



CLASS 5

TORTS AND PERSONAL INJURY

NEGLIGENCE: ELEMENTS

1. **Duty:** The defendant must owe a duty to the plaintiff to avoid causing the harm that was eventually caused.
2. **Breach:** The defendant must have breached this duty by acting unreasonably in a manner that was likely to cause the plaintiff's harm.
3. **Causation:** The breach of duty by the plaintiff must have actually been the cause of the injury.
4. **Damages (Harm):** The plaintiff must have actually suffered some kind of injury.

DUTY AND BREACH: THE STANDARD OF CARE

- For there to have been a breached duty, the defendant must have acted in an unreasonable manner. The test to determine this is whether a “**reasonable person**” in the same situation would have acted more carefully.
- Very often, this is a jury question, not just a question of law.

DUTY AND BREACH: THE STANDARD OF CARE (CONT.)

- The “**reasonable person**” test varies under the circumstances.
 - What is reasonable during a life-threatening emergency may not be reasonable under ordinary circumstances.
- Acting in accordance with industry custom is evidence that the defendant acted reasonably, but it is not conclusive.
 - Failing to act in accordance with industry custom is evidence that the defendant acted unreasonably, but it is not conclusive.

DUTY AND BREACH: THE STANDARD OF CARE (CONT.)

- ***Negligence per se***: Acting illegally (violating any law or ordinance) is conclusive evidence of a breach of duty, unless exceptional circumstances warrant an exception.
 - “Duty” includes the duty to warn a victim of impending harm, if there is a special relationship between the plaintiff and defendant.

DUTY AND BREACH: THE REASONABLE PERSON TEST

- Every person is expected to match the standard of care expected of the average person. Thus, even if a person can show that he or she is exceptionally clumsy or careless, that person will still be held to the reasonable person standard.
- **People with disabilities** may have the disability factored into the equation (“a reasonable person with that disability”).
- Mental disabilities are not generally factored into the reasonable person test.

DUTY AND BREACH: THE REASONABLE PERSON TEST (CONT.)

- **Children:**

- Are generally held to the standard of a child of similar, age, intelligence and experience.
- Very young children are incapable of committing a negligence tort.
- If a child engages in an “adult activity” (e.g., driving, blasting, etc.), the child will be held to an adult standard.

DUTY AND BREACH: THE REASONABLE PERSON TEST (CONT.)

- **Experts:**

- Experts in the field or professional service providers are held to the standard of that of the “average” member of the professions. This is true even if the particular defendant is inexperienced.

MEDICAL MALPRACTICE

- **Old Rule**: Doctors were held to the standard of the average doctor in the environment in which he or she practiced
- **New Rule**: Doctors are held to “nationwide” standards and must perform reasonably based on doctors across country.

MEDICAL MALPRACTICE (CONT.)

- **Duty of Disclosure:**

- **A doctor must disclose the risks and side effects of a drug or procedure or face liability for failing to disclose it, unless:**

- It is a life-threatening emergency and there is no time to make the disclosure
- The doctor reasonably believes that, based on the patient's physical or mental condition, the disclosure would be harmful to the patient

MEDICAL MALPRACTICE (CONT.)

- The *Tarasoff* rule:
 - **A doctor/ psychologist has the duty to disclose to a third party, the intent of a patient to harm that third party!**
 - Note that causation is still required in all of these cases.



QUIZ TIME

DUTY: THE FORESEEABILITY REQUIREMENT

- To owe and breach a “duty” to a person, it must be foreseeable that your actions would hurt another person. (The *Palsgraf* case)
- Standard: “The eye of reasonable vigilance, looking forward, would foresee an unreasonable risk of harm to the plaintiff, should the defendant proceed in the absence of due care.”
- Anyone within the “zone of danger” that arises from the defendant’s negligent actions is foreseeable.

DUTY: THE FORESEEABILITY REQUIREMENT (CONT.)

- Some concrete rules:
 - Rescuers and rescuers' injuries are foreseeable
 - That children will use dangerous instruments left at their disposal is foreseeable
 - Encouraging a person to commit a harmful act makes it foreseeable that he or she will do so

BREACH OF DUTY

- For a breach to occur, the defendant's conduct must have been unreasonable; if the conduct was reasonable under the circumstances, there is no breach of duty.
- People are not required to prevent every possibility of harm from happening, if preventing those possibilities is too burdensome or expensive.

BREACH OF DUTY (CONT.)

- The *Hand* formula (from *United States v. Carroll Towing*): If somebody is trying to prevent a greater harm, there is a breach of duty in an action that is likely to cause harm only if:
 - The **BURDEN** of preventing the harm
 - Is **LESS THAN**
 - The **PROBABILITY** of the potential resulting harm,
 - **TIMES** the
 - **GRAVITY** of the potential harm

RES IPSA LOQUITUR

- (Substitute for proving breach of duty)
 - Even if the plaintiff cannot prove that the defendant was negligent, that fact can be inferred if:
 1. The cause of the harm must have been something that does not ordinarily occur in the absence of negligence
 2. The defendant had control over the most likely source of the harm
 3. It cannot be shown that someone other than the defendant contributed to the causing of the harm
- This “shifts” the burden from the plaintiff to the defendant in such a case! The defendant must show lack of negligence instead of the opposite.