Assessing Foreseeable Risks and Costs

1. Court issues:
   1. determines defendant owed plaintiff a duty (usually reasonable care)
   2. question for jury is whether the defendant breached the duty by exercising requisite care
2. **Negligence: overt conduct that creates unreasonable risk of harm that a reasonable person would avoid**
   1. risk of harm is unreasonable when:
      1. reasonable and prudent person would foresee the harm
      2. would avoid conduct that creates the risk
3. ACTS THAT CREATE RISK (p121)
4. FORESEEABILITY OF HARM
   1. **Pipher v. Parsell (pg 123)**
      1. ***PURPOSE: To illustrate foreseeability***
      2. COURTS:(Del 2007) D=Parsell P=Pipher, D won on summary judgment.  On Appeal argues negligence was not a matter of law.  Reversed.
      3. FACTS: Parsell driving, Pipher in middle in pickup truck. When three sixteen-year-olds were driving in a pick-up, the passenger-side rider unexpectedly grabbed the wheel two times, and the second time it happened the truck left the road and Pipher (P) was injured.
      4. ISSUE: Was their negligence because Parsell did not discharge the dangerous passenger? Was their negligence because did not admonish dangerous passenger?
      5. RULE: When the actions of a passenger that cause an accident are not foreseeable, there is no negligence attributable to the driver, but when the actions of a passenger that interfere with the driver’s safe operation of his vehicle are foreseeable, the failure to prevent such conduct may be a breach of the driver’s duty to other passengers or the public.
      6. ANALYSIS: Argues once it happened the first time there was a duty to exercise reasonable care.
      7. CONCLUSION: There were enough reasons this should have been submitted to a jury.
   2. Foreseeability of Harm
      1. An actor is negligent only f his conduct created foreseeable risk and the actor recognized, or a reasonable person would have recognized, that risk.
      2. If there is an element that the risk was foreseeable it is for a jury to decide.
   3. Unforeseeable
      1. Where a reasonable person in the defendant's circumstances would not foresee any danger, then, the defendant is "simply not negligent".
5. UNSTRUCTURED WEIGHING OF RISKS AND COSTS
   1. **Indiana Consolidated Ins. v. Mathew (pg 127)**
      1. PURPOSE: Not negligence under circumstances
      2. COURTS :(IN 1980) Mathew won at trial.  Insurance appeals. Judgment affirmed.
      3. FACTS: Lawnmower.  Brothers across street. Added gas, tried to start, fire.  Ran to phone.  Garage engulfed in flames. Mr. Mathew (D) started his brother’s lawnmower to cut his brother’s lawn and the lawnmower caught fire damaging his brother’s garage.
      4. ISSUE: Is the standard of care to determine negligent conduct whether a person exercised the duty to use carethat an ordinary prudent person would exercise under the same or similar circumstances?
      5. RULE: The standard of care to adjudge negligent conduct is whether a person exercised the duty to use care that an ordinary prudent person would exercise under the same or similar circumstances.
      6. ANALYSIS: Looked at each of his three actions (1) Filling gas tank, (2) Starting inside, (3) Failed to push outside.  In all court determined he acted like a reasonable person.
      7. CONCLUSION: He acted as a reasonable and prudent person under similar circumstances.
      8. FROM CLASS
         1. Risk Utility Analysis – there is more social utility that he did not move the mower. It would have created a greater risk.
   2. **Stinnett v. Buchele (pg 130)**
      1. PURPOSE: Illustrates foreseeability and also personal responsibility
      2. COURTS: (KY 1980) Buchele is defendant and employer.  Lower Court granted summary judgment in favor of defendant.  Affirmed.
      3. FACTS: Employee hired to paint a barn roof falls from the roof while painting it and injuries himself.
      4. ISSUE: Did Buchele have a duty to provide safety devices?
      5. RULE: reasonably safe tools for doing the work when the employee injures himself during the scope of his employment and the employee’s knowledge of the dangers to be incurred while working is equal to or exceeds the knowledge of the employer.
