risk had not been there. The very name above the gate, the Flopper, was warning to the timid. If the name was not enough, there was warning more distinct in the experience of others. We are told by the plaintiff's wife that the members of her party stood looking at the sport before joining in it themselves. Some aboard the belt were able, as she viewed them, to sit down with decorum or even to stand and keep their footing; others jumped

or fell. The tumbling bodies and the screams and laughter supplied the merriment and fun. "I took a chance," she said when asked whether she thought that a fall might be expected.

Plaintiff took the chance with her, but, less lucky than his companions, suffered a fracture of a knee cap. He states in his complaint that the belt was dangerous to life and limb in that it stopped and started violently and suddenly and was not properly equipped to prevent injuries to persons who were using it without knowledge of its dangers, and in a bill of particulars he adds that it was operated at a fast and dangerous rate of speed and was not supplied with a proper railing, guard or other device to prevent a fall therefrom. No other negligence is charged.

We see no adequate basis for a finding that the belt was out of order. It was already in motion when the plaintiff put his foot on it. He cannot help himself to a verdict in such circumstances by the addition of the facile comment that it threw him with a jerk. One who steps upon a moving belt and finds his heels above his head is in no position to discriminate with nicety between the successive stages of the shock, between the jerk which is a cause and the jerk, accompanying the fall, as an instantaneous effect. There is evidence for the defendant that power was transmitted smoothly, and could not be transmitted otherwise. If the movement was spasmodic, it was an unexplained and, it seems, an inexplicable departure from the normal workings of the mechanism. An aberration so extraordinary, if it is to lay the basis for a verdict, should rest on something firmer than a mere descriptive epithet, a summary of the sensations of a tense and crowded moment. But the jerk, if it were established, would add little to the case. Whether the movement of the belt was uniform or irregular, the risk at greatest was a fall. This was the very hazard that was invited and foreseen.

Volenti non fit injuria. One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. The antics of the clown are not the paces of the

cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquillity. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.

A different case would be here if the dangers inherent in the sport were obscure or unobserved, or so serious as to justify the belief that precautions of some kind must have been taken to avert them. Nothing happened to the plaintiff except what common experience tells us may happen at any time as the consequence of a sudden fall. Many a skater or a horseman can rehearse a tale of equal woe. A different case there would also be if the accidents had been so many as to show that the game in its inherent nature was too dangerous to be continued without change. The president of the amusement company says that there had never been such an accident before. A nurse employed at an emergency hospital maintained in connection with the park contradicts him to some extent. She says that on other occasions she had attended patrons of the park who had been injured at the Flopper, how many she could not say. None, however, had been badly injured or had suffered broken bones. Such testimony is not enough to show that the game was a trap for the unwary, too perilous to be endured. According to the defendant's estimate, two hundred and fifty thousand visitors were at the Flopper in a year. Some quota of accidents was to be looked for in so great a mass. One might as well say that a skating rink should be abandoned because skaters sometimes fall.

There is testimony by the plaintiff that he fell upon wood, and not upon a canvas padding. He is strongly contradicted by the photographs and by the witnesses for the defendant, and is without corroboration in the testimony of his companions who were witnesses in his behalf. If his observation was correct, there was a defect in the equipment, and one not obvious or known. The padding should have been kept in repair to break

the force of any fall. The case did not go to the jury, however, upon any such theory of the defendant's liability, nor is the defect fairly suggested by the plaintiff's bill of particulars, which limits his complaint. The case went to the jury upon the theory that negligence was dependent upon a sharp and sudden jerk.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and a new trial granted, with costs to abide the event.

Questions to Ponder About *Murphy v. Steeplechase*

A. Amusement parks in the in the Roaring 20s seem to be more dangerous places than the amusement parks of today. Do you think an amusement park today would have a ride like the Flopper? Assuming it did, and the facts of *Murphy* came to pass, do you think the case would come out the same way these days?

B. Judge Cardozo seems to say that risk was necessary for the Flopper to be fun: "There would have been no point to the whole thing, no adventure about it, if the risk had not been there." Do you agree?

C. Generally speaking, assumption of the risk requires not only that the plaintiff knows about the risk, but that the plaintiff understands the nature of the risk. Clearly James Murphy appreciated the risk that he might fall. But do you think James Murphy appreciated the fact that he might suffer a broken kneecap from the Flopper?

