

Chapter 3

The Negligence Standard

When a plaintiff sues a defendant for “negligence,” the first question traditionally is whether the defendant owed the plaintiff a duty—an issue considered in a separate chapter. The second question, and the subject of this chapter, is whether the defendant breached that duty by failing to use reasonable care. Often, as in auto accident or malpractice cases where a defendant’s obligation to be careful is obvious because of the risks the activity creates, the existence of a duty is taken for granted; the litigation focuses immediately on whether the defendant breached the duty by acting negligently. Thus while the question of the defendant’s duty to the plaintiff may come first as a formal matter, as a practical matter the first question in many negligence cases is whether the defendant took reasonable precautions against the harm that occurred. This chapter considers a series of issues that arise in answering that question—and the related question of whether the *plaintiff* might have been negligent as well.

The word “negligence” sometimes is used to refer generally to the tort we are studying (the tort of negligence), and sometimes is used to refer more specifically to this second element of the tort (breach of the duty of care owed to the defendant)—in other words, as a sort of synonym for carelessness. So it is possible to refer to a negligent (i.e., careless) defendant who nonetheless is not held liable for the tort of negligence (consisting of duty, breach, causation, and damages). This dual usage of the word can be confusing at first; it may help to avoid speaking of defendants as behaving “negligently,” and to speak instead of their failure to use due care.

A. THE REASONABLE PERSON

Restatement (Second) of Torts (1965)

§283. CONDUCT OF A REASONABLE MAN; THE STANDARD

Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.

This general formulation from the Restatement remains a common basis for a jury instruction in a negligence case. What are the attributes of the reasonable person whose behavior provides the benchmark for this judgment? Is the reasonable person of tort law simply a person with average intelligence, ability, and experience? Or is it perhaps an average person with the defendant's intelligence, ability, and experience? If there are two defendants in a case, one 15 years old and the other 50, should their conduct be measured against the same standard, or against the conduct of reasonable people aged 15 and 50, respectively, or against a generic standard?

1. *Mental Ability and Mental States*

Williams v. Hays

143 N.Y. 442, 38 N.E. 449 (1894)

157 N.Y. 541, 52 N.E. 589 (1899)

[The defendant, William Hays, was captain and part owner of the *Emily T. Sheldon*, a two-masted sailing ship bound from Maine to Annapolis with a cargo of ice. Soon after leaving port the ship encountered a storm with high winds, heavy rains, and light snow. Hays tried to sail the ship toward Cape Cod, but it became impossible for him to tell where he was. He set the ship's two sails against each other to bring the vessel to a standstill and ride out the storm. After twenty-four hours of this he again tried to find Cape Cod; another twelve hours later, the Thatcher Island lights (a pair of lighthouses near Gloucester) at last came into view. Though the seas remained heavy, the storm subsided, and Hays retired to his cabin. He had been on the deck of the ship and with little to eat for forty-eight hours. He took 15 grains of quinine (a remedy—not alcoholic—for fever and malaria, which Hays feared he might have contracted) and lay down. A few hours later, the ship's mate roused Hays to say that the crew was having trouble steering the ship. A tugboat soon passed, said that the *Sheldon's* rudder appeared to be broken, and offered to tow the vessel to shore. Hays declined. Another tug passed and made a similar

offer; this, too, Hays refused. The testimony of the *Sheldon's* crew was that at this point Hays was "staggering about the vessel, making irresponsible answers to questions, appeared to be in a dazed condition, and to be either drunk or insane." The crew told Hays that the *Sheldon* was being dragged toward shore by the tides, but he would take no measures in response. The ship eventually was wrecked on Peaked Hill Bar, near Provincetown. A life-saving boat soon arrived, but it took its crew several hours to coax Hays to come ashore. Hays later was able to remember nothing that had occurred that day.

EARL, J.—[after stating the facts:] [The plaintiff, as representative of the *Sheldon's* other owners,] brought this action against the defendant to recover damages for the loss of the vessel, alleging that it was due to his carelessness and misconduct. The defendant claims that from the time he went to his cabin, leaving the vessel in charge of his mate and crew, to the time the vessel was wrecked, and he found himself in the life saving station, he was unconscious, and knew nothing of what occurred, that in fact he was, from some cause, insane, and therefore not responsible for the loss of the vessel. The case was submitted to the jury on the theory that the defendant, if sane, was guilty of negligence causing the destruction of the vessel, but, if insane, was not responsible for her loss through any conduct on his part which, in a sane person, would have constituted such negligence as would have imposed responsibility. [The jury found for the defendant, and the plaintiff brought this appeal.]

The important question for us to determine, then, is whether the insanity of the defendant furnishes a defense to the plaintiff's claim, and I think it does not. The general rule is that an insane person is just as responsible for his torts as a sane person, and the rule applies to all torts, except, perhaps, those in which malice, and therefore intention, actual or imputed, is a necessary ingredient, like libel, slander, and malicious prosecution. In all other torts, intention is not an ingredient, and the actor is responsible, although he acted with a good and even laudable purpose, without any malice. The law looks to the person damaged by another, and seeks to make him whole, without reference to the purpose or the condition, mental or physical, of the person causing the damage. The liability of a lunatic for his torts, in the opinions of judges, has been placed upon several grounds. The rule has been invoked that, where one of two innocent persons must bear a loss, he must bear it whose act caused it. It is said that public policy requires the enforcement of the liability, that the relatives of a lunatic may be under inducement to restrain him, and that tortfeasors may not simulate or pretend insanity to defend their wrongful acts, causing damage to others. The lunatic must bear the loss occasioned by his torts, as he bears his other misfortunes, and the burden of such loss may not be put upon others. [. . .] [The court quoted from *Cooley on Torts*:] "Undoubtedly, there is some appearance of hardship, even of injustice, in compelling one to respond for that which, for want of the control of reason, he was unable to avoid; that it is imposing upon a

person already visited with the inexpressible calamity of mental obscurity an obligation to observe the same care and precaution respecting the rights of others that the law demands of one in the full possession of his faculties. But the question of liability in these cases, as well as in others, is a question of policy; and it is to be disposed of as would be the question whether the incompetent person should be supported at the expense of the public, or of his neighbors, or at the expense of his own estate. If his mental disorder makes him dependent, and at the same time prompts him to commit injuries, there seems to be no greater reason for imposing upon the neighbors or the public one set of these consequences, rather than the other; no more propriety or justice in making others bear the losses resulting from his unreasoning fury, when it is spent upon them or their property, than there would be in calling upon them to pay the expense of his confinement in an asylum, when his own estate is ample for the purpose." [. . .]

If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. He was not responsible for the storm, and while it was raging his efforts to save the vessel were tireless and unceasing; and, if he thus became mentally and physically incompetent to give the vessel any further care, it might be claimed that his want of care ought not to be attributed to him as a fault. In reference to such a case, we do not now express any opinion.

[Reversed and remanded.]

[After the case was returned to the trial court, the defendant, relying on the last paragraph excerpted above, argued that the case should be sent again to a jury to determine "whether or not the defendant became insane solely in consequence of his efforts to save the vessel during the storm." The trial judge disagreed and gave a directed verdict to the plaintiff. The defendant appealed, and the Court of Appeals again reversed and remanded:]

HAIGHT, J.—[. . .] Upon directing a verdict in favor of the plaintiff, the trial court said: "Assuming, as we must, for such purpose, that the condition of the defendant was the result of exhaustion, caused by his efforts to save the ship from the perils of the storm, and the heavy dose of quinine which he took as a remedy, I fail to see how that presents any exception to the principle laid down by the court of appeals, that a person of unsound mind is responsible for the consequences of acts which in the case of a sane person would be negligent. In other words, the standard by which he is to be judged is the same as that which must be applied to the actions of a sane person. It certainly seems to be a cruel doctrine; but as it is apparently based upon the principle that, as between two innocent persons, the loss must fall upon him who caused it, rather than upon the other, the best that can be said about it is that it is a rule which serves the convenience of the public, to which individual rights must give way." [. . .]

We cannot give our assent to such a view of the law. To our minds it is carrying the law of negligence to a point which is unreasonable, and,

prior to this case, unheard of, and is establishing a doctrine abhorrent to all principles of equity and justice. In this case, as we have seen, the storm commenced on Friday, continued through Saturday and Sunday, and it was not until 5 o'clock Monday morning that the defendant was relieved from the care of his vessel. For three days and nights he had been upon duty almost continuously, and for the last 48 hours had not been below the deck. The man is not yet born in whom there is not a limit to his physical and mental endurance, and, when that limit has been passed, he must yield to laws over which man has no control. When the case was here before, it was said that the defendant was bound to exercise such reasonable care and prudence as a careful and prudent man would ordinarily give to his own vessel. What careful and prudent man could do more than to care for his vessel until overcome by physical and mental exhaustion? To do more was impossible. And yet we are told that he must, or be responsible. Among the familiar legal maxims are the following: The law intends what is agreeable to reason; it does not suffer an absurdity. Impossibility is an excuse in law, and there is no obligation to perform impossible things. Applying these maxims to the case under consideration, we think the fallacy of the reasoning below is apparent, and that it cannot and ought not to be sustained.

Reversed and remanded.

NOTES

1. *The law intends what is agreeable to reason.* What rules emerge from the two opinions of the Court of Appeals? Are they consistent? *Williams v. Hays* often is cited for the proposition that lunacy is no defense to a claim of negligence—a description of the holding that leaves out the qualifications Haight, J., added in the court's second opinion above. When are those qualifications likely to be important? Suppose a surgeon at an understaffed hospital performs surgery for 48 consecutive hours; she then capitulates to exhaustion or madness and commits an act of malpractice. What does *Williams v. Hays* suggest would be the proper instruction for the jury in such a case? What result if the defendant is an overworked associate at a large law firm, resulting in a claim of legal rather than medical malpractice?

