

# Torts

Professor Pope

Class 16: Sept. 27, 2011

# Negligence Introduction

Goodbye intentional  
torts

Negligence is an  
entirely separate  
theory of tort liability

DEF has

**No** desire to pose risk

**No** knowledge with  
subst. certainty

But DEF poses a risk  
to others

Not just any risk

An **unreasonable** risk

## Negligence

Standard of care  
(p. 131-258)

Actual causation  
(p. 259-293)

Proximate causation  
(p. 294-403)

Damages (later)

## Defenses

EAR (~consent)

IAR (~consent)

Contrib./Comp.

SOL, SOR

Immunity

1. Duty
2. Breach
3. Injury
4. Cause in fact
5. Proximate cause

**Negligent** = fail to act as reasonable person would act in the same circumstances

Used often to refer to breach of duty

*E.g.* “Lindsey Thomas was negligent.”

1. **Duty**
2. **Breach**

3. Injury
4. Cause in fact
5. Proximate cause

**Duty** = what would the reasonable person in DEF position do

**Breach** = deviation from that

Showing that DEF was “negligent” does NOT mean proving **liability** for “negligence”

To win **claim** for negligence

PTF must show **not only**  
duty and breach

**But also** causation + damages

DEF injured

Because of the breach

# Standard of Care

Nobody takes **every**  
precaution to avoid  
**all** risks

DEF need not take  
**every** precaution

DEF must only take  
those precautions that  
the **reasonable person**  
would take in same  
circumstances

## DEF duty

What the reasonable  
person would do

### Rest.3d Torts: Phys. Harm § 7

Actor ordinarily has duty  
to exercise **reasonable**  
**care** when actor's conduct  
creates risk of physical  
harm.

## Tools

Intuition

## Guides

Balancing

Custom

Risk utility

Statutes (“per se”)

Res ipsa loquitur

## Special

### DEF

Emergency

Physically disabled

Children

Insane

Skilled/talented

Professionals

# Judge v. Jury

### Rest.3d 8(a)

When . . . reasonable minds can differ as to the **facts** relating to the [DEF] conduct, it is the function of the **jury** to determine those facts.

### Rest.3d 8(b)

When . . . reasonable minds can differ as to whether [DEF] conduct lacks **reasonable care**, it is the function of the **jury** to make that determination

Susan is the mother of Michael, a 23-month-old child. Susan and Michael are visiting at a vacation home owned by their friend Jon. Susan and Michael are in the kitchen; the room is lit by a kerosene lamp on a table.

If Susan leaves the kitchen for an hour in order to read a book, and before she returns Michael knocks over the lantern, starting a fire that damages Jon's cabin, a court should find Susan negligent **as a matter of law.**

If Michael knocks the lantern over during a four-second period in which Susan has turned her back in order to take a boiling pot off the stove, the court should find as a **matter of law that Susan's turning away is not negligent.**

If the lantern is knocked over after Susan, wanting to make a quick phone call, leaves the room for one minute, whether Susan's departure is negligent is a **question for the jury to decide.**

**No** reasonable person would take precaution to avoid **unforeseeable** risk

DEF did **not** fail to do what reasonable person would do in the same circumstances

DEF complied with **duty** (aka **standard of care**)

**Nobody** would plan against risks could not foresee

PWS 133

# Lubitz v. Wells



PWS 134

# Blyth v. Birmingham Waterworks



Probability



Severity

Jury could find  
reasonable person  
**would** take  
precaution to avoid  
**foreseeable** risk

Reasonable person would

Notice and respond to **obvious** risk, even if never occurred before

Take **easy** precautions given risk severity

PWS 135

# Gulf Refining v. Williams



DEF must take **action** reasonable person would based on information

DEF should also **know** information a reasonable person would

No reasonable person would take **expensive** precaution to avoid **remote** risk

Reasonable person would

Would **not** take expensive precautions to avoid low probability or low severity risk



# Davis v. Snohomish County



All  
Risks

Foreseeable  
risks

Those a reasonable person would  
Take precautions to avoid

Jury could find  
reasonable person  
would take **cheap/easy**  
precaution to avoid  
**significant** risk