Case: Hulsey v. Elsinore Parachute Center

The following case explores express assumption of the risk and considers under what circumstances a release will be enforceable.

Hulsey v. Elsinore Parachute Center

Court of Appeal of California, Fourth Appellate District,
Division Two
May 16, 1985

ANTHONY HULSEY, Plaintiff and Appellant, v. ELSINORE PARACHUTE CENTER, Defendant and Respondent. No. E000643. Court ofdozo Appeal of California, Fourth Appellate

District, Division Two. Opinion by McDaniel, J., with Kaufman, Acting P.J., and Rickles, J., concurring.

Judge FRANKLIN DOUGLAS McDANIEL:

In this appeal, we are called upon to review the propriety of a summary judgment entered for defendant in a sports risk case. The action in the trial court was to recover for personal injuries suffered by plaintiff at the time of his first parachute jump, one attempted under the auspices of defendant. At the hearing of the motion for summary judgment, no disputed issues of fact were raised in connection~ with the count based on negligence~. As a consequence, the trial court was concerned generally with~ whether the agreement and release of liability signed by plaintiff at the time of the instructional preparation for his first parachute jump is enforceable against him.~ In our view, the trial court correctly ruled that the release is enforceable.~

After the case was at issue and defendant had taken plaintiff's deposition, defendant noticed a motion for summary judgment. The supporting papers included the declaration of counsel for defendant, Peter James McBreen, the principal purpose of which was to authenticate certain documentary evidence he wished to place before the court: (1) Exhibit "A," a copy of plaintiff's deposition; (2) exhibit "B," a copy of the "Registration Card" signed by plaintiff several hours before he took off on his misadventure; and (3) exhibit "C," a copy of the "Agreement of Release of Liability," also signed by plaintiff at the same time he filled out the "Registration Card" on the reverse side.

As established by plaintiff's deposition, he went to defendant's place of business, the Elsinore Parachute Center (EPC), in the company of three friends, two of whom had had previous experience in sport parachuting. Upon arriving at EPC, plaintiff enrolled in the "First Jump Course" offered by defendant. Although plaintiff stated he had no recollection of filling out or signing the "Parachute Center Adult Registration Form," he did admit that the written inscriptions, the initials and the signature on the form were his.

Continuing, plaintiff also disclaimed any recollection of reading or signing the "Agreement & Release of Liability," but he did admit once again that the signature and the initials on the agreement were his. Plaintiff admitted that he voluntarily enrolled in the first-jump course and was not coerced in any way during the registration process.~

During the classroom training, the instructor advised the class that students occasionally break their legs while jumping. In addition, canopy control was discussed and plaintiff received instruction on the proper procedure to be followed in maneuvering the parachute for landing. Plaintiff admitted that he understood the information provided and felt he was one of the better students in the class.~

Plaintiff's actual jump was postponed several hours because of wind. At approximately 6:30 p.m., plaintiff boarded the aircraft for his first jump. Plaintiff recalled that the wind was "still" or "very calm" when he boarded the aircraft.

Plaintiff's exit from the aircraft was normal. Plaintiff testified that he attempted to steer toward the target area but was unable to reach it. Plaintiff attempted to land in a vacant lot but collided with electric power lines as he neared the ground. As he drifted into the wires, plaintiff saw a bright flash. Plaintiff's next recollection was of regaining consciousness on the ground. Despite the extreme risk to which he was thereby exposed, plaintiff sustained only a broken wrist.

As for other items before the court, exhibit "B" and exhibit "C," attached to Attorney McBreen's declaration,~ are included herein~. These items are copies of the registration card and the release reproduced here~.