After the second decision of the Court of Appeals, the plaintiff dropped his case against Hays. For details, see W. B. Hornblower, *Insanity and the Law of Negligence*, 5 Colum. L. Rev. 278 (1905).

2. *Lacking the highest order of intelligence.* In *Vaughan v. Menlove*, 132 Eng. Rep. 490 (C.P. 1837), the defendant built a haystack near the edge of his property. His neighbor repeatedly complained that it was a fire hazard. The defendant responded that his property was insured, and said that he would "chance it." The defendant later built a chimney through the haystack; either despite this precaution or because of it, however, the stack burst into flames. The fire spread to the defendant's barn and stables, and from there to the

plaintiff's cottages, which were entirely destroyed. The trial court told the jury that it was to decide whether the fire was caused by gross negligence on the part of the defendant; the jury further was instructed that the defendant was bound to use such reasonable caution as a prudent person would have exercised under the circumstances. The jury returned a verdict for the plaintiff. The defendant appealed, contesting the instructions given to the jury and arguing that he "ought not to be responsible for the misfortune of not possessing the highest order of intelligence."

Held, for the plaintiff, that the trial court instructed the jury correctly:

It is contended [. . .] that the learned Judge was wrong in leaving this to the jury as a case of gross negligence, and that the question of negligence was so mixed up with reference to what would be the conduct of a man of ordinary prudence that the jury might have thought the latter the rule by which they were to decide; that such a rule would be too uncertain to act upon; and that the question ought to have been whether the Defendant had acted honestly and bona fide to the best of his own judgment. That, however, would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various. [. . .] The care taken by a prudent man has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question.

Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. That was in substance the criterion presented to the jury in this case[.]

What is the relationship between *Vaughan v. Menlove* and *Williams v. Hays*? Are the cases consistent? Does the same rationale underlie the two decisions?

3. *Mental disabilities*. In *Lynch v. Rosenthal*, 396 S.W.2d 272 (Kan. App. 1965), the plaintiff, Ronald Lynch, was a 22-year-old man with the mental capacity of a child of 10 and an I.Q. of 65. Ten years earlier the defendant's wife had taken Lynch out of the State Home for children who were "subnormal," or mentally retarded; since then Lynch had lived on the defendant's farm, helping out with chores and being treated like a member of the family. One day the defendant asked Lynch to help him with the corn picking. Lynch was instructed to walk between the corn picker and a wagon into which corn from the picker was discharged. He was to pick up any corn that fell onto the ground and put it in the wagon. While attempting to do this, Lynch stumbled into the picker. His right arm became caught in its husking rollers, resulting in serious injuries. Lynch brought a lawsuit claiming the defendant had been

negligent in failing to warn him directly that it would be dangerous to come too close to the picker. The defendant argued that Lynch had been contributorily negligent as a matter of law in coming too near the machine. Lynch's expert, a psychiatrist, testified that there are three categories of subnormal mentality: "moron, low moron, and idiot"; he said Lynch was a "low moron," and did not have the ability to appreciate the danger of moving machinery, though he could have comprehended a clear warning to stay away from it. The jury returned a verdict for Lynch, and the defendant appealed.

Held, for the plaintiff, that the evidence was sufficient to support the verdict, and that the plaintiff was not contributorily negligent as a matter of law. Said the court:

[T]here was medical evidence to the effect that plaintiff's mental condition was such that he would understand a direct warning to stay away from [] machinery, which defendant did not give, but that he might not be able to understand the reason therefor. The extent of his mental deficiency was fully explored in the evidence. [. . .] Here, there is testimony to the effect that defendant directed plaintiff, a mentally subnormal person, to walk behind the picker, between it and the following wagon, which defendant himself admitted was a dangerous place to walk. The plaintiff's contributory negligence, under the evidence here, was for the jury to determine.

What was the significance in this case of Lynch's mental impairments? What is the superficial similarity between *Lynch v. Rosenthal* and *Vaughan v. Menlove* (the L case where the court said the defendant should be held to the standard of a reasonable person regardless of whether he possessed below average intelligence)? In what respects are the two cases answering different questions?

4. *Distinct defects*. From Oliver Wendell Holmes, Jr., *The Common Law* 86-88 (1881):

The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is, that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed

for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.

The rule that the law does, in general, determine liability by blameworthiness, is subject to the limitation that minute differences of character are not allowed for. The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that. If we fall below the level in those gifts, it is our misfortune; so much as that we must act at our peril, for the reasons just given. But he who is intelligent and prudent does not act at his peril, in theory of law. On the contrary, it is only when he fails to exercise the foresight of which he is capable, or exercises it with evil intent, that he is answerable for the consequences.

There are exceptions to the principle that every man is presumed to possess ordinary capacity to avoid harm to his neighbors, which illustrate the rule, and also the moral basis of liability in general. When a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them. A blind man is not required to see at his peril; and although he is, no doubt, bound to consider his infirmity in regulating his actions, yet if he properly finds himself in a certain situation, the neglect of precautions requiring eyesight would not prevent his recovering for an injury to himself, and, it may be presumed, would not make him liable for injuring another. So it is held that, in cases where he is the plaintiff, an infant of very tender years is only bound to take the precautions of which an infant is capable; the same principle may be cautiously applied where he is defendant. Insanity is a more difficult matter to deal with, and no general rule can be laid down about it. There is no doubt that in many cases a man may be insane, and yet perfectly capable of taking the precautions, and of being influenced by the motives, which the circumstances demand. But if insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse.

Did the defendant in *Vaughan v. Menlove* have a “distinct” defect as Holmes used that expression? Did the plaintiff in *Lynch v. Rosenthal*? Holmes’s understanding received the following endorsement in §289 of the Restatement (Second) of Torts (1965):

Comment n. Inferior qualities. If the actor is a child, allowance is made for his inferior qualities of mind and body, and the standard becomes that of a reasonable man with such qualities[.] If the actor is ill or otherwise physically disabled, allowance is made for such disability[.] Except

in such cases, the actor is held to the standard of a reasonable man as to his attention, perception, memory, knowledge of other pertinent matters, intelligence, and judgment, even though he does not in fact have the qualities of a reasonable man. The individual who is habitually wool-gathering and inattentive, absent-minded, forgetful, ignorant or inexperienced, slow-witted, stupid, or a fool, must conform to the standards of the society in which he lives, or if he cannot conform to them must still make good the damage he does.

5. *Bridge unsafe*. In *Weirs v. Jones County*, 53 N.W. 321 (Iowa 1892), the defendant county determined that one of its bridges was in an unsafe condition, condemned it, and posted signs reading "Bridge unsafe" at each end. The plaintiff, unable to read English, drove his wagon over the bridge several days later. The bridge collapsed, and the plaintiff's horses and wagon fell into the stream below. He sued the county to recover for the loss of the animals and the damage to the wagon. The trial court instructed the jury as follows:

[I]f you find from the evidence that the signboards were placed in a conspicuous place at each end of the bridge, and were of such construction as would give warning to a person of ordinary care, about to enter upon the bridge, of its unsafe condition, and if you find from the evidence that such signboards were so maintained up to and at the time plaintiff entered upon the bridge, then the fact that plaintiff was unable to read the English language, if you shall so find, would be no excuse for him[.]

So instructed, the jury brought in a verdict for the county. The plaintiff appealed, claiming the instruction was erroneous. The court of appeals affirmed:

[T]he fact that [the plaintiff] could not read the English language should not require that the board of supervisors should put up impassable and immovable barriers, in order to protect the county from suits for damages, or to post notices or signboards of danger in all languages, so that people of every tongue might be warned of the danger. The laws of this country and the proceedings of the courts are required to be in the English language. The proceedings of the boards of supervisors, and notices ordered by them, are in the same language. The jury found that the precautions taken by the board to protect travelers were reasonably sufficient to notify persons exercising ordinary and reasonable care that the bridge was unsafe. The plaintiff cannot be allowed to claim that some standard of care shall be applied to him which is not applicable to persons in general.

What is the superficial similarity between *Weirs v. Jones County* and *Lynch v. Rosenthal*? What is the distinction between them?

6. *Reasonableness and religion*. In *Friedman v. State*, 54 Misc. 448 (N.Y. Cl. 1967), the plaintiff, Ruth Friedman, was a 16-year-old girl who went sightseeing with a male friend at a ski resort operated by the state of New York. Late in the afternoon they got onto the chair lift at the top of the mountain where they had been hiking and began their descent. A few minutes later the chair lift stopped moving; it had been shut down for the night by one of the resort's attendants, who did not realize that the plaintiff and her friend were still on their way down. They found themselves suspended 20 to 25 feet in the air. They called for help, but there was no response. The plaintiff lowered herself so that she was hanging from the chair, then let go and fell to the ground. She was able to walk to the base camp, where she broke in and used the phone to call for help; but in the fall she had suffered various injuries, including a broken nose, a disfiguring injury to her left nostril, trauma to her left shoulder, whiplash, and resulting "anxiety with nightmares." She brought suit against the state, which moved to dismiss the claim on the ground that the plaintiff had been contributorily negligent. The court of claims found for the plaintiff, and awarded her \$35,000. Said the court:

[I]t does not require much imagination or experience to determine that a lightly dressed 16-year-old city girl might become hysterical at the prospect of spending a night on a mountainside, suspended in the air and with no apparent reason to hope for rescue until the next morning. Secondly, we must add to the fact of expectable hysteria, the moral compulsion this young lady believed she was under, not to spend a night alone with a man.