# Chicago RR v. Krayenbuhl

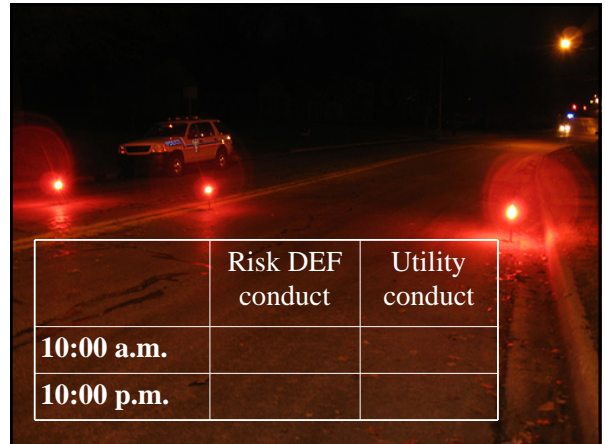




DEF can have many **different theories** of negligence

No reasonable person would **have** a RR turntable given the risk

No reasonable person would leave **unlocked**



# Balancing

Tool for arguing what the reasonable person would do

Risk  
utility

# Risk > utility

Type interests affected  
Extent harm  
# persons

Social value  
DEF conduct  
Chance advance  
Alternatives

USA  
v.  
Carroll  
Towing



As known *ex ante*

Burden of bargee                      Low

Severity risk (loss)                      High

Probability                                  High

**Therefore →  $B < PL$**

# Torts

Professor Pope

Class 17: Sept. 29, 2011

**No** reasonable person would take precaution to avoid **unforeseeable** risk

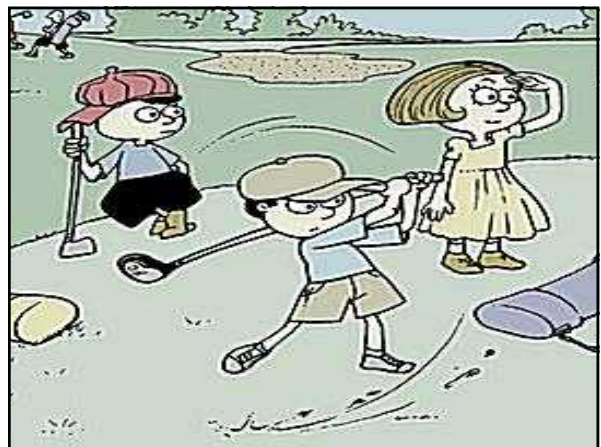
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PWS 133

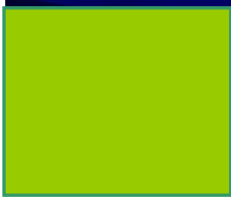
**Lubitz**  
**v.**  
**Wells**



# Blyth v. Birmingham Waterworks



Probability



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PWS 139

**Davis**  
**v.**  
**Snohomish**  
**County**





Jury could find reasonable person would take **cheap/easy** precaution to avoid **significant** risk

PWS 138

# Chicago RR v. Krayenbuhl



DEF can have many **different theories** of negligence

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No reasonable person would leave **unlocked**

	Risk DEF conduct	Utility conduct
10:00 a.m.		
10:00 p.m.		



# Balancing

Tool for arguing what the reasonable person would do

Risk  
/  
utility

## Risk > utility

Type interests affected  
Extent harm  
# persons

Social value  
DEF conduct  
Chance advance  
Alternatives

PWS 141

USA  
v.  
Carroll  
Towing



As known *ex ante*

Burden of bargee Low

Severity risk (loss) High

Probability High

Therefore → **B < PL**



# Torts

Professor Pope

Class 18: Sept. 30, 2011

PWS 141

# USA v. Carroll Towing



As known *ex ante*

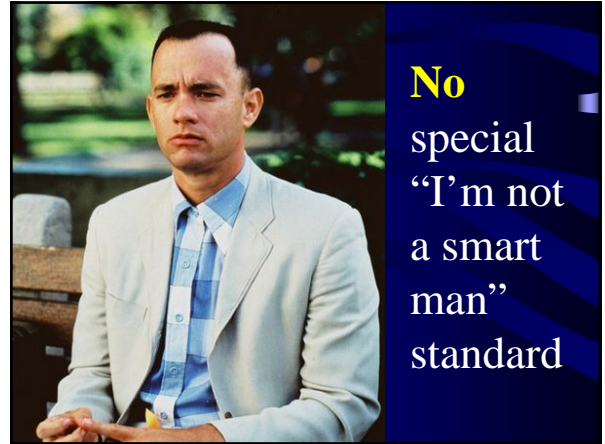
Burden of bargee	Low
Severity risk (loss)	High
Probability	High

Therefore →  $B < PL$

Reasonable  
person standard  
is **objective**

PWS 145

# Vaughan v. Menlove



I. CONDUCT	B-	B-	B
A. IS ATTENTIVE	B	B	B
B. ACCEPTS CORRECTION	A-	A-	A
C. IS COURTEOUS	A	A	A
D. TAKES CARE OF PROPERTY	A-	A-	A
E. DOES CAREFUL WORK	A-	A	A
F. WORKS WELL WITH OTHERS	A	A	A
G. FINISHES WORK ON TIME	A	A	A
<del>II. EFFORT</del>	<del>B</del>	<del>A-</del>	<del>A</del>

Negligence = conduct worse than the reasonable person

You can do **your** best and still be negligent. There’s no “A” for effort

PWS 148

**Delair**  
**v.**  
**McAdoo**



DEF **not** measured against what reasonable person, **who knew what DEF knew**, would do

DEF deemed to have knowledge of ordinary person

DEF measured against what reasonable person who knew what DEF **should have** know would do

### Neighborhood knowledge

Ice is slippery

Even if unaware of risk, might be aware of potential for risk that should trigger investigation

# Custom

**Tool for arguing what the reasonable person would do**

### Restatement 3d s 13(b) [sword]

An actor's **departure** from the custom of the community, or of others in like circumstances, . . . is evidence of . . . negligence but does not require a finding of negligence.

### Restatement 3d s 13(a) [shield]

An actor's **compliance** with the custom of the community, or of others in like circumstances, is evidence that the actor's conduct is not negligent but does not preclude a finding of negligence.

# Trimarco v. Klein



Custom is a **guideline** - for the jury to **consider**

Jury can ignore and decide that reasonable DEF would do **more** or **less** than custom

8	UNITED STATES DISTRICT COURT FOR	
9	THE SOUTHERN DISTRICT OF CALIFORNIA	
0		CASE NO.: <b>'11 CV0272 BTM WMc</b>
1	ISAIAH HARRIS, a minor, by and through	<b>COMPLAINT FOR:</b>
2	his guardian ad litem, MARIA CARMEN	
3	HARRIS; MARIA CARMEN HARRIS, an	(1) Negligence;
4	individual; MICHAEL JEROME HARRIS,	(2) Negligent Infliction of Emotional Distress
5	JR., an individual,	(Bystander)
6	Plaintiff,	
7	v.	<b>DEMAND FOR JURY TRIAL</b>
8	WALT DISNEY PARKS AND RESORTS	
	U.S., INC., a Florida corporation; and	
	DOES 1 through 50, inclusive,	
	Defendants.	



UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

THERESA CROAK  
3476 North Wilshire Dr.  
Palatine, IL 60067

and

NEIL CROAK  
3476 North Wilshire Dr.  
Palatine, IL 60067

Plaintiffs,

vs.

SKECHERS, U.S.A., Inc.  
228 Manhattan Beach Blvd.,  
Manhattan Beach, CA 90266

Case No. \_\_\_\_\_

COMPLAINT WITH  
DEMAND FOR JURY TRIAL

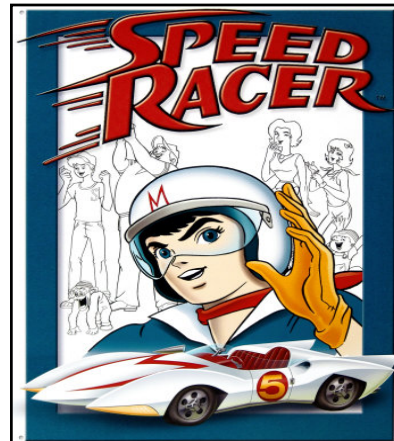
Some DEF measured  
ONLY against what  
**certain** other reasonable  
persons would do in the  
same circumstances

Skilled/talented  
Emergency  
Physically disabled  
Children (with exception)  
Insane (narrow)  
Professionals

**Skilled or  
Talented DEF  
Standard of care**

**Restatement 3d s 12**

If an actor has **skills or knowledge**  
that exceed those possessed by  
most others, these skills or  
knowledge are circumstances to be  
**taken into account** in determining  
whether the actor has behaved as a  
reasonably careful person.



Extra  
skill



Held to  
higher  
standard



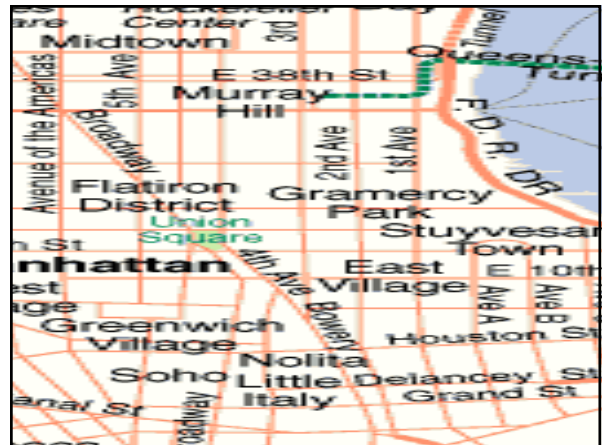
# Emergency Standard of Care

## Restatement 3d s 9

If an actor is confronted with an **unexpected emergency** requiring rapid response, this is a circumstance to be **taken into account** in determining whether [DEF] conduct is that of the reasonably careful person.

PWS 154

# Cordas v. Peerless Transp.



# Physical Disability Standard of care

## Restatement 3d s 11

- (a) The conduct of an actor with **physical** disability is negligent only if it does not conform to that of a reasonably careful person **with** the same disability.

**Roberts v.  
Louisiana p.157**





# Torts

Professor Pope

Class 19: Oct. 4, 2011

"The reasonable man adapts himself to the world; the unreasonable one persists in trying to adapt the world to himself. Therefore all progress depends on the unreasonable man."  
-George Bernard Shaw



## Standard of care

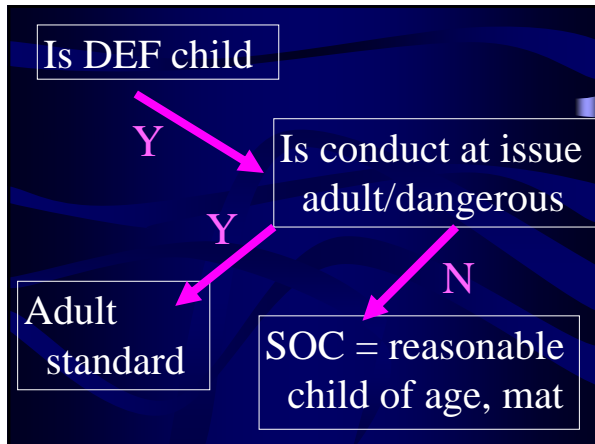
# Children

### Restatement 3d s 10

(a) A **child's** conduct is negligent if it does not conform to that of a reasonably careful person of the **same age, intelligence, and experience**, except as provided in (b) or (c).

(b) A child **less than 5 years** of age is incapable of negligence.

(c) The special rule in (a) does not apply when the child is engaging in a **dangerous activity** or one characteristically undertaken **by adults**.



# Robinson v. Lindsay



**Judge**  
Which standard  
Which instruction

**Jury**  
Measure DEF conduct  
against given standard

**Standard of care**

# Insane

**Restatement 3d s 11(c)**

An actor's mental or emotional disability is **not considered** in determining whether conduct is negligent, unless the actor is a child.