PARACHUTING CENTER ADULT REGISTRATION FORM

214 C

LAST NAME Hulsey FIRST NAME Anthony MIDDLE INITIAL J AGE 23 SEX M

PERMANENT ADDRESS 5530 W 190th St. #169 PHONE 370-6454

CITY Torrance, CA. STATE CA. ZIP CODE 90503

OCCUPATION Craftman DATE OF BIRTH 3/8/59 (MO/DAY/YEAR) WEIGHT 170 HEIGHT 5'7"

PRESENT ADDRESS SAME as above

CITY ____ STATE ____ ZIP CODE ____ PHONE ____ I.D. 05693629 U.S.P.A. # ____

How did you learn of the center? **(Check Only One Please)**

- ☐ Magazine Article
- ☐ Sports Show (Which) ____
- ☐ Yellow Pages Ad
- ☑ Friend (Name) Steve Samson! Gray Pistol
- ☐ Word of Mouth
- ☐ Lecture
- ☐ Other ____

How Did You Travel To Center

☐ Plane ☑ Car ☐ Bus ☐ Other ____

MEDICAL STATEMENT FOR UNDERGOING PARACHUTE TRAINING AND JUMPING AJH.

I hereby certify that I am not aware of and am not under treatment for any physical infirmity or chronic ailment, or injury of any nature, and that I have normal vision or have corrective lenses, and that I have never been treated for any of the following:

1.) Cardiac or pulmonary condition or disease
2.) High or low blood pressure
3.) Fainting spells or convulsions
4.) Hard of hearing
5.) Nervous disorder
6.) Diabetes
7.) Kidney or related diseases

Signature Anthony Jose Hulsey Date 5/22/82

IMPORTANT — AFTER READING, SIGNING AND DATING THIS SIDE — TURN FORM OVER — READ AND COMPLETE OTHER SIDE

Exhibit "B" to McBreen Declaration

AGREEMENT & RELEASE OF LIABILITY A. J. H.

I, Anthony Hulsey, HEREBY ACKNOWLEDGE that I have voluntarily applied to participate in parachuting instruction and training, culminating in a parachute jump at the premises of Elsinore Parachute Center.

I AM AWARE THAT PARACHUTE INSTRUCTION AND JUMPING ARE HAZARDOUS ACTIVITIES, AND I AM VOLUNTARILY PARTICIPATING IN THESE ACTIVITIES WITH KNOWLEDGE OF THE DANGER INVOLVED AND HEREBY AGREE TO ACCEPT ANY AND ALL RISKS OF INJURY OR DEATH. PLEASE INITIAL A.J.H.

AS LAWFUL CONSIDERATION for being permitted by Elsinore Parachute Center or one of its affiliated organizations to participate in these activities and use their facilities, I hereby agree that I, my heirs, distributees, guardians, legal representatives and assigns will not make a claim against, sue, attach the property of, or prosecute Elsinore Parachute Center, Parachutes, Inc., and or one of its affiliated organizations, and Aurora Leasing Company, and Orange Sport Parachuting Center, Inc., and Elsinore Sport Parachuting Center, Inc., and Lakewood Sport Parachuting Center, Inc. for injury or damage resulting from the negligence or other acts, howsoever caused, by any employee, agent or contractor of Elsinore Parachute Center or its affiliates, as a result of my participation in parachuting activities. In addition, I hereby release and discharge Elsinore Parachute Center, Parachutes, Inc., Skydive, Skydive II, and its affiliated organizations, and Aurora Leasing Company, and Orange Sport Parachuting Center, Inc., and Elsinore Sport Parachuting Center, Inc., and Lakewood Sport Parachuting Center, Inc. from all actions, claims or demands I, my heirs, distributees, guardians, legal representatives, or assigns now have or may hereafter have for injury or damage resulting from my participation in parachuting activities.

I HAVE CAREFULLY READ THIS AGREEMENT AND FULLY UNDERSTAND ITS CONTENTS. I AM AWARE THAT THIS IS A RELEASE OF LIABILITY AND A CONTRACT BETWEEN MYSELF AND ELSINORE PARACHUTE CENTER AND/OR ITS AFFILIATED ORGANIZATIONS AND SIGN IT OF MY OWN FREE WILL.

DATED: 5/22/

WITNESS Rebecca Avila SIGNATURE Anthony Jay Hulsey

DATE 5/22/82

Exhibit "C" to McGreen Declaration

~In pursuing his appeal, plaintiff makes four substantive contentions. They are that: (1) on the undisputed factual scenario there was no clear and comprehensive notice to plaintiff of what the legal consequences of the release would be; (2) such releases are against public policy; (3) the release is unenforceable because unconscionable in that it did not comport with plaintiff's reasonable expectations~.