Claimants called Rabbi Herschel Stahl to testify as an expert witness on the Hebrew Law and the orthodox interpretation and observance of said Law. The Rabbi knew Miss Friedman and her family and he knew that she had been reared in an orthodox observance of her faith. Rabbi Stahl advised the Court that under the Hebrew Law, the Shulchan Arukh, there is a specific law, the Jichud, which absolutely forbids a woman to stay with a man in a place which is not available to third person. To violate this Jichud would be an overwhelming moral sin which would not only absolutely ruin this young girl's reputation but also the reputation of her parents. It was his opinion that a girl who had been trained in a 100 per cent orthodox home, as Miss Friedman was, might go even to the lengths of jumping to her death to avoid violation of the Jichud. [. . .] Rabbi Stahl's testimony established a basis for the moral compulsion that Miss Friedman believed she was under and which, in our opinion, increased the hysteria we believe a young girl might well experience regardless of faith. As stated by Justice Frankfurter in *Watts v. State of Indiana*, 338 U.S. 49, 52: "There is torture of mind as well as body; the will is as much affected by fear as by force."

The court of appeals affirmed, 297 N.Y.S.2d 850 (1969), but reduced the verdict to \$20,000; it reserved judgment on the significance of any moral compulsion the plaintiff may have felt to leap from the chair lift.

What is the superficial similarity between *Friedman v. State* (as decided by the trial court in the excerpt above) and *Weirs v. Jones County*? How would you state the distinction between them? Suppose the plaintiff in *Friedman* had jumped twice as far, and that the jump therefore would have been unreasonable without the plaintiff's religious beliefs but arguably reasonable with them. What result, and on what reasoning?

7. *Contributory negligence*. In many cases plaintiffs are partly to blame for their own injuries. At common law, the doctrine of *contributory negligence* generally provided that plaintiffs whose own carelessness contributed to their injuries could collect nothing from a defendant. The doctrine was capable of producing harsh results; even if the defendant's negligence was clear and the plaintiff was only slightly at fault, the plaintiff nevertheless had to bear the entire loss. Courts ameliorated these consequences by limiting the doctrine in various ways. The most important limitation was the doctrine of *last clear chance*, which held that that a plaintiff was not barred from recovery by his own negligence if the defendant had the last good opportunity to avoid the accident through the use of due care and failed to do so. The details of the doctrine varied from jurisdiction to jurisdiction, but it generally applied in cases where the plaintiff was helpless or inattentive and the defendant became aware of the danger but did not prevent it.

During the later part of the twentieth century these rules were replaced in most states by doctrines of *comparative negligence* that reduced recoveries by negligent plaintiffs in proportion to their fault but did not prevent them from recovering altogether. The shift from contributory to comparative negligence was made by judicial decisions in some states and by legislation in others, and the details of the resulting rules vary. Some states use "modified" forms of comparative negligence, allowing plaintiffs to collect only if they are not more than 50 percent responsible for their injuries; others use a "pure" rule of comparative negligence, allowing plaintiffs who are 90 percent to blame for their injuries to still bring suit to collect the remaining 10 percent. The jury may be invited to consider both how negligent each party was and the causal role that each party's negligence played in contributing to the loss. Some states also use rules of "comparative fault" that allow juries to balance the ordinary negligence of the plaintiff against the gross negligence of the defendant and to apportion liability accordingly. These rules also vary in their effect on the related but distinct defense of *assumption of the risk*. We consider the details of these doctrines and the transition between them in the chapter on Defenses later in the book.

The meaning of the negligence standard generally is the same regardless of whether the plaintiff's or defendant's conduct is being assessed; this

chapter thus uses both types of cases to illustrate the meaning of the term. But can you think of situations where you would expect negligence by the plaintiff and defendant to be judged by different standards, either formally by a court or informally by a jury? What considerations bearing on the negligence standard might be present for potential plaintiffs but not for potential defendants?

8. *One degree of care*. In *Fredericks v. Castora*, 360 A.2d 696 (Pa. App. 1976), the plaintiff was riding in a car that was hit by two trucks. The jury found no negligence on the part of either of the trucks' drivers. The plaintiff appealed, contending that the jury should have been instructed to apply a higher standard to the defendants than it would apply to ordinary drivers; the plaintiff pointed out that both defendants were professionals who drove trucks for a living and had done so for over 20 years. The court of appeals affirmed:

In the present case the trial court in its charge defined negligence as the want of due care under the circumstances and the failure to act as a reasonable, prudent person under the circumstances. A requirement that experienced truck drivers be subject to a higher standard of care does not impress us as being a useful concept to infuse into the law of vehicle negligence. An understanding of the ordinary standard of due care applicable to the average motorist under the multitude of changing circumstances likely to confront today's driver is already difficult to grasp and apply justly. To begin to vary the standard according to the driver's experience would render the application of any reasonably uniform standard impossible. Other jurisdictions have confronted the problem of varying degrees of care and sought to control the ceaseless variation of the concept of negligence by establishing a single standard: "Care does not increase or diminish by calling it names. We think the abstract concept of reasonable care is in itself quite difficult enough to grapple with and apply in our law without our courts gratuitously conferring honorary degrees upon it. There is only one degree of care in the law, and that is the standard of care which may reasonably be required or expected under all the circumstances of a given situation." We decline this opportunity to develop a higher standard of care for experienced truck drivers and find that the trial court did not err in its instruction on the degree of care in the present case.

9. *Supernormal strength, X-ray vision, etc.* Restatement (Second) of Torts, §298, comment d (1965), provides:

Necessity that the actor employ competence available. The actor must utilize with reasonable attention and caution not only those qualities and facilities which as a reasonable man he is required to have, but also those superior qualities and facilities which he himself has. Thus, a superior vision may enable the actor, if he pays reasonable attention, to perceive

dangers which a man possessing only normal vision would not perceive, or his supernormal physical strength may enable him to avoid dangers which a man of normal strength could not avoid.

Illustration 1. A is driving a pair of well-broken horses. They become frightened and run away. A is unusually strong and could by the exercise of reasonable care in using his full muscular power bring the horses under control. He is negligent toward anyone run down by the horses if he fails to do so, although a man of ordinary muscular strength would be unable to control the horses.

From the Second Restatement, §289:

Illustration 12. A is a physician. His child exhibits symptoms which A, because of his previous training and experience, should recognize as indicating that the child has scarlet fever. A fails to recognize them, and permits his child to go to school, where the child communicates the disease to B, another pupil. A is negligent in not recognizing the risk, although if he were a layman he might not be negligent.

Can these provisions be squared with the decision in *Fredericks v. Castora*? If so, what is the distinction between them? If not, which approach seems preferable?

2. *Physical Infirmities*

1. *The reasonably prudent deaf man.* In *Kerr v. Connecticut Co.*, 140 A. 751 (Conn. 1928), the plaintiff's decedent, William Kerr, was a 58-year-old man with very poor hearing. One evening he walked home from work on Asylum Avenue in Hartford, alongside which ran the defendant's trolley line. A trolley came up behind Kerr at about 15 miles per hour. The driver saw Kerr and noticed that he was walking close enough to the tracks that he would be hit if he and the trolley both continued on their paths. The driver sounded his gong, but Kerr did not hear it and veered still closer to the tracks. The driver applied his brakes, but it was too late; the trolley knocked Kerr onto the adjacent road, and soon afterwards he died from his injuries. Kerr's administratrix sued the trolley company. The trial court found negligence on Kerr's part but no negligence on the part of the trolley driver. The plaintiff appealed and the Connecticut Supreme Court affirmed, holding that Kerr was contributorily negligent as a matter of law:

The law required the decedent to exercise that care for his own safety which a reasonably prudent man would exercise under the same circumstances. It is true that he had a legal right to walk where he was walking, just as any traveler has a right to walk in any part of the public highway.

But as a reasonable man he was charged with knowledge that the place close to the trolley rail where he was walking was dangerous, and that a passing trolley car would necessarily strike him, and he also knew that he could not hear the bell or gong of an approaching car from the rear. It was his duty therefore to take such care as a reasonably prudent deaf man would take under those conditions.

There is nothing in the finding of facts to show that he took any precautions whatever. So far as appears, he took this position of danger and continued in it, without looking back up the “long stretch” of straight and unobstructed track from which an overtaking car would come.

2. *Blindness*. In *Davis v. Feinstein*, 88 A.2d 695 (Pa. 1952), the plaintiff, a blind man, was walking down 60th Street in Philadelphia, using a cane to touch the walls of abutting buildings and to tap the ground in front of him. He nevertheless fell through an open cellar door in front of the defendant’s furniture store. The plaintiff sued the defendant for negligence and won a jury verdict; the trial court rejected the defendant’s claim that the plaintiff should be held contributorily negligent as a matter of law. The defendant appealed, and the Pennsylvania Supreme Court affirmed:

A blind person is not bound to discover *everything* which a person of normal vision would. He is bound to use due care under the circumstances. Due care for a blind man includes a reasonable effort to compensate for his unfortunate affliction by the use of artificial aids for discerning obstacles in his path. When an effort in this direction is made, it will ordinarily be a jury question whether or not such effort was a *reasonable* one.

What is the distinction between *Davis v. Feinstein* and *Kerr v. Connecticut Co.* (the case holding a deaf plaintiff contributorily negligent)? What is the distinction between *Davis v. Feinstein* and *Weirs v. Jones County*?

State as precisely as possible the common issue that all of the cases in this section are discussing, from *Williams v. Hays* through *Davis v. Feinstein*.

3. *Age*

Purtle v. Shelton

474 S.W.2d 123 (Ark. 1971)

[The defendant, Kenneth (“Bubba”) Shelton, was a 17-year-old boy who accidentally shot his 16-year-old hunting companion (the plaintiff). The jury attributed an equal share of responsibility for the accident to the plaintiff and defendant. Under the state’s contributory negligence rule, the plaintiff therefore recovered nothing. The plaintiff’s primary claim on appeal was that

the trial court erred in instructing the jury that the defendant should be found negligent only if he failed to use that degree of care which a reasonably careful minor of his age and intelligence would use in similar circumstances.]