Incentive for those taking care to take care

Avoid false claims of mental disability

Courts need not determine degrees of disability

Jury **MAY** consider mental disability IF

Affects ability to understand or appreciate, or ability to control

**and** sudden, no notice

**Breunig**  
**v.**  
**Am Fam Ins**



Contrast *Breunig*  
with *Cohen v Petty*  
p.10

# Standard of care Professionals

“Professional negligence”

“Malpractice”

Standard against which  
**professional DEF** measured

What the reasonable, prudent  
**professional** would have  
done in same circumstances

Basically just a special  
form of **custom**

Need **expert witness** from  
that profession to tell the  
jury about the custom

New lawyers/doctors  
Same standard as the rest  
of the profession

No lower “beginner”  
standard

Specialists (e.g. board-  
certified)

Held to higher standard  
of specialty

# Heath v. Swift Wings



How Fred flew

How Fred should  
have flown

# Hodges v. Carter



Case within a case

**Attorney error** in  
underlying case

But was it **negligent** error



# Boyce v. Brown

Lawyers,  
architects,  
engineers

Physicians

**Lawyers, architects, engineers.....**

Evidence for the jury to **consider**  
about what the reasonable  
professional would have done  
in DEF shoes

Jury can decide standard higher  
or lower

**Physicians**

Custom is what the experts say

Jury makes no normative,  
value judgments

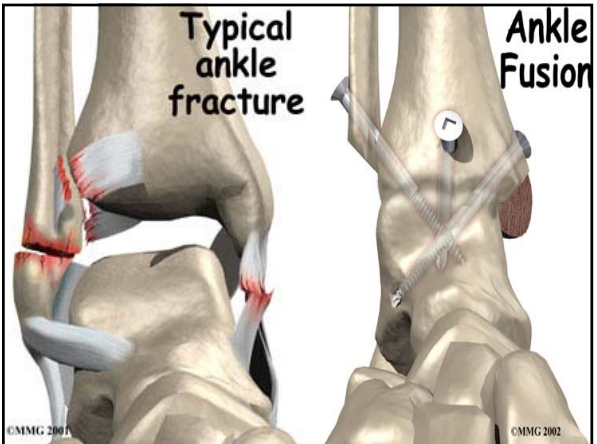
Jury does not say “X is what  
does normally do, but they  
OUGHT to do x+1.”

Custom =  
**evidence** of  
the standard  
of care

All except  
med mal

Custom =  
proof,  
**definition**  
of standard  
of care

Med mal



Sept. 1927	Fix fractured ankle
Nov. 1934	Ankle again
Jan. 1936	Ankle again
Jan. 1936	New doc x-ray See necrosis bone

To show breach, PTF must establish DEF did not do what reasonable, prudent physician would have done

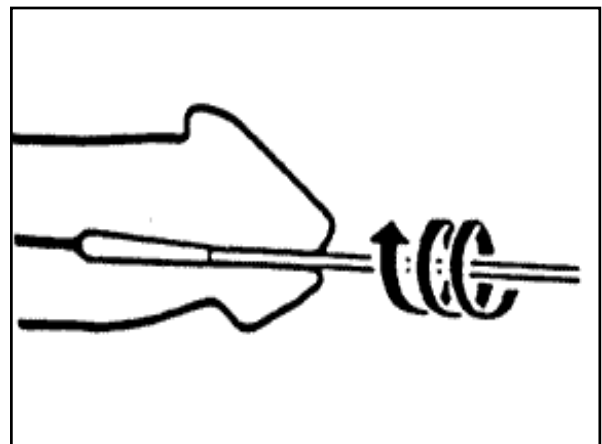
How does/must PTF establish what reasonable, prudent physician would have done

## Dr. Kent

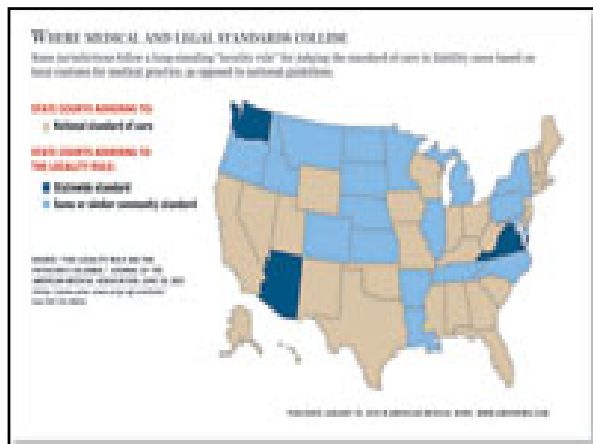
PTF treating physician  
PTF expert  
DEF colleague



# Morrison v. McNamara







**Statewide**

VA DEF duty to act as RPP doc **in VA**

Only VA, WA, AZ

**Same or similar**

DEF duty to act as RPP in DEF community **or** one similar to it

17 jurisdictions

**National**

DEF duty to act as RPP **in USA**

31 jurisdictions

# Torts

Professor Pope

Class 20: Oct. 6, 2011

DEF did **owe a duty** to passengers

Issue is the nature and scope of that existing duty

DEF  
argument

Beisel's act was **not foreseeable**

- No reason to suspect she would grab wheel
- No notice
- No history
- “shock and surprise”

Reasonable person does not take precaution against **unforeseeable risks**

*cf. Lubitz; Blyth*

Taking precautions here would be unreasonable

E.g. never ever take passengers?

E.g. restrain passengers with velcro?

**ISSUE** Did DEF driver breach SOC (fail to do what reasonable person would have done)

**RULE** Reasonable person would take precaution against only foreseeable risks

**ANALYSIS** This risk was not foreseeable because [ ]. Therefore, the reasonable person would not take precaution against it.