[B]efore proceeding to a discussion of the~ issues of substance noted, we must also note in passing that we are not at all persuaded that plaintiff should be relieved of the legal consequences of the things he signed because he did not realize what he was signing or that somehow he was distracted or misled from a fair realization of what was involved. It is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it. On the record here, there is no indication whatsoever of fraud or other behavior by defendant which would otherwise have made the [usual] rule inapplicable.

Another aspect of this preliminary inquiry into the circumstances surrounding plaintiff's filling out the registration card and signing the release involves the size of the type used in printing the release. In the case of *Conservatorship of Link* (1984) 158 Cal.App.3d 138, the court held the purported exculpatory documents unenforceable for several reasons, including the fact that they were printed in five and one half point type and thus could not easily be read by persons of ordinary vision. (*Id.*, at pp. 141-142.) Actually, as observed in *Link*, "The five and one-half point print is so small that one would conclude defendants never intended it to be read … the lengthy fine print seems calculated to conceal and not to warn the unwary."

The type size contained in *Link* is not present here. As appears from the actual size reproduction in the appendix, the release is in 10-point type, both caps and lower case letters. This size comports with a number of minimums prescribed by statute. ~Examples: Civil Code sections 1630 [eight to ten-point: parking lots]; 1677 [eight-point bold red or ten-point bold:

liquidated damages provision in realty purchase contract]; 1803.1 and 1803.2 [eight to fourteen-point: retail installment sales]; 1812.85 [ten-point bold: health studio services]; 1812.205 and 1812.209 [ten to sixteen-point bold: seller assisted marketing plan]; 1812.302 and 1812.303 [ten-point bold: membership camping]; 1812.402 [ten-point: disability insurance]; 1861.8 [ten-point bold: innkeepers]; 1916.5 and 1916.7 [ten-point bold: loan of money]; 2924c [twelve to fourteen-point bold: mortgage default notice]; 2982.5 and 2983.2 [eight to ten-point bold: automobile sales finance]; 2985.8, 2986.2 and 2986.4 [six to ten-point bold: vehicle leasing act]; 3052.5 [ten-point bold: service dealer lien]." (Conservatorship of Link, supra, 158 Cal.App.3d 138, 141.)[↵]

As appears from a copy of the agreement reproduced in actual size and attached as an appendix, the second paragraph recites in bold-faced type: "I Am Aware That Parachute Instruction And Jumping Are Hazardous Activities, And I Am Voluntarily Participating In These Activities With Knowledge Of The Danger Involved And Hereby Agree To Accept Any And All Risks Of Injury Or Death. Please Initial." Plaintiff affixed his initials.

The third paragraph recites that the subscriber will not sue EPC or its employees "for injury or damage resulting from the negligence or other acts, howsoever caused, by any employee, agent or contractor of [EPC] or its affiliates, as a result of my participation in parachuting activities." That paragraph goes on to recite that the subscriber will "release and discharge" EPC and its employees "from all actions, claims or demands … for injury or damage resulting from [the subscriber's] participation in parachuting activities."

The fourth paragraph, also in bold-faced type, recites that: "I Have Carefully Read This Agreement And Fully Understand Its Contents. I Am Aware That This Is A Release Of Liability And A Contract Between Myself And Elsinore Parachute Center And/Or Its Affiliated Organizations And Sign It Of My Own Free Will." Plaintiff's signature was thereto subscribed.

I

Plaintiff's first contention involves an inquiry into whether plaintiff could reasonably have been expected to understand its legal consequences for him. In substance, plaintiff argues that the agreement was not sufficiently explicit or unambiguous to be enforceable against him~.

Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd. (1983) 147 Cal.App.3d 309 refused to enforce an exculpatory agreement between a race car driver and race sponsor. The operative language used in the agreement there in issue provided that the driver would "save harmless and keep indemnified" (*Id.*, at p. 312) the race sponsor. The court reasoned that such language could not be reasonably expected to alert a layperson to the significance of the agreement and, therefore, that it was not sufficiently clear and explicit.