SMITH, J.—The appellant [] contends that the court should have instructed the jury that Kenneth, in using a high powered rifle, was required to use the same degree of care that would be observed by an adult in like circumstances. In making that argument counsel cite our holding in *Harrelson v. Whitehead*, 365 S.W.2d 868 (Ark. 1963), where we adopted the general rule that a minor operating a motor vehicle must use the same degree of care as an adult would use. The appellant argues that motor vehicles and rifles are both dangerous and should therefore be treated alike as far as their use by a minor is concerned.

We cannot accept that argument. To begin with, the motor vehicle rule was not adopted, as our opinion in *Harrelson* reflects, solely because the driving of an automobile entails danger to others. There are other factors to be considered. A minor must be at least sixteen to operate a car by himself. He must pass an examination to demonstrate his ability to operate the vehicle on the highways. The rules governing the operation of motor vehicles are largely statutory and make no distinction, express or implied, between the degree of care to be exercised by a minor and that to be exercised by an adult. A measure of financial responsibility is required. In view of all those factors, the cases in other jurisdictions, as we pointed out in *Harrelson*, have consistently held minors to the same degree of care as adults in driving upon the highways.

In the second place, we considered the subject anew in *Jackson v. McCuiston*, 247 Ark. 862 (1969). There a farm boy almost fourteen years old was operating a tractor propelled stalk cutter—a large piece of machinery having a dangerous cutting blade. In holding that minor to an adult standard of care we quoted from three authorities: The Restatement of Torts (2d), Prosser on Torts, and Harper & James on Torts. All three authorities recognize the identical rule, that if a minor is to be held to an adult standard of care he must be engaging in an activity that is (a) dangerous to others and (b) normally engaged in only by adults. In the course of that opinion we stated that the minor “was performing a job normally expected to be done by adults.”

We are unable to find any authority holding that a minor should be held to an adult standard of care merely because he engages in a dangerous activity. There is always the parallel requirement that the activity be one that is normally engaged in only by adults. So formulated, the rule is logical and sound, for when a youth is old enough to engage in adult activity there are strong policy reasons for holding him to an adult standard of care. In that situation there should be no magic in the attainment of the twenty first birthday.

We have no doubt that deer hunting is a dangerous sport. We cannot say, however, either on the basis of the record before us or on the basis of

common knowledge, that deer hunting is an activity normally engaged in by adults only. To the contrary, all the indications are the other way. A child may lawfully hunt without a hunting license at any age under sixteen. We know, from common knowledge, that youngsters only six or eight years old frequently use .22 caliber rifles and other lethal firearms to hunt rabbits, birds, and other small game. We cannot conscientiously declare, without proof and on the basis of mere judicial notice, that only adults normally go deer hunting.

In refusing to apply an adult standard of care to a minor engaged in hunting deer, we do not imply that a statute to that effect would be unwise. Indeed, we express no opinion upon that question. As judges, we cannot lay down a rule with the precision and inflexibility of a statute drafted by the legislature. If we should declare that a minor hunting deer with a high powered rifle must in all instances be held to an adult standard of care, we must be prepared to explain why the same rule should not apply to a minor hunting deer with a shotgun, to a minor hunting rabbits with a high powered rifle, to a twelve year old shooting crows with a .22, and so on down to the six year old shooting at tin cans with an air rifle. Not to mention other dangerous activities, such as the swinging of a baseball bat, the explosion of firecrackers, or the operation of an electric train. All we mean to say in this case is that we are unwilling to lay down a brand new rule of law, without precedent and without any logical or practical means of even surmising where the stopping point of the new rule might ultimately be reached. [. . .]

Affirmed.

FOGLEMAN, J. (dissenting)—[. . .] Bubba Shelton had been instructed in the skill of deer hunting by his grandfather, Melvin Tucker, a deer hunter for 30 years. Tucker testified that he had taken his grandson hunting ever since the boy was big enough to follow him in the woods with a dog, and before Bubba was big enough to carry a gun. Young Shelton, he said, had been carrying a gun ever since he was 12 or 13 years old. Tucker said that he taught the boy the safety rules of handling, shooting, loading and unloading a gun. He also taught Bubba what he called the most important thing in hunting in the woods—a certain knowledge of the identity of his target. Young Shelton, a high school senior, said that he had been deer hunting for about eight years. He had previously killed a deer. [. . .]

This court had no qualms about taking judicial notice of the hazards of automobile traffic, the frequency of accidents, often having catastrophic results, and the fact that immature individuals are no less prone to accidents, than adults, in reaching the conclusion that the time had come to require a minor to observe the same standards of care as an adult when operating an automobile. I find no logical reason for not doing the same when the use of a high powered rifle is the implement endangering the lives of all who now flock to the woods in the limited deer hunting season. Logic seems to dictate that an even higher standard be required when firearms are the death

dealing instrument than is expected when the potential danger arises from the negligent use of a motor vehicle. [. . .]

BYRD, J. (dissenting)—Because a bullet fired from the gun by a minor is just as deadly as a bullet fired by an adult, I'm at a loss to understand why one with "buck fever" because of his minority is entitled to exercise any less care than any one else deer hunting. One killed by a bullet so fired would be just as dead in one instance as the other and without any more warning.

NOTES

1. *7 vs. 77*. In *Roberts v. Ring*, 173 N.W. 437 (Minn. 1919), the plaintiff's son, Roberts, was seven years old. As he ran across a street he was struck by an automobile driven by the defendant, who was seventy-seven years old and had defective powers of sight and hearing. The defendant was traveling at a speed of four to five miles per hour, and said that he saw the Roberts boy when he was still about five feet in front of his car. The defendant was not able to stop, and drove his car all the way over him. The jury brought in a verdict for the defendant, and the plaintiff appealed.

Held, for the plaintiff, that the jury was not properly instructed. The court said that the trial court correctly instructed the jury to make allowances for the youth of the plaintiff's son: "Had a mature man acted as did this boy he might have been chargeable with negligence as a matter of law. But a boy of seven is not held to the same standard of care in self-protection. In considering his contributory negligence the standard is the degree of care commonly exercised by the ordinary boy of his age and maturity." But the jury incorrectly had been instructed that in deciding whether the defendant was negligent it could take into account his age and whether he suffered from any physical infirmities:

[D]efendant's infirmities did not tend to relieve him from the charge of negligence. On the contrary they weighed against him. Such infirmities, to the extent that they were proper to be considered at all, presented only a reason why defendant should refrain from operating an automobile on a crowded street where care was required to avoid injuring other travelers. When one, by his acts or omissions causes injury to others, his negligence is to be judged by the standard of care usually exercised by the ordinarily prudent normal man.

Why hold children to a reduced standard of care but not the elderly?

2. *Motorboats vs. velocipedes*. In *Dellwo v. Pearson*, 107 N.W.2d 859 (Minn. 1961), the defendant, a 12-year-old boy, ran across the plaintiff's fishing line with his powerboat. This caused the plaintiff's fishing rod to break, and a piece of the reel flew into the plaintiff's eye, causing injuries for which she sought to recover. The trial court instructed the jury that "In considering

the matter of negligence, the duty to which defendant is held is modified because he is a child, a child not being held to the same standard of conduct as an adult and being required to exercise only that degree of care which ordinarily is exercised by children of like age, mental capacity, and experience under the same or similar circumstances.” The jury returned a general verdict for the defendant, and the plaintiffs appealed, claiming the jury had been improperly instructed. The Minnesota Supreme Court reversed:

[I]n the circumstances of modern life, where vehicles moved by powerful motors are readily available and frequently operated by immature individuals, we should be skeptical of a rule that would allow motor vehicles to be operated to the hazard of the public with less than the normal minimum degree of care and competence.

To give legal sanction to the operation of automobiles by teen-agers with less than ordinary care for the safety of others is impractical today, to say the least. We may take judicial notice of the hazards of automobile traffic, the frequency of accidents, the often catastrophic results of accidents, and the fact that immature individuals are no less prone to accidents than adults. While minors are entitled to be judged by standards commensurate with age, experience, and wisdom when engaged in activities appropriate to their age, experience, and wisdom, it would be unfair to the public to permit a minor in the operation of a motor vehicle to observe any other standards of care and conduct than those expected of all others. A person observing children at play with toys, throwing balls, operating tricycles or velocipedes, or engaged in other childhood activities may anticipate conduct that does not reach an adult standard of care or prudence. However, one cannot know whether the operator of an approaching automobile, airplane, or powerboat is a minor or an adult, and usually cannot protect himself against youthful imprudence even if warned. Accordingly, we hold that in the operation of an automobile, airplane, or powerboat, a minor is to be held to the same standard of care as an adult.

What is the distinction between *Dellwo v. Pearson* and *Purtle v. Shelton*?

3. *Juvenile and adult activities.* As the opinion in *Dellwo* suggests, the law generally does not hold children to an adult standard of care when they are riding bicycles. Why? Consider that when behavior is governed by the rule of negligence, people often must coordinate their precautions; the precautions each should take often will depend on the precautions others are required to use. Drivers and pedestrians are required to use reasonable care, but each ordinarily is entitled to assume that the other will be using reasonable care as well. Drivers are not required to assume that pedestrians will walk into the street without looking. But in some situations (when?), one party may be able to see that the other probably will not be using reasonable care, and can compensate accordingly. In other situations one party’s inability to measure

up to the standard of the “reasonably prudent person” may be invisible, and in that case the other party will not be able to compensate. One might argue that we should be ready to recognize people’s inability to take due care in the former situations but not the latter. Indeed, this is one way to understand Holmes’s argument that the law only will modify the reasonable person standard to account for “distinct defects.” How helpful is this distinction in explaining the cases that have defined the reasonable person? Is being a child a “distinct defect” as Holmes used the term? In what settings is the defendant’s age obvious to others?