**CONCLUSION** Therefore, DEF had no duty to guard against it. Therefore, DEF did not breach any duty to PTF.

## PTF argument

DEF is held to standard of a reasonable driver  
No child standard even though 16

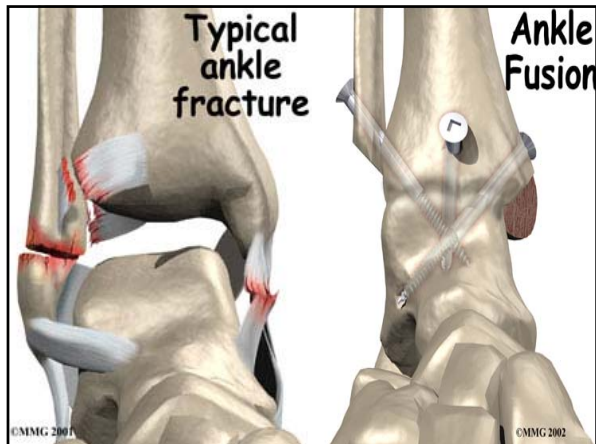
Reasonable driver **should expect** "crazy" things from 16yo just because 16?

Focus not on **prevention** but on **control**

Reasonable driver should have been more **alert** (less talking with passengers)

If more alert → could have maintained **control** when B grabbed wheel

## Boyce v. Brown



Sept. 1927      Fix fractured ankle

Nov. 1934      Ankle again

Jan. 1936      Ankle again

Jan. 1936      New doc x-ray  
See necrosis bone

To show breach, PTF must establish DEF did not do what reasonable, prudent physician would have done

How does/must PTF establish what reasonable, prudent physician would have done

**Dr. Kent**

PTF treating physician

PTF expert

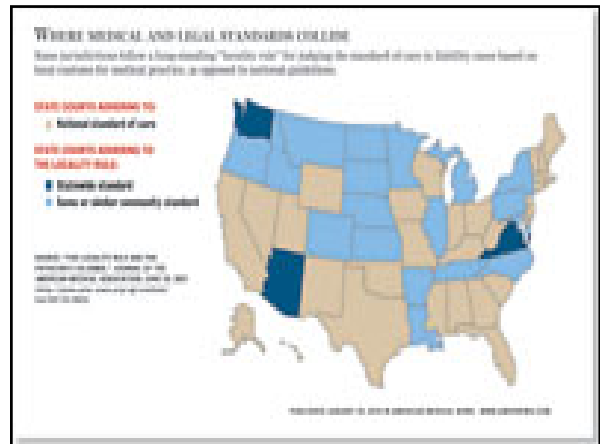
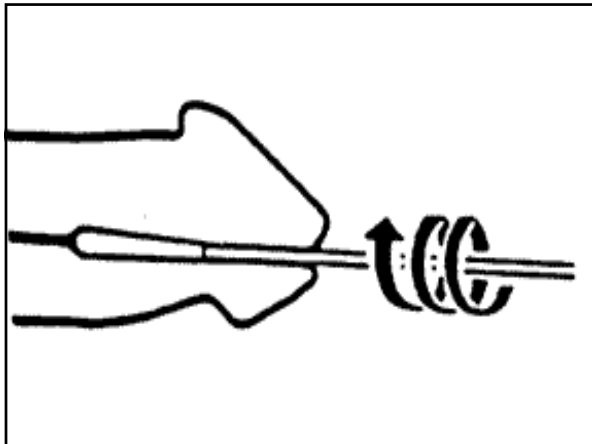
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**Morrison**

**v.**

**McNamara**



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**Informed Consent**

A specific kind of negligence

Where DEF **failed to disclose information** that PTF alleges DEF had a duty to disclose

Informed consent

≠

Battery

### Battery

No consent to any treatment **at all**

E.g. doc does completely different procedure

E.g. doc does procedure on wrong part of body

### Informed consent

Patient **did** consent to the procedure

But would **not** have if disclosure were appropriate

Informed consent

≠

Malpractice

Physician may have **performed** the procedure perfectly

The problem is that the physician did not make appropriate **disclosures**

Usually concerning the **inherent risks**

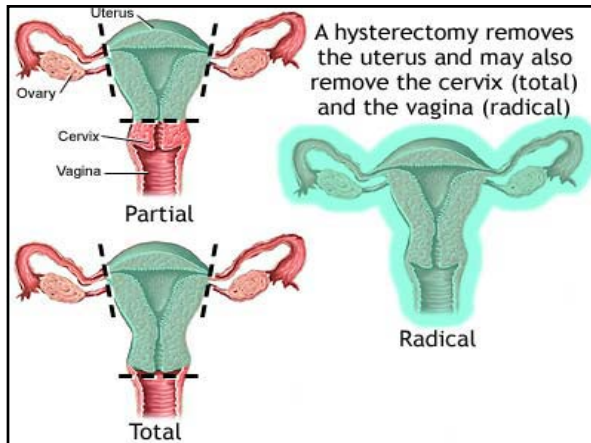
## Inherent risks of proposed treatment

- Probability
- Degree of harm

## Alternatives

- Benefits & risks
- Doing nothing

# Scott v. Bradford



## Duty

Material risk standard  
Professional standard

## Breach

Failure to disclose

## Injury

Undisclosed risk  
materialized

## Causation

If disclosure → no  
consent → no injury

## Professional Malpractice Standard

What would have been disclosed by the **reasonable physician**

Around 25 states (e.g. DE)

## Material Risk Standard

What would a **reasonable patient** consider material in making a treatment decision

Around 25 states (e.g. NJ)