      6. ANALYSIS: Negligence is careless conduct under the circumstances.
      7. CONCLUSION:
   3. FROM CLASS
      1. Assessment of risk can then include, what can the plaintiff do?
   4. The Obviousness of Risk
      1. The obviousness of danger may make the likelihood of its materializing so slight that there is no need to try to eliminate the risk.
   5. **Bernier v. Boston Edison Co. (Pg 133)**
      1. PURPOSE: Illustrates weighing risks
      2. COURTS: (MASS 1980). Bernier and Kasputys sued Ramsdell and Boston Ed. Against Boston Edison for negligently designing, selecting, constructing the poll. Jury found against Ramsdell and Edison. Edison appeals. “The jury made a judgment as to the social responsibility of the design…”
      3. FACTS: May 1972. Bernier and girlfriend leaving ice cream shop. Alice Ramsdell, started to pull out from the curb, last spot on Massachusetts Ave. She saw a Car coming up behind her but felt she could go. The two collided. She bumped her head on the steering wheel and her foot slipped to the accelerator. She ended up crossing the street she intended to turn right on and was now on the sidewalk, heading East on Mass. Ave. She scraped a store, leveled a parking meter, and hit a car. She also struck an electric pole (owned by Defendant). The electric pole when it fell came down across the plaintiff’s legs. Breaking both thighs and his shin bone.
      4. ISSUE: Does a person or a corporation have a duty to reasonably foresee accidents that create an unreasonable risk of injury and take reasonable steps to mitigate the risk of injury?
      5. RULE: Failure to take reasonable steps to prevent unreasonable risk of injury from reasonably foreseeable accidents is negligence.
      6. ANALYSIS: Left in the grip of a problem to way risks of motorists against pedestrians. However, Edison had only demonstrated concern for costs, not for safety.
      7. CONCLUSION:
   6. FROM CLASS
      1. This is a polycentric problem. Probability of harm is high, liability from harm is high, and burden of cost is low.
6. STRUCTURED WEIGHING OF RISKS
   1. **United States v. Carroll Towing (Pg 137)**
      1. PURPOSE:
      2. COURTS: (2d Cir 1947) first held Carroll Towing (Grace Line) liable. Then considered whether no bargee on board the Anna C. was negligence that reduced recovery to Anna C owners (Conners).
      3. FACTS: Barge “Anna C.” loaded with flour. Caroll Towing owned by Grace Line. Carried by wind and tide against a tanker whose propeller broke a hole in her bottom. No bargee on board the Anna C thus no one there to report damage and Carroll Towing could have used pumps. Instead, she careened, dumped cargo, and sank.
      4. ISSUE: Must an owner protect the barge at hand 24/7 via his bargee?
      5. RULE: Absent a reasonable excuse an owner is liable. It is not intention to require 24/7 monitoring, but to be prudent.
      6. ANALYSIS: Must consider three factors:
         1. (P) - Probability she will break away
         2. (L) - Resulting injuries if she does break away
         3. (B) - Burden of alternate precautions
         4. Thus, the burden is less than the liability multiplied by the probability. B<PL
      7. CONCLUSION:
   2. FROM CLASS
      1. Famous case by Learned Hand
      2. Due to defendants negligence
      3. Model addresses rational factors
   3. Applying the Risk-Utility Formula
      1. Estimating Risks – everything has risk
      2. Estimating costs or benefits
         1. How much will a safety precaution cost?
         2. How much benefit will a safety precaution create?
      3. Judicial application – gave sidewalk example and used statistics to determine how often it occurred.
      4. Memory – there is a duty to remember to take care of a risk
      5. Cost of Memory – railroad engineer fails to blow whistle
      6. Costs of information – must be foreseeable.
   4. Evaluating the Risk-Utility Formula
      1. What values? – Provides deterrence
      2. Objections –
   5. FROM CLAS
      1. Think of other ways of addressing costs
         1. Social cost
         2. Information cost
         3. Social utility (garbage truck)
         4. Burdens (rail road)
         5. Environmental analysis
7. **Assessing Responsibility with multiple parties (pg 143)**
   1. When more than one person is negligent
   2. **PLAINTIFF AND DEFENDANT**
      1. Tortfeasor - A wrongdoer; an individual who commits a wrongful act that injures another and for which the law provides a legal right to seek relief; a defendant in a civil tort action.