In contrast to the agreement in *Ferrell*, the one here was phrased in language clear to anyone. We have already quoted the pertinent provision, and it would be hard to imagine language more clearly designed to put a layperson on notice of the significance and legal effect of subscribing it. The flaws which the *Ferrell* court found in the agreement it had before it are not present here. Instead of disguising the operative language in legalese, the defendant prepared its agreement in simple, clear and unambiguous language understandable to any layperson. In sum, we hold that the language of the agreement here falls well within the *Ferrell* rule, i.e., that it was effectively drafted so as "clearly [to] notify the prospective releasor or indemnitor of the effect of signing the agreement." (*Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd., supra*, 147 Cal.App.3d 309, 318.)

II

Turning to plaintiff's second contention, namely that releases of the type here used are against public policy, we note first that such agreements as this are arguably contemplated by section 1668 of the Civil Code. That section provides: "All contracts which have for their object, directly or indirectly, to exempt anyone from the responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

Whatever it proscribes, this section does *not* invalidate contracts which seek to except one from liability for simple negligence or strict liability.

Civil Code section 1668 refers to limitations which are described as against the policy of the law. Such policy is the aggregate of judicial pronouncements on a given issue, and in this context deal with the concept characterized as "the public interest." This concept calls up for discussion *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92.

Tunkl is a case in which the plaintiff signed an agreement that relieved the defendant hospital from liability for the wrongful acts of the defendant's employees. The plaintiff was required to sign the agreement to gain admission into the defendant's hospital. Thereafter, the plaintiff brought suit against the hospital claiming that he was injured as a result of the negligence of hospital employees. The trial court upheld the release. On appeal, the California Supreme Court invalidated the release agreement on the grounds that it affected the "public interest. "The court set forth the following six factors which it deemed relevant in determining whether a contract affects the public interest: (1) It concerns a business of a type generally thought suitable for public regulation; (2) the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public; (3) the party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards; (4) as a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services; (5) in exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence; (6) as a result of the transaction, the person or property of the purchaser is placed under the control of the

seller, subject to the risk of carelessness by the seller or his agent.

Applying the *Tunkl* factors to the facts here, several distinctions are readily apparent. First, parachute jumping is not subject to the same level of public regulation as is the delivery of medical and hospital services. Second, the *Tunkl* agreement was executed in connection with services of great importance to the public and of practical necessity to anyone suffering from a physical infirmity or illness. Parachute jumping, on the other hand, in not an activity of great importance to the public and is a matter of necessity to no one.

Finally, because of the essential nature of medical treatment, the consuming party in *Tunkl* had little or no choice but to accept the terms offered by the hospital. Defendant had no decisive advantage in bargaining power over plaintiff by virtue of any "essential services" offered by defendant. When referring to "essential services" the court in *Tunkl* clearly had in mind medical, legal, housing, transportation or similar services which must *necessarily* be utilized by the general public. Purely recreational activities such as sport parachuting can hardly be considered "essential."

In sum, measuring the transaction here against the *Tunkl* factors, we can see no logical reason for extending the "public interest" limitation on the freedom to contract to the exculpatory agreement here relied on by defendant.

There are no California cases directly on point dealing with exculpatory contracts in the context of high risk sports activities, but there are an ample number on the books in other states. *Jones v. Dressel* (Colo. 1981) 623 P.2d 370, a Colorado case, was decided on very similar facts by means of a summary judgment. The case is especially persuasive because the Colorado court relied extensively on *Tunkl* in arriving at its holding that the exculpatory agreement there relied upon by an operator of business furnishing sky diving facilities did *not* fall within the ambit of agreements proscibed as against the public interest.~

Accordingly, following both logic and the persuasive holdings cited from other jurisdictions, we hold that the exculpatory agreement here under discussion is not against the "public interest" so as to bring it within the prohibitions of section 1668 of the Civil Code because contrary to "the policy of the law."

We come now to the narrower issue of whether the exculpatory contract here relied upon as an affirmative defense by defendant should not be enforced because, as to plaintiff, it would be "unconscionable."~ Plaintiff has made the picturesque if not ludicrous contention that he "was led to believe" that the urgent thing confronting him at the time he signed and initialed the agreement was to sign up to purchase a photograph, and that as a consequence he did not realize the significance of the agreement when he signed it. He makes this contention despite the fact that his initials appear immediately adjacent to the capitalized words in bold-faced type, "Agreement & Release of Liability." It is hard to imagine that plaintiff, after having initialed the agreement in three places and signed it in one could have harbored any *reasonable* expectations other than what was unambiguously recited in the title and text of the agreement.