4. *The wonder years*. In *Dunn v. Teti*, 421 A.2d 782 (Pa. App. 1979), the defendant swung a stick negligently, causing injuries to the plaintiff. Both parties were approximately six years old. The trial court gave summary judgment to the defendant on the ground that he was too young to be capable of negligence. The court of appeals affirmed:

The issue with which we are confronted in this case is the minimum age below which a child is incapable of acting negligently because he lacks the attention, intelligence and judgment necessary to enable him to perceive risk and recognize its unreasonable character. The obligation to use reasonable care extends to both adults and minors, but the standard against which the acts of a child are measured to determine if they constitute negligent conduct varies from that employed for adults. When measuring the conduct of children, courts depart from the well known objective test of the care of a reasonable and prudent man, the test generally utilized to judge adult behavior, and make allowance for immaturity. A child is held to that measure of care that other minors of like age, experience, capacity and development would ordinarily exercise under similar circumstances.

The application of this standard is clarified by the use of several presumptions delineating convenient points to aid in drawing the uncertain line between capacity to appreciate and guard against danger and incapacity: (1) minors under the age of seven years are conclusively presumed incapable of negligence; (2) minors between the ages of seven and fourteen years are presumed incapable of negligence, but the presumption is a rebuttable one that weakens as the fourteenth year is approached; (3) minors over the age of fourteen years are presumptively capable of negligence, with the burden placed on the minor to prove incapacity.

Cavanaugh, J., dissented:

When determining whether a child is capable of acting negligently, the standard to be applied is that of a reasonable person of like age, intelligence and experience under the circumstances. This standard, unlike the Majority’s conclusive presumption, adequately takes into account

the differing capacities of children of the same age to appreciate and cope with the dangers of a given situation.

Why is the presumption “conclusive” that a child under the age of seven cannot be capable of negligence? What is gained by such a rule that is not achieved by simply instructing the jury to compare the defendant’s behavior to the (presumably low) standard set by other children of the same age? Some courts prefer to take this latter approach; see, e.g., *Standard v. Shine*, 295 S.E.2d 786 (S.C. 1982).

B. RISKS AND PRECAUTIONS

United States v. Carroll Towing Co.
159 F.2d 169 (2d Cir. 1947)

[The Conners Marine Company brought this action in admiralty against the Pennsylvania Railroad for the loss of a barge, the *Anna C*. Conners owned the *Anna C* and had chartered her to the Pennsylvania in a package deal that included the services of a Conners bargee between the hours of 8 A.M. and 4 P.M. On January 2, 1944, the Pennsylvania moved the *Anna C* to the end of Pier 52 in New York Harbor. She was loaded with a cargo of flour belonging to the United States. A little later the Grace Line sent a tug it had chartered, the *Carroll*, up to Pier 52 to get another barge. The Grace Line employees—a harbormaster and his helper—had to adjust the lines of the *Anna C* in order to get to the other barge; when they were done, they improperly retied the *Anna C*’s lines. As a result, the *Anna C* later broke away from the pier and bumped into a tanker whose propeller punched a hole in the *Anna C* beneath the waterline. At the time, the Conners Company’s bargee, who was supposed to be aboard the *Anna C*, was elsewhere; thus nobody discovered the leak until it was too late to pump the water from the barge. The *Anna C* sank along with her cargo. The parties affected by the accident brought various claims against one another.

[The court determined that the Grace Line’s harbormaster and deckhand were negligent in retying the *Anna C* to the pier, so they were partly responsible for the ensuing damage. The court then considered whether the Conners Company also had been negligent because its bargee was not aboard the *Anna C* at the critical moment.]

LEARNED HAND, J.—[. . .] [I]f the bargee had been on board, and had done his duty to his employer, he would have gone below at once, examined the injury, and called for help from the “Carroll” and the Grace Line tug. Moreover, it is clear that these tugs could have kept the barge afloat, until they had safely beached her, and saved her cargo. This would have avoided

what we shall call the “sinking damages.” Thus, if it was a failure in the Conners Company’s proper care of its own barge, for the bargee to be absent, the company can recover only one third of the “sinking” damages from the Carroll Company [the owner of the tugboat] and one third from the Grace Line. For this reason the question arises whether a barge owner is slack in the care of his barge if the bargee is absent.

[The court then considered whether it was negligent for the Conners Company to have an absent bargee. After reviewing cases on the subject, it continued:] It appears from the foregoing review that there is no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her moorings. However, in any cases where he would be so liable for injuries to others, obviously he must reduce his damages proportionately, if the injury is to his own barge. It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability.

Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner’s duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P ; the injury, L ; and the burden, B ; liability depends upon whether B is less than L multiplied by P : i.e., whether $B < PL$.

Applied to the situation at bar, the likelihood that a barge will break from her fasts and the damage she will do, vary with the place and time; for example, if a storm threatens, the danger is greater; so it is, if she is in a crowded harbor where moored barges are constantly being shifted about. On the other hand, the barge must not be the bargee’s prison, even though he lives aboard; he must go ashore at times. We need not say whether, even in such crowded waters as New York Harbor a bargee must be aboard at night at all[.] We leave that question open; but we hold that it is not in all cases a sufficient answer to a bargee’s absence without excuse, during working hours, that he has properly made fast his barge to a pier, when he leaves her. In the case at bar the bargee left at five o’clock in the afternoon of January 3rd, and the flotilla broke away at about two o’clock in the afternoon of the following day, twenty-one hours afterwards. The bargee had been away all the time, and we hold that his fabricated story was affirmative evidence that he had no excuse for his absence. At the locus in quo—especially during the short January days and in the full tide of war activity—barges were being constantly “drilled” in and out. Certainly it was not beyond reasonable expectation that, with the inevitable haste and bustle, the work might not be done with adequate care. In such circumstances we hold—and it is all that we do hold—that it was a fair requirement that the Conners Company should have a bargee aboard (unless he had some excuse for his absence), during the working hours of daylight.

NOTES

1. *Introducing the Hand formula.* Judge Hand's style of analysis is perhaps the best-known and most widely discussed method of analyzing whether a party took reasonable care to prevent an accident. The Hand formula presents a number of difficulties in application, however, and is not without its detractors. One purpose of the cases in this section of the chapter is to explore how the formula might be applied to various cases involving claims of negligence. In each case, try to identify the three elements of the Hand formula: *B*, the "burden" or cost of the untaken precaution that the plaintiff claims the defendant should have used; *P*, the probability of the accident occurring if the precaution were not taken; and *L*, the loss that would result if the accident were to occur. The most usual interpretation of the Hand formula is economic: the goal is to put dollar values on *B* and *L* to the extent possible. As you read this section, consider whether there are other ways to think about the formula's elements.

To illustrate, suppose that if the defendant fails to take some precaution, such as keeping a bargee on its barge, there is a 10 percent chance that during the coming year an accident will occur; and if it does occur the total cost of the accident will be \$100,000 (the typical cost of a barge). In this example, *P* is .10; *L* is \$100,000; so $P \times L$ —the expected cost of the accident—is \$10,000. Another way of looking at this is to say that \$10,000 is the average size of the accident costs that will result if this same situation is played out repeatedly over a long period of time: we would expect one accident about every ten years if a given barge owner always fails to keep a bargee on board; the average annual cost of this to a barge owner will be \$10,000 (\$100,000 divided by 10 years, or multiplied by .10). *B* in this case is the cost of having a bargee. If a bargee would cost each barge owner \$5,000 per year, then the Hand formula would suggest that it is negligent to fail to use one. If hiring a bargee would cost each barge owner \$30,000 per year, then the Hand formula suggests that it is *not* negligent to do without one: it would be cheaper (and therefore preferable) to let the accidents occur; it would be a waste to hire a \$30,000 bargee to prevent a \$10,000 accident (recalling that \$10,000 is the average cost of the accidents; when the accidents happen, they will cost more than that, but nine times out of ten they won't happen at all).

The illustration just considered is unrealistic because it usually is impossible to put clear numbers on each element of the Hand formula. Hand himself said that "[of the factors in the formula] care is the only one ever susceptible of quantitative estimate, and often that is not. The injuries are always a variable within limits, which do not admit of even approximate ascertainment; and, although probability might theoretically be estimated, if any statistics were available, they never are; and, besides, probability varies with the severity of the injuries. It follows that all such attempts are illusory; if serviceable at all, they are so only to the extent that they center attention upon which one of the factors may be determinative in any given situation." *Moisan v. Loftus*, 178

F.2d 148 (2d Cir. 1949). Even so, however, it may be possible to compare the *relative* relationships between *B*, *P*, and *L* in different cases, and so to use the formula to shed light on their outcomes.

Juries deciding negligence claims, meanwhile, are not told to apply the Hand formula. As noted in the previous section, jury instructions generally just ask whether the defendant behaved in the way that a reasonably prudent person would under the same circumstances. This test—the “reasonable man” or “reasonable person” test—rarely is supplemented with any further guidance, though occasionally a jury will be invited to compare the risks and benefits of a defendant’s behavior. The Hand formula sometimes is used, however, by courts of appeal when they review jury verdicts:

Currently, there seem to be four basic appellate stances toward the Hand formula: (1) use it routinely, sometimes even *sua sponte*, (2) use it if the appeal is couched in cost-benefit terms, (3) ignore it by disposing even of explicit cost-benefit claims under the reasonable person standard, and (4) reject it as a matter of law. A few courts (most clearly those of Louisiana and Michigan) take approach (1). No court, to my knowledge, takes approach (4). The majority of courts take either approach (2) or approach (3).

Gilles, *The Invisible Hand Formula*, 80 Va. L. Rev. 1015 (1994). Yet regardless of how much or how little the Hand formula is used explicitly by courts, it may be a useful tool for analysis. Some commentators—most famously Richard Posner—consider the Hand formula a compelling description of what judges (and perhaps juries) *do*, whether or not they say so explicitly or even realize it consciously. Appellate opinions, both modern and old, often analyze cases in terms that may resemble the Hand formula; consider this passage from the old English case of *Mackintosh v. Mackintosh*, 2 Macph. 1347 (1864):

[I]t must be observed that in all cases the amount of care which a prudent man will take must vary infinitely according to circumstances. No prudent man in carrying a lighted candle through a powder magazine would fail to take more care than if he was going through a damp cellar. The amount of care will be proportionate to the degree of risk run, and to the magnitude of the mischief that may be occasioned.