      2. **Contributory Negligence** – Defendant pays NOTHING
      3. **Comparative Negligence** – The plaintiff’s recovery is not ordinarily reduced for an intentional tort. Recovery is reduced in negligence and strict liability cases.
   3. **DEFENDANT AND DEFENDANT**
      1. Apportionment Among Defendants – dividing (apportioning) among the defendants
      2. **Joint and Several Liability** – Plaintiff can enforce claim against either tortfeasor, a judgment against both. However, cannot collect more than her damages.
      3. Contribution – Primary would pay, secondary would have to contribute back to primary
      4. Insolvent or Immune Tortfeasors – Contribution could not be made and the more solvent party would pay all damages.
      5. **Several Liability** – Proportionate share liability, comparative fault liability. No tortfeasor liable for more than his share. No contribution.
      6. Evaluating
      7. Recapping
         1. Additional Variations
         2. Type of Damages – Joint and Several for economic harm. Only severally liable for non-economic harm.
         3. Threshold Percentage – Joint and Several only if defendant exceeds 50%. Otherwise Several Liability.
         4. Reapportionment of uncollectible shares – assign but then reallocate if uncollectible.
   4. Bases of Liability
      1. Proving and Evaluating Conduct (pg 147)
8. PROVING CONDUCT
   1. Plaintiff must prove each element by a preponderance of the weight of the evidence, the greater weight of evidence.
   2. Negligence must be shown to be more probable than not. Proven by weighing the evidence.
   3. **Santiago v. First Student (Pg 147)**
      1. PURPOSE: illustrates proving conduct
      2. COURTS: (RI 2004) Trial judge granted summary judgment for defendant. Affirmed.
      3. FACTS: Defendant operates a school bus. Plaintiff alleges an accident but cannot recall specifics. Plaintiff describes bus approaching intersection, vehicle coming from the right, bus applied brakes and collided with vehicle. Hurt her face on the seat. No police report of the incident.
      4. ISSUE: whether the plaintiff has met the burden of presenting sufficient evidence.
      5. RULE: A plaintiff bears the burden of proving a defendant’s actions were the proximate cause of her injuries.
      6. ANALYSIS: the plaintiff attempts to justify the lack of evidence to support her claim by pointing to the nature of the accident.
      7. CONCLUSION:
   4. FROM CLASS
      1. **Burden is on plaintiff to prove** 
         1. **What act constituted negligence**
         2. **Identify the safer conduct**
9. PROVING CONDUCT
   1. Difficulty in obtaining accurate statements
      1. Contradictory testimony – Jury must determine
      2. Uncontradicted Evidence – Jury might not believe
   2. Forsyth v. Joseph
      1. FACTS: Occupant of a car struck by truck.
   3. Circumstantial Evidence – often the most important evidence in tort cases.
      1. “Any fact or issue can be proved by circumstantial evidence as well as direct evidence.”
      2. Evidence is evidence of one fact that tends to establish some other fact. Is evidence of one fact, or of a set of facts, from which the existence of the fact to be determined may be reasonably be inferred.