Because the agreement, in both its language and format, was not one which could even remotely operate to defeat the reasonable expectations of plaintiff and hence be unconscionable if enforced, we hold that it did not so operate and hence that its enforcement against him was not unconscionable.

Case: Hiett v. Lake Barcroft Community Association

The following case shows the flexibility of the public policy doctrine to invalidate waivers.

Hiett v. Lake Barcroft Community Association

Supreme Court of Virginia
June 5, 1992

Robert David Hiett v. Lake Barcroft Community Association, Inc., et al. Record No. 911395. Justice Keenan delivered the opinion of the Court.

Justice BARBARA MILANO KEENAN:

The primary issue in this appeal is whether a pre-injury release from liability for negligence is void as being against public policy.

Robert D. Hiett sustained an injury which rendered him a quadriplegic while participating in the "Teflon Man Triathlon" (the triathlon) sponsored by the Lake Barcroft Community Association, Inc. (LABARCA). The injury occurred at the start of the swimming event when Hiett waded into Lake Barcroft to a point where the water reached his thighs, dove into the water, and struck his head on either the lake bottom or an object beneath the water surface.

Thomas M. Penland, Jr., a resident of Lake Barcroft, organized and directed the triathlon. He drafted the entry form which all participants were required to sign. The first sentence of the form provided:

> In consideration of this entry being accept[ed] to participate in the Lake Barcroft Teflon Man Triathlon I hereby, for myself, my heirs, and executors waive, release and forever discharge any and all rights and claims for damages which I may have or m[a]y hereafter accrue to me against the organizers and sponsors and their representatives, successors, and assigns, for any and all injuries suffered by me in said event.

Evelyn Novins, a homeowner in the Lake Barcroft subdivision, asked Hiett to participate in the swimming portion of the triathlon. She and Hiett were both teachers at a school for learning-disabled children. Novins invited Hiett to participate as a member of one of two teams of fellow teachers she was organizing. During a break between classes, Novins presented Hiett with the entry form and he signed it.

Hiett alleged in his third amended motion for judgment that LABARCA, Penland, and Novins had failed to ensure that the lake was reasonably safe, properly supervise the swimming event, advise the participants of the risk of injury, and train them how to avoid such injuries. Hiett also alleged that Penland

and Novins were agents of LABARCA and that Novins's failure to direct his attention to the release clause in the entry form constituted constructive fraud and misrepresentation.

In a preliminary ruling, the trial court held that, absent fraud, misrepresentation, duress, illiteracy, or the denial of an opportunity to read the form, the entry form was a valid contract and that the pre-injury release language in the contract released the defendants from liability for negligence. The trial court also ruled that such a release was prohibited as a matter of public policy only when it was included: (1) in a common carrier's contract of carriage; (2) in the contract of a public utility under a duty to furnish telephone service; or (3) as a condition of employment set forth in an employment contract.

Pursuant to an agreement between the parties, the trial court conducted an evidentiary hearing in which it determined that there was sufficient evidence to present to a jury on the issue of constructive fraud and misrepresentation. Additionally, the trial court ruled that as a matter of law Novins was not an agent of LABARCA, and it dismissed her from the case.

The remaining parties proceeded to trial solely on the issue whether there was constructive fraud and misrepresentation by the defendants such as would invalidate the waiver-release language in the entry form. After Hiett had rested his case, the trial court granted the defendants' motion to strike the evidence. This appeal followed.

Hiett first argues that the trial court erred in ruling that the pre-injury release provision in the entry form did not violate public policy. He contends that since the decision of this Court in *Johnson's Adm'x v. Richmond and Danville R.R. Co.*, 86 Va. 975 (1890), the law in Virginia has been settled that an agreement entered into prior to any injury, releasing a tortfeasor from liability for negligence resulting in personal injury, is void because it violates public policy. Hiett asserts that the later cases of this Court have addressed only the release of liability from property damage or indemnification against liability to third parties. Thus, he contends that the holding in *Johnson* remains unchanged. In response, LABARCA and Novins argue that the

decisions of this Court since *Johnson* have established that pre-injury release agreements such as the one before us do not violate public policy. We disagree with LABARCA and Novins.