# Exceptions

## Information already known

To this particular patient  
Or is commonly known

## Emergency

Urgent need, immediate care  
Not competent  
No opportunity to secure  
consent from patient or from  
surrogate decision maker

## Therapeutic privilege

Disclosing risk information  
would make the patient so upset:  
That could not make a  
rational choice  
That would materially  
affect medical condition

# Torts

Professor Pope

Class 24: Oct. 18, 2011

## Posted within 10 days

Exam

Scoring sheet

Models

Grade distribution

Your exam (direct email)

Jury instructions  
on duty (standard  
of care)

[PTF] claims that [he/she]  
was harmed by [DEF]'s  
negligence. To establish  
this claim, [PTF] must  
prove all of the following:

**1. That [DEF] was negligent;**

2. That [PTF] was harmed;

3. That [DEF]'s negligence  
was a substantial factor in  
causing [PTF]'s harm.

Negligence is the failure to use reasonable  
care to prevent harm to oneself or to others.

A person can be negligent by acting or by  
failing to act. A person is negligent if he or  
she does something that a reasonably  
careful person would not do in the same  
situation or fails to do something that a  
reasonably careful person would do in the  
same situation.

You may **consider** customs or practices in the community in deciding whether [DEF] acted reasonably.

Customs and practices do not necessarily determine what a reasonable person would have done in [DEF]'s situation. They are **only factors** for you to consider. Following a custom or practice does not excuse conduct that is unreasonable. You should consider whether the custom or practice itself is reasonable.

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A specific kind of negligence

Where DEF **failed to disclose information** that PTF alleges DEF had a duty to disclose

Informed consent

≠

Battery

## Battery

No consent to any treatment **at all**

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- Probability
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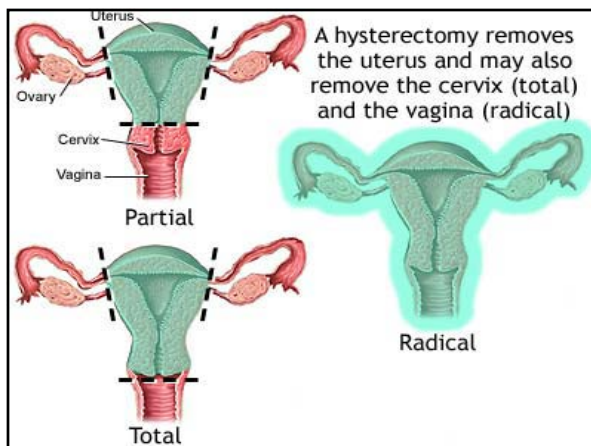
Alternatives

- Benefits & risks
- Doing nothing

Scott

v.

Bradford



Duty

Material risk standard  
Professional standard

Breach

Failure to disclose

Injury

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Around 25 states (e.g. DE)

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## **Exceptions**

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To this particular patient

Or is commonly known

### **Emergency**

Urgent need, immediate care

Not competent

No opportunity to secure consent from patient or from surrogate decision maker

### **Therapeutic privilege**

Disclosing risk information would make the patient so upset:

That could not make a rational choice

That would materially affect medical condition

# Contributory Negligence

Affirmative defense to  
claim of negligence

DEF points to **PTF own**  
negligence

Negligence of the **PTF**

Traditionally a complete  
defense for the DEF

Despite DEF negligence,  
DEF wins because of PTF  
negligence

We will directly address this  
when we get to **defenses**

But some cases explore duty,  
breach, causation issues

# Standard of care Judge set

## Tools/ Guides

- Intuition
- Balancing
- Skilled/talented
- Custom
- Risk utility
- **Judge-made rules**
- **Statutes**

## Special DEF

- Emergency
- Physically disabled
- Children
- Insane
- Professionals (malpractice, informed consent)

**Restatement 2d § 285(c)**

The standard of conduct of a reasonable man may be established by judicial decision