Does this statement amount to the same point made by the Hand formula? If not, how is it different? Soon we will see additional examples of old cases that may or may not involve the type of balancing Hand describes. As you read them, consider whether more explicit thought about the Hand formula and its implications would have led to any difference in the court’s result or analysis, or whether reflection on the Hand formula now makes the logic of the cases seem any clearer than the opinions themselves do.

Some commentators have argued that the Hand formula can be justified in ethical as well as economic terms:

From an economic perspective the Hand formula makes excellent sense. The formula can be seen as designed to encourage efficient investments in safety and risk reduction; as such, it has served as a cornerstone for economic analysis. Yet despite its economic implications, the Hand formula is also conducive to an ethical explanation of the negligence liability standard. Typically the burden of risk prevention is borne in the first instance by the defendant. Take the defendant whose conduct creates a risk to others that can be measured as \$100—a risk which the defendant could prevent by incorporating a \$50 precaution. If the defendant fails to adopt this precaution and hence acts negligently, the defendant's choice shows that he attaches a greater weight to his own interests than to the interests of others. By ranking his own welfare as more important than the welfare of others, the defendant's conduct can correctly be reproached as ethically improper.

Gary Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 *Tex. L. Rev.* 1801, 1819-1820 (1997). Posner offers a related suggestion. Usually his theory is thought to be that the Hand formula, or the intuition behind it, is attractive to courts because it gives people incentives to behave efficiently—i.e., to keep waste of all sorts to a minimum by either preventing accidents or allowing them to occur, whichever is cheaper. It is not necessary to his claim, however, that courts think of efficiency as an important goal; he suggests that perhaps the Hand formula reflects certain moral intuitions about blameworthiness:

Because we do not like to see resources squandered, a judgment of negligence has inescapable overtones of moral disapproval, for it implies that there was a cheaper alternative to the accident. Conversely, there is no moral indignation in the case in which the cost of prevention would have exceeded the cost of the accident. [. . .] If indignation has its roots in inefficiency, we do not have to decide whether regulation, or compensation, or retribution, or some mixture of these best describes the dominant purpose of negligence law. In any case, the judgment of liability depends ultimately on a weighing of costs and benefits.

Posner, *A Theory of Negligence*, 1 *J. Legal Stud.* 29 (1972). These theories suggest a final question to consider as you examine the cases and problems that follow: does analysis under the Hand formula produce the same outcomes as would be generated by worrying about fairness and corrective justice?

2. *The area of ordinary prevision.* In *Adams v. Bullock*, 227 N.Y. 208 (1919), the defendant ran a trolley line in the city of Dunkirk. The trolleys were powered by a system of overhead wires. At one point the trolley line was crossed by a bridge that carried the tracks of the Nickle Plate and Pennsylvania railroads. As the court recounted: "Pedestrians often use the bridge as a short cut between streets, and children play on it. [. . .] [T]he plaintiff, a boy of

twelve years, came across the bridge, swinging a wire about eight feet long. In swinging it, he brought it in contact with the defendant's trolley wire, which ran beneath the structure. The side of the bridge was protected by a parapet eighteen inches wide. Four feet seven and three-fourths inches below the top of the parapet, the trolley wire was strung. The plaintiff was shocked and burned when the wires came together." A jury returned a verdict for the plaintiff. The defendant appealed on the ground that the evidence was insufficient to support the verdict.

Held, for the defendant, that the trial court erred in entering judgment on the verdict. Said the court (per Cardozo, J.):

The defendant in using an overhead trolley was in the lawful exercise of its franchise. Negligence, therefore, cannot be imputed to it because it used that system and not another. There was, of course, a duty to adopt all reasonable precautions to minimize the resulting perils. We think there is no evidence that this duty was ignored. The trolley wire was so placed that no one standing on the bridge or even bending over the parapet could reach it. Only some extraordinary casualty, not fairly within the area of ordinary prevision, could make it a thing of danger. Reasonable care in the use of a destructive agency imports a high degree of vigilance. But no vigilance, however alert, unless fortified by the gift of prophecy, could have predicted the point upon the route where such an accident would occur. It might with equal reason have been expected anywhere else. At any point upon the route, a mischievous or thoughtless boy might touch the wire with a metal pole, or fling another wire across it. If unable to reach it from the walk, he might stand upon a wagon or climb upon a tree. No special danger at this bridge warned the defendant that there was need of special measures of precaution. No like accident had occurred before. No custom had been disregarded. We think that ordinary caution did not involve forethought of this extraordinary peril. [. . .]

There is, we may add, a distinction not to be ignored between electric light and trolley wires. The distinction is that the former may be insulated. Chance of harm, though remote, may betoken negligence, if needless. Facility of protection may impose a duty to protect. With trolley wires, the case is different. Insulation is impossible. Guards here and there are of little value. To avert the possibility of this accident and others like it at one point or another on the route, the defendant must have abandoned the overhead system, and put the wires underground. Neither its power nor its duty to make the change is shown.

How might you restate the court's reasoning using the Hand formula? How might you argue that the opinion *doesn't* amount to an application of the Hand formula?

3. *A social being is not immune from social risks.* In *Bolton v. Stone*, [1951] A.C. 850, 1 All E.R. 1078 (H.L.), *rev'g* [1950] 1 K.B. 201, the plaintiff, Bessie

Stone, lived on a residential street adjoining Lord's Cricket Ground. The grounds were enclosed on the plaintiff's side by a seven-foot fence. One day the plaintiff was standing in front of her garden gate when she was struck by a ball hit out of the Cricket Ground. There was evidence that on rare occasions over the previous 30 years balls had been hit over the fence, though none had caused injury; in any event, all agreed that the hit was excellent, covering a distance of about 20 yards, which was twenty yards beyond the fence.

The plaintiff sued the club that owned the grounds, including a negligence count among her claims. The defendants were awarded judgment after a bench trial. The Court of Appeal reversed, holding that the trial court erred in finding no negligence; the House of Lords reversed again, holding that there must be judgment for the defendants. Said Reid, L.J.:

My Lords, it was readily foreseeable that an accident such as befell the respondent might possibly occur during one of the appellants' cricket matches. Balls had been driven into the public road from time to time, and it was obvious that if a person happened to be where a ball fell that person would receive injuries which might or might not be serious. On the other hand, it was plain that the chance of that happening was small. [. . .] It follows that the chance of a person ever being struck even in a long period of years was very small. [. . .]

In the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others. What a man must not do, and what I think a careful man tries not to do, is to create a risk which is substantial. [. . .] In my judgment, the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger. In considering that matter I think that it would be right to take into account not only how remote is the chance that a person might be struck, but also how serious the consequences are likely to be if a person is struck, but I do not think that it would be right to take into account the difficulty of remedial measures. If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all.

Said Radcliffe, L.J.:

My Lords, I agree that this appeal must be allowed. I agree with regret, because I have much sympathy with the decision that commended itself to the majority of the members of the Court of Appeal. I can see nothing unfair in the appellants being required to compensate the respondent for the serious injury that she has received as a result of the sport that they have organised on their cricket ground at Cheetham Hill, but the law of negligence is concerned less with what is fair than with what is

culpable, and I cannot persuade myself that the appellants have been guilty of any culpable act or omission in this case. [. . .]

It seems to me that a reasonable man, taking account of the chances against an accident happening, would not have felt himself called on either to abandon the use of the ground for cricket or to increase the height of his surrounding fences. He would have done what the appellants did. In other words, he would have done nothing. Whether, if the unlikely event of an accident did occur and his play turn to another's hurt, he would have thought it equally proper to offer no more consolation to his victim than the reflection that a social being is not immune from social risks, I do not say, for I do not think that that is a consideration which is relevant to legal liability.

In what respects do the statements from the House of Lords resemble the Hand formula? In what respects are they different?

4. *Marginal analysis.* If the Hand formula is to be used correctly as an economic matter it has to be applied at the margin. What does this mean? A typical analysis of whether a defendant was negligent involves picking an untaken precaution and asking if due care—or, here, the Hand formula—required it. But the important question is not just whether taking the precaution would have been better than doing nothing; it is whether the precaution was cost-justified considering the other precautions that also were available.

A simplified example will make the point clearer. Imagine a case like *Bolton v. Stone*, but one in which we have more precise information about the costs and effectiveness of various precautions the defendants might have taken. Suppose that the only risk at issue is the chance that a cricket ball will hit a pedestrian on the head, inflicting a \$50,000 injury. Suppose further that the defendants can choose between the following precautions:

a. They can build no fence around the cricket ground. In this case there is a 10 percent chance each year that someone will be hit by a cricket ball and sustain a \$50,000 injury—an “expected” accident cost of \$5,000 per year ($50,000 \times 0.10$).

b. They can build a fence seven feet tall. Assume that the cost of building and then maintaining the fence would be \$2,000 per year, and that it would reduce the chance of the \$50,000 accident each year to 2 percent—an expected annual cost of \$1,000 ($50,000 \times 0.02$).

c. They can build a fence ten feet tall. Assume that the cost of building and then maintaining this fence would be \$2,500 per year, and that it would reduce the chance of an accident each year to 1.8 percent—an expected cost of \$900 ($50,000 \times 0.018$).

Given these assumptions, what does the economic interpretation of due care require the defendants to do? Spending \$2,500 to build a ten-foot fence

would reduce the annual expected cost of accidents from \$5,000 to \$900; on this view the precaution clearly seems cost-justified. But there is another option: building a seven-foot fence. The *marginal cost* (in other words, the additional, incremental cost) of moving from a seven-foot fence to a ten-foot fence is \$500 per year. The *marginal benefit* of doing so is a \$100 reduction each year in accident costs. So suppose the defendants build the seven-foot fence, and the plaintiff is hit by a cricket ball that goes just over it; the evidence shows that a ten-foot fence would have prevented the accident. Does the Hand formula suggest that the defendant should be held liable?