   4. Judge and Jury
      1. Questions of fact and credibility are for the jury to decide.
      2. Juries are called upon to decide not merely facts but make decisions of conduct.
         1. Jury – what are the facts?
         2. Evaluation of the facts
   5. Witness Opinions
      1. Non-Expert – witnesses not ordinarily allowed to give opinions.
      2. Expert – are allowed to give opinion.
   6. Kibler v. Maddux
10. EVALUATING CONDUCT THROUGH NOTICE (pg. 153)
    1. **Thomas v. Cracker Barrel Old Country Store (Pg 153)**
       1. PURPOSE: The evidence is presented through inference and this is a question for the jury.
       2. COURTS: (FLA DCA 1995). Summary judgment granted for Cracker Barrel at trial court.
       3. FACTS: Thoma rose from her table, took several steps and fell. She states there was liquid on the floor (1-2 feet square) and says she slipped on it. One witness, saw no one carrying drinks nor saw anyone drop or spill anything. Mr. Charlie Gray, Mgr., saw no foreign substance on the floor.
       4. ISSUE: Whether there is evidence for a jury to determine is supported through inference.
       5. RULE: Slip and fall accident: plaintiff must show that the premise owner either created a dangerous condition or had actual or constructive knowledge of the dangerous condition.
       6. ANALYSIS: conflicting testimony.
       7. CONCLUSION: Summary judgment takes away the jury’s opportunity to review the evidence and make inferences.
    2. ***Three theories of proving defendants negligence in slip and fall accidents.***
       1. The defendant created and failed to take reasonable actions to abate the hazard
       2. The defendant did not directly create the condition but discovered a condition (or should have) and failed to take reasonable steps
       3. Defendant’s mode of operation made it foreseeable that others would create a dangerous condition and failed to take reasonable measures to discover and remove it. Should have discovered.
       4. Chief method is to show the substance has been there for a relatively long time.
    3. Reasonableness

Violation of Private Standard (pg 156)

1. ACTOR'S OWN STANDARD
   1. Wal-Mart Stores, Inc. v. Wright
      1. Trial found or Wright. Reversed.
      2. Cannot use one’s own higher expectations against himself.
      3. Evidence bearing on what could be care, but does not set the standard of care.
   2. FROM CLASS
      1. Shopkeepers rules – manuals and policies can go to evidence, not care or standard of care.
2. CUSTOM
   1. **Duncan v. Corbbetta  (Pg 157)**
      1. PURPOSE: illustrates ordinary custom exceeding code
      2. COURTS: (1991) Plaintiff appealed. App court ruled although there was error at trial did not harm defendant.
      3. FACTS: Plaintiff descending stairs and top stair collapsed. Regular wood, not pressure treated wood was used. Trial judge did not allow plaintiff’s expert to testify that pressure treated wood is the common custom.
      4. ISSUE:
      5. RULE: Proof of a general custom is admissible because it tends to establish a standard by which ordinary care can be judged even when in excess of code or statute.
      6. ANALYSIS:
      7. CONCLUSION:
   2. NOTES
      1. Evidence defendant violated customary standards of the community is generally sufficient to go to the jury
      2. “What usually is done may be evidence of what ought to be done, but what ought to be done is set by the standard of reasonable prudence, whether it is usually complied with or not.”
   3. **The T.J. Hooper  (Pg 159)**
      1. PURPOSE:
      2. COURTS: Judge found all vessels unseaworthy. Gave interlocutory decree holding each tug and barge jointly liable to each cargo owner, and each tug for half damages loss of its barge. Affirmed.
      3. FACTS: Two tugs (Montrose and the Hooper) towing two barges. The barges were lost in a gale storm. Two suits: cargo owners sued barge owners and barge owners sued tugs. Radios were owned personally, toys, not furnished by the owner as it was not customary. One line did it.
      4. ISSUE:
      5. RULE: Courts in the end say what is required, there are precautions so imperative that even their universal disregard will not excuse their omission.
      6. ANALYSIS: When some said the radio was necessary the court may at least say they were right and those without were slack.