**B&O RR  
v.  
Goodman**

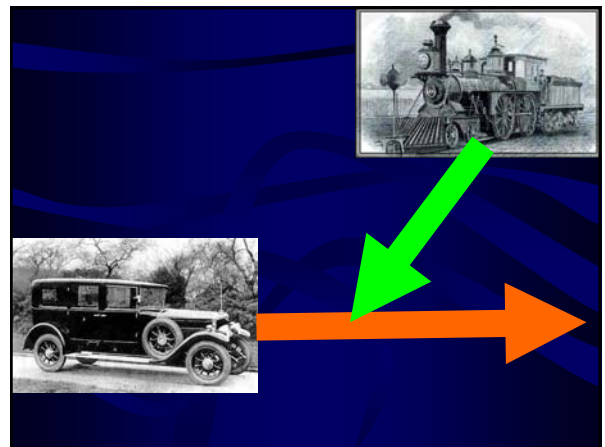
This case authored by J. Holmes

Holmes was replaced by  
J. Cardozo in 1932

J. Cardozo discusses and rejects  
in *Pokora*

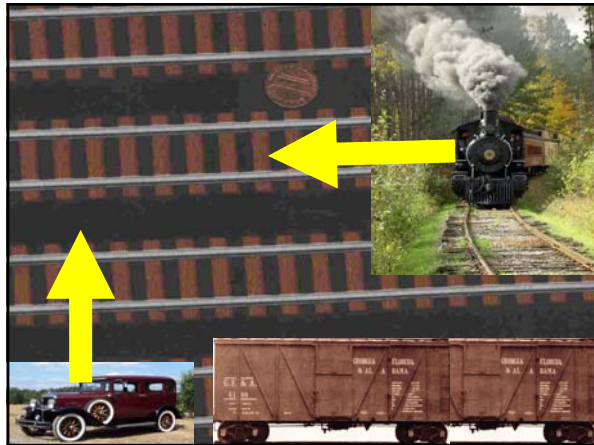
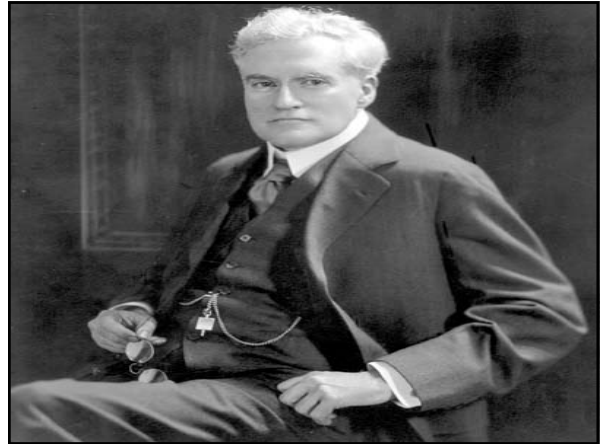


**Holmes:** “When faced with recurring issue, judges should render negligence determination”





# Pokora v. Wabash RR



Today: **Individualization**  
of parties' negligence

“The balance of advantage  
**depends** on many  
circumstances and can  
be easily disturbed.”

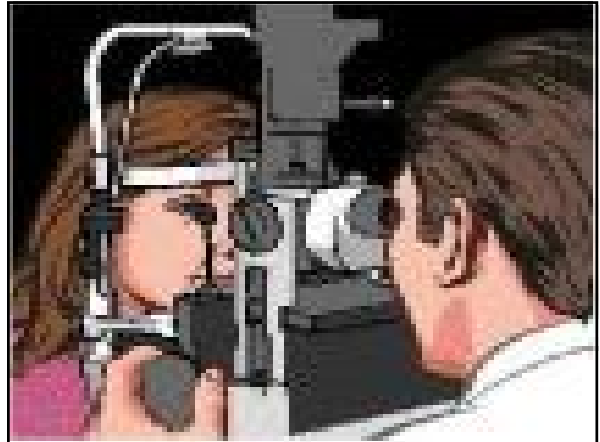
## Rest. 3d Torts s 8

Tort law has  
accepted an “ethics  
of particularism”

If reasonable minds  
can differ

It is for the **jury**  
to determine  
reasonable care

# Helling v. Carey



Judges reject professional,  
custom-based standard of  
care

Judges determine standard  
of care **on their own**

**Standard of care**

**Statutes  
Regulations**

## **Restatement 2d § 285**

The standard of conduct of a  
reasonable man may be

(a) established by a legislative  
enactment or administrative  
regulation which **so provides,**

OR

(b) adopted by the court from  
a legislative enactment or  
an administrative regulation  
which does **not so provide,**

Shortcut to prove what reasonable person would do

Judge determines if borrow statute

Jury determines if statute violated

If no borrow → just use reasonable person

## Statutory standards

Sword

or

Shield

## Sources of Law

(from where to borrow)

Federal statute

Federal regulation

E.g. OSHA, FDA, CMS, DEA, CPSC

State statute

State regulation

Municipal ordinance

## Law on Tort

(what the law says about tort actions)

1. Allow statutory COA
2. Allow borrowing
3. Disallow borrowing
4. Preempt
5. Silent (typical)

**75 Pa. C.S.A. § 4581**

Any person who is operating a passenger car, . . . and who transports a child under four years of age . . . **shall fasten** such child securely

In no event shall a violation . . . be used as evidence . . . nor shall any jury in a civil action be instructed that any conduct did constitute or could be interpreted by them to constitute a violation . . .

Statute still applies  
DOT, AG can prosecute

But PTF cannot use statute as basis for establishing standard of care

**Osborne**  
v.  
**McMasters**

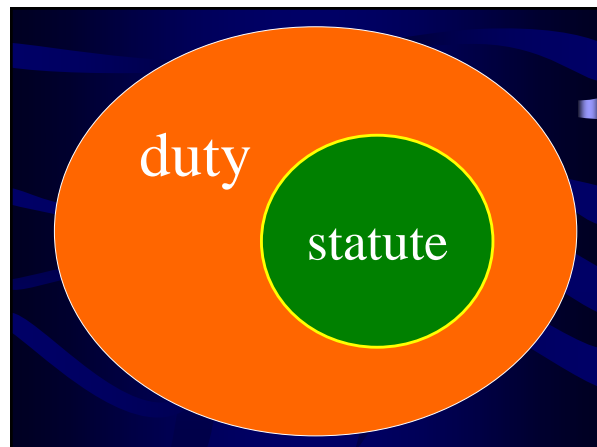




# Standard of care from statutes

**Restatement 3d s 14**

An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect



PTF member of **class**  
intended protection

Intended to cover  
**type of harm** suffered

Otherwise **appropriate**







# Stachniewicz v. Mar-Cam



- Or. Rev. Stat. § 471.410(1)**
- Do not give alcohol to someone visibly intoxicated
- 
- Or. L.C.B. Reg. § 10-065(2)**
- Do not give alcohol to someone visibly intoxicated
  - Do not allow boisterous conduct