5. *Heroic measures*. In *Eckert v. Long Island R. Co.*, 43 N.Y. 502 (1871), the plaintiff's decedent was having a conversation with another person about 50 feet from the defendant's railroad tracks in East New York when a train arrived from Queens at a speed of 12 to 20 miles per hour. The plaintiff's witnesses heard no signal from the train's whistle. The plaintiff claimed that the defendant was negligent in running its train at that speed through a thickly populated neighborhood. A child of three or four years of age was sitting on the defendant's track as the train approached and would have been run over if not removed. The plaintiff's decedent saw the child, ran to it, seized it, and threw it clear of danger. He did not have time to get clear himself, however, and was hit by the train. He died later that night. The plaintiff won a jury verdict and the trial court entered judgment upon it. The defendant appealed, claiming that the plaintiff's case should have been dismissed because he was contributorily negligent. The Court of Appeals affirmed:

The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will

not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent unless such as to be regarded as either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a nonsuit was, therefore, properly denied. [. . .]

What was the untaken precaution by Eckert that formed the basis of the railroad's argument? What was its cost? How did it compare to the cost of the actions Eckert did take?

6. *The economics of Eckert.* At first the dramatic facts of the *Eckert* case might seem an unlikely occasion for application of the Hand formula. *Eckert* nevertheless has generated some discussion of the role of costs and benefits in applying the negligence standard. Consider Terry, *Negligence*, 29 Harv. L. Rev. 40, 42-44 (1915):

The plaintiff's intestate, seeing a child on a railroad track just in front of a rapidly approaching train, went upon the track to save him. He did save him, but was himself killed by the train. The jury were allowed to find that he had not been guilty of contributory negligence. The question was of course whether he had exposed himself to an unreasonably great risk. Here the [. . .] elements of reasonableness were as follows:

- (a) The magnitude of the risk was the probability that he would be killed or hurt. That was very great.
- (b) The principal object was his own life, which was very valuable.
- (c) The collateral object was the child's life, which was also very valuable.
- (d) The utility of the risk was the probability that he could save the child. That must have been fairly great, since he in fact succeeded. Had there been no fair chance of saving the child, the conduct would have been unreasonable and negligent.
- (e) The necessity of the risk was the probability that the child would not have saved himself by getting off the track in time.

Here, although the magnitude of the risk was very great and the principal object very valuable, yet the value of the collateral object and the great utility and necessity of the risk counterbalanced those considerations, and made the risk reasonable. The same risk would have been unreasonable, had the creature on the track been a kitten, because the value of the collateral object would have been small.

Compare Posner's more recent analysis:

Almost any tort problem can be solved as a contract problem, by asking what the people involved in an accident would have agreed on in advance with regard to safety measures if transaction costs had not been prohibitive. A striking example is provided by the old case of *Eckert v. Long Island Railroad*. The defendant's train was going too fast and without adequate signals in a densely populated area. A small child was sitting on the tracks oblivious to the oncoming train. Eckert ran to rescue the child and managed to throw it clear but was himself killed. The court held that Eckert had not been contributorily negligent, and therefore his estate could recover damages for the railroad's negligence. For "it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself." If, as implied by this passage, the probability that the child would be killed if the rescue was not attempted was greater than the probability that Eckert would get himself killed saving the child, and if the child's life was at least as valuable as Eckert's life, then the expected benefit of the rescue to the railroad in reducing an expected liability cost to the child's parents was greater than the expected cost of rescue. In that event, but for prohibitive transaction costs, the railroad would have hired Eckert to attempt the rescue, so it should be required to compensate him *ex post*.

Posner, *Economic Analysis of Law* 272 (5th ed. 1998). What is the relationship between analysis of *Eckert* under the Hand formula and the analysis Posner conducts by imagining a hypothetical contract between the parties? Is there any difference between the two approaches?

7. *Even the claims of humanity must be weighed in a balance.* In *The Margharita*, 140 F. 820 (5th Cir. 1905), the libelant, Martinez, was a seaman aboard a cargo ship bound from a Chilean port to Savannah. His libel alleged that he fell overboard one evening as the vessel was rounding Cape Horn. By the time he was pulled back onto the boat, a "shark or other marine monster" had bitten off his leg a few inches below the knee. There was no surgeon on the ship; the nearest place where one could be found was Port Stanley in the Falkland Islands, a detour which would have taken the ship perhaps three weeks to complete. The *Margharita* did not stop at Port Stanley or any other port, but continued without interruption on its 7,000 mile voyage to Georgia. It arrived three months later. There Martinez had a small additional portion of the leg amputated; in the later words of the court of appeals, "The result obtained was satisfactory, and according to the surgeon who performed the operation and testified for [Martinez] he now has a fairly good stump."

Martinez sued the owners of the ship for negligence in failing to seek aid for him at Port Stanley or some other port between Cape Horn and

Savannah. The trial court gave judgment to Martinez, and awarded him \$1,500 in damages:

It is not difficult to conceive the unspeakable agony—indeed, torture—which the libelant must have experienced in his long voyage of more than 7,000 miles to Savannah with the ragged extremity of his cruelly wounded leg incased at times in a box of hot tar and at other times rudely bandaged by the kind, but inexperienced, hands of his shipmates. According to his own testimony his sufferings were so great that he often lost consciousness. [. . .] [It] is the duty of the courts, not only to compensate the seaman for his unnecessary and unmerited suffering when the duty of the ship is disregarded, but to emphasize the importance of humane and correct judgment under the circumstances on the part of the master.

The court of appeals reversed:

Before surgical aid could have been obtained by putting into Port Stanley in the Falkland Islands, the nearest available point, the acute and dangerous stage resulting from the injury had passed. Before that port could have been reached the healing processes of nature were under way and had made progress. [. . .] No permanent loss or disability was occasioned by the long delay in securing surgical aid. The appellee's leg was gone, and all that a surgeon could do was to put it in condition to heal properly with the soft parts covering the ends of the bones. Therefore, the only injury resulting from the delay was the prolongation of the suffering occasioned by the healing wound. With these conditions obtaining as to the appellee, was the master bound to deviate from his course and put into Port Stanley? The measure of a master's obligation to a seaman who is severely injured with the ship at sea is discussed by Mr. Justice Brown in [*The Iroquois*, 194 U.S. 240, 243 (1904)]:

[. . .] "With reference to putting into port, all that can be demanded of the master is the exercise of reasonable judgment and the ordinary acquaintance of a seaman with the geography and resources of the country. He is not absolutely bound to put into such port if the cargo be such as would be seriously injured by the delay. Even the claims of humanity must be weighed in a balance with the loss that would probably occur to the owners of the ship and cargo. A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is peculiarly applicable to the case of seamen." [. . .]

The accident occurred upon "one of the loneliest and most tempestuous seas in the world," and in winter. The making of an unknown harbor would have been fraught with uncertainty, and possibly with difficulties of navigation. The delay incident to a deviation from the course and

stoppage would have been of somewhat indefinite duration. During this time the owners of the bark would sustain heavy loss in the wages and provisions of the crew and the demurrage of the bark.

We have examined the cases cited by appellee in support of the contention the master should have put into some intermediate harbor to secure surgical aid and relief, and it is worthy of note that in each of them, where this was held to be the duty of the master, permanent injuries and disabilities resulted from his failure to pursue this course.

How might the reasoning in this case be expressed using the Hand formula? Can the \$1,500 damage award by the trial court be used as the measure of "L"? Is it of any use to try to imagine how the parties might have handled this situation by contract if they had foreseen it?

8. *A dissenting view.* In his article *Hand, Posner, and the Myth of the "Hand Formula,"* 4 *Theoretical Inquiries L.* 145 (2003), Professor Richard Wright takes a skeptical view of the Hand formula:

The legal literature generally assumes that an aggregate risk utility test is employed to determine whether conduct was reasonable or negligent. However, this test is infrequently mentioned by the courts and almost never explains their decisions. Instead, they apply, explicitly or implicitly, various justice based standards that take into account the rights and relationships among the parties. [. . .]

Under the aggregate risk utility test, it is proper (indeed required) for you to put others at even great risk for your solely private benefit if your expected private gain outweighs the others' expected losses. However, such behavior, which treats others solely as a means to one's own ends, is condemned by common morality and the underlying principles of justice as a failure to properly respect the equal dignity and freedom of others. [. . .] [T]he reported cases rarely involve situations in which the sole justification offered for the defendant's creation of significant risks to another is some private (economic or non-economic) benefit to the defendant. The private benefit issue rather arises indirectly in situations involving participatory plaintiffs or socially valuable activities, in which [. . .] the creation of significant risks to others is deemed reasonable if and only if the risks are not too serious; they are necessary (unavoidable) in order for the participatory plaintiffs or everyone in society to obtain some desired benefit; they have been reduced to the maximum extent feasible without causing an unacceptable loss in the desired benefit; and they are significantly outweighed by the desired benefit. While the private benefits desired by those being put at risk and the equal freedom enhancing benefits to everyone in society are taken into account, the purely private benefits to the defendant (or some third party) are not taken into account.