      7. CONCLUSION:
   4. FROM CLASS:
      1. Customs are used as evidence
      2. Ordinance becomes a standard of care (Negligence per se)
         1. When an ordinance it is a floor for the duty of care required and becomes negligence per se
         2. When a custom it only serves as evidence
      3. Role of safety customs
         1. Violations as evidence of negligence
         2. Customs manual code
            1. Not a standard of care
            2. But if statute or ordinance then it may be a standard of care

Compliance with Statute (pg 161)

1. Compliance
   1. Statutes can sometimes define a duty of care.
   2. **Miller v. Warren  (Pg 161)**
      1. PURPOSE: Illustrates a statute
      2. COURTS: Trial judge instructions, found for defendant. Appellate court reversed and remanded.
      3. FACTS: Plaintiffs suffered serious burns in a motel that did not have fire alarms.
      4. ISSUE: Because the motel complied with the law was there negligence?
      5. RULE: Compliance with a rule does not constitute care per se. Failure to comply with a code or regulation constitutes prima facia negligence
      6. ANALYSIS:
      7. CONCLUSION: Statutory regulation merely sets the floor of due care.

**Unspecified Negligence - Res Ispa Loquitor**

1. ORIGINS and BASIC FEATURES
   1. The doctrine of res ipsa loquitur (Latin for "the thing itself speaks") states that the elements of duty of care and breach can be sometimes inferred from the very nature of an accident or other outcome, even without direct evidence of how any defendant behaved.
   2. **Byrne v. Boadle  (Pg 162)**
      1. PURPOSE: Illustrate Res Ipsa Loquitor – negligence is obvious even with no evidence.
      2. COURTS: Trial judge “non suited” the case. On appeal by plaintiff.
      3. FACTS: Walking in Scotland Road and lost all recollection. Witness testified a barrel of flour fell on him.
      4. ISSUE: If the plaintiff puts on no evidence of negligence can there be negligence?
      5. RULE: The common sense interpretation of the facts – the accident – spoke for itself.
      6. CONCLUSION:
   3. For res ipsa loquitor to apply there must be three things:
      1. The accident which produced a person’s injury was one which ordinarily does not happen in the absence of negligence.
      2. The instrumentality or agent which caused the accident was under the exclusive control of the defendant
      3. The circumstances indicated that the untoward event was not caused or contributed to by any act or neglect on the part of the injured.
   4. FROM CLASS
      1. Res Ipsa made easy
         1. Injury was probably result of negligence
         2. It was probably Defendant who was negligent
         3. Limiting principles (Point to the Defendant)
            1. Exclusive control
            2. Eliminating other causes-> Plaintiff was not responsible
   5. Notes
      1. Sufficiency of evidence – the plaintiff will survive a motion for directed verdict and it will go to the jury to decide.
      2. Instructions – merely tells the jury that if they do find the existence of these elements then they may draw the inference of negligence.
      3. Permissible inference – creates a permissible inference the jury may draw as it seems fit.
      4. Presumption – sometimes inference is so strong it is common sense.
      5. Thus the defendant has the burden of showing he is NOT negligent
      6. The judge will direct a verdict to the plaintiff unless defendant produces evidence he is not negligent.
      7. FROM CLASS
         1. it requires the defendant to put on proof.
         2. Rebuttal of the evidence.
         3. Defendant must meet with an explanation.
         4. We must ask
            1. What act was negligent
            2. Was there a safer alternative
2. IS NEGLIGENCE MORE PROBABLE THAN NOT?
   1. **Koch v. Norris Public Power District  (Pg 167)**
      1. PURPOSE: Illustrate res ipsa loquitor
      2. COURTS:
      3. FACTS: Power line fell, winds were normal, weather was dry and sunny. When it fell it caused the land to catch fire and damaged plaintiff’s property.
      4. ISSUE: Is this res ipsa loquitor?
      5. RULE: res ipsa loquitor –power lines do not fall on their own, therefore they must have been negligently constructed in the absence of evidence showing otherwise.