# Torts

Professor Pope

Class 25: Oct. 20, 2011

## Standard of care from statutes

### Restatement 3d s 14

An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect

duty

statute

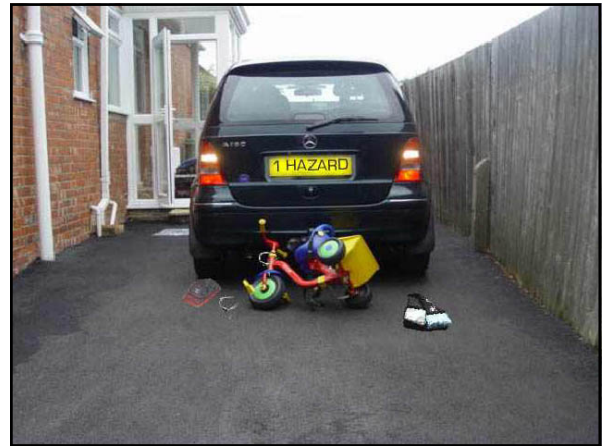
PTF member of **class**  
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Intended to cover  
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Otherwise **appropriate**









# Stachniewicz v. Mar-Cam



## Or. Rev. Stat. § 471.410(1)

- Do not give alcohol to someone visibly intoxicated

## Or. L.C.B. Reg. § 10-065(2)

- Do not give alcohol to someone visibly intoxicated
- Do not allow boisterous conduct

# Ney v. Yellow Cab





**PTF and harm  
in class but  
inappropriate  
to borrow**

**Perry  
v.  
S.N**



**V.T.C.A., Family Code § 261.109. Failure to Report; Penalty**

(a) A person commits an offense if the person has **cause to believe** that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect and knowingly fails to report as provided in this chapter.

(b) An offense under this section is a **Class B misdemeanor**.



V.T.C.A., § 12.22. Class B Misdemeanor

An individual adjudged guilty of a Class B misdemeanor shall be punished by:

- (1) a fine not to exceed \$2,000;
- (2) confinement in jail for a term not to exceed 180 days; or
- (3) both such fine and confinement.

PTF member of class  
intended protection

Intended to cover type of  
harm

Otherwise appropriate

	Negligence	Negligence per se
Supreme Court	?	?
Appellate	DEF	PTF
Trial	DEF	DEF

## Statutory standards:

Often dispositive (re SOC)

Sometimes just  
admissible (re SOC)

If you decide that [P/D] violated this law . . . then you **must find** that [P/D] was negligent.

If you find that [P/D] did not violate this law . . . then you must **still decide** whether [P/D] was negligent in light of the other instructions.

### Negligence per se

Tex. Fam. Code requires reporting

Therefore, reasonable person would report

Not posed as a question to jury

**Pre-defined** for the jury

No negligence per se

1. Extreme change in tort law
2. Could not be limited to serious misconduct (ill-defined standard)
3. Disproportionate liability
4. Defendants relationship to abuse was extremely indirect

“[A] negligence per se cause of action against these defendants would derive the element of duty **solely** from the Family Code. At common law there is generally no duty to protect another from the criminal acts of a third party or to come to the aid of another in distress.

“[I]n most negligence per se cases **already owes** the plaintiff a pre-existing common law duty to act as a reasonably prudent person, so that the statute's role is merely to **define more precisely** what conduct breaches that duty.”

“[R]ecognizing a new, purely statutory duty “can have an **extreme effect** upon the common law of negligence” when it allows a cause of action where the common law would not. . . .

The **change** tends to be especially great when, as here, the statute criminalizes **inaction** rather than action.”

“. . . a person may become aware of a possible case of child abuse only through second-hand reports or ambiguous physical symptoms, and it is **unclear** whether these circumstances [trigger the statute].”

“ . . . legislative intent to penalize nonreporters far less severely than abusers weighs against holding a person who fails to report . . . civilly liable for the enormous damages that the abuser subsequently inflicts. The specter of **disproportionate liability** . . . ”

“[T]he **indirect relationship** between violation of such a statute and the **plaintiff's ultimate injury** is a factor against imposing tort liability. . . . connection between the defendant's conduct and the plaintiff's injury is significantly more **attenuated** in a case based on failure to report”



# Torts

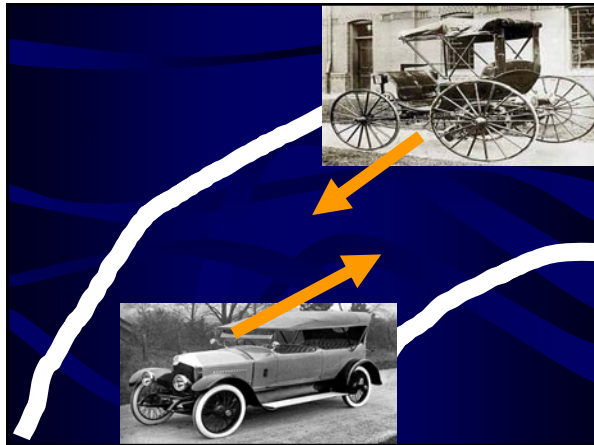
Professor Pope

Class 26: Oct. 21, 2011

Martin

v.

Herzog



Excused  
Violations

If you decide that [P/D]  
violated this law . . .  
then you must find that  
[P/D] was negligent  
[**unless** you also find  
that the violation was  
excused].

Zeni

v.

Anderson



§ 288A

- (a) the violation is reasonable because of the actor's **incapacity**
- (b) he neither **knows** nor should know of the occasion for compliance
- (c) he is **unable** after reasonable diligence or care to comply;

- (d) he is confronted by an **emergency** not due to his own misconduct
- (e) compliance would involve a **greater risk** of harm to the actor or to others.

**Custom**  
**vs.**  
**Statute**