The case law in this Commonwealth over the past one hundred years has not altered the holding in *Johnson*. In *Johnson*, this Court addressed the validity of a pre-injury release of liability for future negligent acts. There, the decedent was a member of a firm of quarry workers which had entered into an agreement with a railroad company to remove a granite bluff located on the company's right of way. The agreement specified that the railroad would not be liable for any injuries or death sustained by any members of the firm, or its employees, occurring from any cause whatsoever.

The decedent was killed while attempting to warn one of his employees of a fast-approaching train. The evidence showed that the train was moving at a speed of not less than 25 miles per hour, notwithstanding the railroad company's agreement that all trains would pass by the work site at speeds not exceeding six miles per hour.

In holding that the release language was invalid because it violated public policy, this Court stated:

> [T]o hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct … can never be lawfully done where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void.

This Court emphasized that its holding was not based on the fact that the railroad company was a common carrier. Rather, this Court found that such provisions for release from liability for personal injury which may be caused by future acts of negligence are prohibited "universally."

As noted by Hiett, the cases following *Johnson* have not eroded this principle. Instead, this Court's decisions after *Johnson* have been limited to upholding the right to contract for the release of

liability for property damage, as well as indemnification from liability to third parties for such damage.

In *C. & O. Ry. Co. v. Telephone Co.*, 216 Va. 858 (1976), this Court upheld a provision in an agreement entered into by the parties to allow the telephone company to place underground cables under a certain railway overpass. In the agreement, the telephone company agreed to release the C & O Railway Company from any damage to the wire line crossing and appurtenances. In upholding this property damage stipulation, this Court found that public policy considerations were not implicated.~

Other cases decided by this Court since *Johnson* have upheld provisions for indemnification against future property damage claims. In none of these cases, however, did the Court address the issue whether an indemnification provision would be valid against a claim for personal injury.

[W]e conclude here, based on *Johnson*, that the pre-injury release provision signed by Hiett is prohibited by public policy and, thus, it is void.~

Questions to Ponder About *Hiett v. LABARCA*

A. Does this case mean that a release of liability for parachuting (of the kind found in *Hulsey v. Elsinore Parachute Center*) would not be upheld in Virginia? (A quick search indicates that there is no shortage of skydiving centers in Virginia.)

B. Is it beneficial for triathlon organizers to make entrants sign releases – even if those releases are doomed to be struck down in court as against public policy?

C. If you were an attorney for LABARCA after this case, what would you recommend they do going forward to protect themselves from liability?

Public Policy Exceptions to Express Agreements to Assume Risk

As is apparent in both *Hulsey v. Elsinore Parachute Center* and *Hiett v. LABARCA*, courts impose a public policy limitation to agreements to waive negligence liability.

Where the defendant is providing some kind of service that is essential to a normal, modern life, and where there is unequal bargaining power between the plaintiff and the defendant, the public policy exception is likely to bar the defendant from using exculpatory releases to avoid liability for negligence. Certain traditional categories for the public-policy exception are hospitals, physicians, dentists, public utilities, professional bailiees (e.g., parking lots), and common carriers (e.g., airlines). It is not hard to imagine that if such releases were allowed for hospitals and physicians, it would be impossible to receive medical treatment without having to release claims for negligence. Indeed, the UCLA Medical Center actually tried this, conditioning their treatment on a patient's waiver of any future claim for negligence. Patients had to sign a document called "Conditions of Admission," which included the following:

> Release: The hospital is a nonprofit, charitable institution. In consideration of the hospital and allied services to be rendered and the rates charged therefor, the patient or his legal representative agrees to and hereby releases The Regents of the University of California, and the hospital from any and all liability for the negligent or wrongful acts or omissions of its employees, if the hospital has used due care in selecting its employees.

This was tested in *Tunkl v. Regents of University of California*, 60 Cal.2d 92 (Cal. 1963). Justice Trobriner wrote for the court:

> While obviously no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party, the above circumstances pose a different situation. In this situation the