      6. CONCLUSION:
   2. **Cosgrove v. Commonwealth Edison  (Pg 168)**
      1. PURPOSE: Illustrate res ipsa loquitor
      2. COURTS:
      3. FACTS: Powerline seen sparking in a storm. Powerline fell and underground gas lines exploded causing a fire.
      4. ISSUE:
      5. RULE: does not apply to the power company as other causes may have been at hand. Applies to gas company, it is the responsibility of the gas company to defend itself.
      6. CONCLUSION: It was not electric company, could not control the storm whereas the gas company had a responsibility. Are there social issues?
   3. NOTES:
      1. Probabilities – judges often us real life experience, rarely do they use actual data
      2. Common Knowledge – to use res ipsa loquitor plaintiff must first show that negligence is more probable than not.
      3. Ordinary Accidents – Only applies when permissible inference rises therefore ordinary accidents would not apply.
   4. **Warren v. Jeffries  (Pg 169)**
      1. PURPOSE: illustrates ordinary accidents
      2. COURTS: NC 1965. At trial, no suit (directed verdict) therefore plaintiff appeals.
      3. FACTS: Six year old child run over by wheel of defendants car, resulted in his death. Jeffries gave keys to mom, kids went to car. All got in. Kids said get out. Wheel ran over him.
      4. ISSUE: Can speculation be evidence of res ipsa loquitor?
      5. RULE: Pure speculation cannot be evidence of res ipsa loquitor.
      6. ANALYSIS: Assume all aspects of plaintiffs evidence true for appeal. What caused the car to roll backward is pure speculation.
   5. FROM CLASS: Using the Core Principles
      1. Injury was probably result of negligence - NOT true. These accidents can happen for other reasons.
      2. It was probably D who was negligent - NOT true.
      3. It cannot be said the injury was probably the result of negligence because these kinds of accidents happen other ways than negligence.
      4. It cannot be said it was probably the defendant who was negligent because
      5. CONCLUSION: the doctrine of res ipsa loquitor is not applicable.
   6. FROM CLASS:
      1. if we have additional evidence to res ipsa we can introduce it. If the complete evidence explains what happens then we are not going to allow. What if it is partial evidence? We need res ipsa because the partial explanation could support the inference.
3. ATTRIBUTING FAULT TO DEFENDANT (pg 171)
   1. **Giles v. City of New Haven  (Pg 171)**
      1. PURPOSE: illustrate fault of defendant
      2. COURTS: Conn 1994. Went to directed verdict for defendant.
      3. FACTS: Plaintiff was an elevator operator for 14 years. Elevator began to move, injured, chain fell and it reversed. She jumped off and sustained injuries.
      4. ISSUE: Can we use res ipsa if the plaintiff may be contributory (control).
      5. RULE: there is no role of exclusive control in res ipsa loquitor
      6. ANALYSIS: Conn’s use of comparative negligence allows res ipsa loquitor. We have never held that any use whatsoever of the instrumentality does not mean we cannot apply. The issue of control is going to the core principle that it was probably the defendant.
      7. CONCLUSION: Defendant could have contributed but is not excluded from using res ipsa loquitor.
   2. Notes
      1. Control Rule – important to establish defendant was negligent, not probably someone else
      2. Exploding Bottle cases – Exclusive control rule is subordinated to its general purpose, that of indicating that it probably was defendant’s negligence which caused the accident.
      3. Eliminating Plaintiff’s Fault –
      4. Comparative Fault basis - there will be res ipsa loquitor
   3. **Collins v. Superior Air-Ground Service (pg 174)**
      1. PURPOSE: Illustrates multiple actors in res ipsa loquitor
      2. COURTS:
      3. FACTS: elderly bedridden woman lived with her daughter. Ambulance service transported woman to rehab center.
      4. ISSUE:
      5. RULE: With only two defendants in consecutive control it had to be one or the other.
      6. ANALYSIS:
      7. CONCLUSION:
   4. Notes
      1. Multiple actors – does not assist the plaintiff and where there is serial control can make it more difficult.