Wright then discusses many common law cases sometimes said to illustrate the logic and use of the Hand formula, and argues that none of them actually do. Here are excerpts from his comments on three of the note cases just considered.

a. Adams v. Bullock:

Cardozo's opinion does not engage in any aggregate-risk-utility balancing, but rather employs, at most, the non balancing, prohibitive cost test for socially valuable activities. Cardozo stated that the "[c]hance of harm, *though remote*, may betoken negligence, *if needless. Facility of protection may impose a duty to protect*" (emphasis added). He did not qualify this statement by any reference to the cost of precaution. His stated reason for holding that the defendant had not been negligent is not that the burden of the precautions was greater than the risk, but rather that the risk was too remote. While noting, in dicta, that even a remote risk might be negligent if needless, Cardozo pointed out that the only way to eliminate the remote risk in this case would be to shut down the trolley or put the wires underground (which would seem to be impossible while continuing to operate the trolley, given the need for the trolley to maintain contact with the electric wires), and requiring either would be contrary to the grant of the trolley franchise: "The defendant in using an overhead trolley was in the lawful exercise of its franchise. Negligence, therefore, cannot be imputed to it because it used that system and not another." The inherent risks of the trolley system with its overhead electric wires were deemed acceptable by the community since the trolley system provided substantial transportation benefits to everyone in the community, the risks were not serious and were reduced to the maximum extent feasible while still obtaining the desired social benefits, and the social benefits greatly outweighed the risks.

b. Bolton v. Stone:

[E]ach of the Law Lords explicitly or implicitly assumed that the defendant cricket club would be liable for negligence if the risk to non-participants like Miss Stone were foreseeable and of a sufficiently high level, regardless of the expected utility to the participants or the burden of eliminating the risk. Each concluded that the risk was foreseeable, but not of a sufficiently high level to be deemed unreasonable as a matter of law, given the very low combined probability of, first, a ball's being hit into the road and, second, the ball striking someone on the little used residential side street. Although several of the Law Lords stated that the risk must be "likely" or "probable," they clearly merely meant that the risk must be significant rather than remote or minimal. The literal (greater than 50%) interpretation of "likely" or "probable" would eliminate almost all negligence cases, which could hardly have been intended. Moreover, each of the Law Lords viewed the negligence issue

in *Bolton* as one that could have been decided either way by the trial court, despite the minimal risk.

c. Eckert v. Long Island Railroad Co.:

The critical passage in the majority opinion [. . .] states: “[. . .] For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent unless such as to be regarded either rash or reckless.”

This “rash or reckless” test, rather than the aggregate risk utility test, is the test that the courts employ to assess the reasonableness of putting oneself at risk in order to save the life of another. In these emergency rescue situations, the courts generally hold that, no matter how much the risk to the would be rescuer may seem to exceed the expected benefit to the potential rescuee, the would be rescuer’s conduct is morally praiseworthy, rather than morally blameworthy or unreasonable, unless it was “foolhardy,” “wanton,” “rash,” or “reckless.” The facts and holdings of these cases, including *Eckert*, indicate that the risk to the plaintiff rescuer is considered foolhardy, wanton, rash, or reckless only if the plaintiff put his own life at serious risk merely to save property rather than the life of another person or if there was no real or fair chance of saving the life of the person whom the plaintiff was attempting to rescue. In those circumstances, the plaintiff is failing to show proper respect for his own life by throwing it away for no good reason. However, if there is a fair chance of saving another’s life, one’s voluntary attempt to save the other’s life, even at a great risk to oneself that exceeds the chance of saving the other, is deemed heroic and morally praiseworthy, both by ordinary persons and by the law.

How convincing are Wright’s arguments? How do you think he would interpret the appellate court’s decision in *The Margharita*?

9. *Untaken precautions (problem)*. In *Davis v. Consolidated Rail Corp.*, 788 F.2d 1260 (7th Cir. 1986), the plaintiff, Davis, was an inspector for the Trailer Train Co., a lessor of cars to railroads. He made his inspections in railroad yards, among them Conrail’s yard in East St. Louis. On the day of the accident at issue here, Davis, driving an unmarked van that was the same color as the Conrail vans used in the yard but that lacked the identifying “C” painted on each Conrail van, arrived at the yard and saw a train coming in from east to west. He noticed that several of the cars in the train were Trailer Train cars that he was required to inspect. The train halted and was decoupled near the front; the locomotive, followed by several cars, pulled away to the west. The remainder of the train was stretched out for three-quarters of a mile to the east; and because it lay on a curved section of the track, its rear end

was not visible from the point of decoupling. An employee of Conrail named Lundy saw Davis sitting in his van, didn't know who he was, thought it queer that he was there, but did nothing.

Shortly afterward Davis began to conduct his inspection. This required him to crawl underneath the cars to look for cracks. He did not hang a metal blue flag on the train, as longstanding railroad custom and regulation required him to do. Unbeknownst to Davis, a locomotive had just coupled with the other (eastern) end of the train. It had a crew of four. Two were in the cab of the locomotive. The other two, one of whom was designated as the rear brakeman, were somewhere alongside the train; the record did not show exactly where they were, but neither was at the western end of the train, where Davis was. The crew was ordered to move the train several car lengths to the east because it was blocking a switch. The crew made the movement, but without blowing the train's horn or ringing its bell. The only warning Davis had of the impending movement was the sudden rush of air as the air brakes were activated. He tried to scramble to safety before the train started up but his legs were caught beneath the wheels of the car as he crawled out from under it. One leg was severed just below the knee; most of the foot on the other leg also was sliced off.

Davis presented three theories of the railroad's negligence to the jury; as commonly is the case, each of the three theories consisted of an untaken precaution by the railroad that might have prevented the accident. His first claim was that Conrail's employee Lundy, whose auto was equipped with a two-way radio, should have notified the crew of the train that an unknown person was sitting in a van parked near the tracks. His second theory was that before the train was moved a member of the crew should have walked its length, looking under the cars. His third theory was that it was negligent for the crew to move the train without first blowing its horn.

A jury found for Davis, assessed his damages at \$3 million, but found that Davis's own negligence had been one third responsible for the accident, and therefore awarded him \$2 million. The railroad appealed. In addition to denying that it was negligent in failing to take the precautions Davis described, the railroad argued that the rule regarding blue flagging relieved it from any duty of care to persons who might be injured by a sudden starting of the train, because all such persons can protect themselves by blue flagging and are careless if they fail to do so.

What result would you expect on these facts? How might the Hand formula be used to assess Davis's theories of negligence and the railroad's responses? What analysis of the case is suggested by Professor Wright's arguments?

10. *The new orthodoxy?* From the Restatement (Third) of Torts (2001) (Tentative Draft):

§3. NEGLIGENCE

A person acts with negligence if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in

ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that it will result in harm, the foreseeable severity of the harm that may ensue, and the burden that would be borne by the person and others if the person takes precautions that eliminate or reduce the possibility of harm.

How does this language differ from the definition of negligence in the Second Restatement considered at the start of this chapter? Does this new formulation amount to an adoption of the Hand formula?

11. *Caught using the Hand formula.* As we conclude our examination of the Hand formula, consider a few broad questions. First, do you think the courts in the cases just considered are applying the Hand formula, consciously or otherwise? Second, is the Hand formula an appropriate way, as a normative matter, to decide whether a defendant has been negligent? What stance should the law take toward defendants who consciously use the Hand formula to decide what precautions to take? In the 1970s the Ford Motor Company was accused of deciding not to strengthen the fuel tanks in its Pinto automobiles because it was cheaper just to pay damages to people burned or killed in fires caused by the weaker fuel tanks. One group of plaintiffs making such a claim won several million dollars from Ford in punitive damages. See *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Ct. App. 1981) (discussed in the chapter on damages). More recently, a jury awarded 4.9 billion dollars in punitive damages against General Motors for placing the gas tank in its Malibu automobiles too close to the rear bumper. (The trial judge reduced the award to \$1.09 billion, and GM settled with the plaintiffs for an undisclosed amount while its appeal was pending.) The plaintiffs' evidence was that GM had calculated that fires resulting from the fuel tank's placement were costing the firm only \$2.40 per vehicle (in average payments to people injured in fiery collisions), and that it therefore would not make sense to spend \$8.59 per vehicle to adopt a safer design. The internal memo on which this analysis was based was written in 1973. It adopted \$200,000 as the value of a human life; the memo's author added that "it is really impossible to put a value on human life. This analysis tried to do so in an objective manner." After the trial ended, one of the jurors said, "We're telling GM that when they know that something . . . is going to injure people, then it's more important that they pay the money to make the car safe than to come to court and have a trial all the time." Another juror said, "We wanted to let them know that no matter how large the company may be, we as jurors, we as people all over the world, will not stand for companies having disregard for human life." See *Los Angeles Times*, July 10, 1999, at 1; *Detroit Free Press* (July 13, 1999).

Are the decisions in these cases best understood as judgments that the defendants are underestimating the size of the "L" involved when they make their Hand formula calculations? Or should the decisions be understood as condemning the defendant's decision to engage in such calculations at all?

Do they tend to support the arguments from Professor Wright considered earlier? In any event, how should an automobile company decide which safety precautions to install in its vehicles and which to leave out? (Strictly speaking the plaintiffs in these cases were claiming not that the defendants were negligent, but that they sold defectively designed products; as we shall see in a later chapter, however, the standard for assessing such claims usually amounts to a comparison of the costs and benefits of the defendant's design with the costs and benefits of an alternative design proposed by the plaintiff.)

12. *Compliance errors.* So far in this section we have been considering one variety of negligence: claims that someone made a decision that violated the Hand formula—a decision not to take an injured sailor into port, or a decision to try to rescue a child sitting on a set of railroad tracks, or a decision not to give goggles to a one-eyed worker. But many negligent acts fall into a different category; they involve lapses of care in which the defendant fails to take some precaution that everyone agrees is required by reasonable prudence, as when a driver forgets to look for pedestrians. These sorts of lapses might be called “compliance errors,” because they are failures to comply with an agreed-upon standard of care. Another way of viewing this distinction is by noting that most of the cases in this section so far have involved questions about what *durable* precautions the Hand formula requires. A durable precaution generally is some safety measure that can be implemented with a single decision, such as installing a fire escape, hiring a bargee, or running wires below the ground. Compliance errors, on the other hand, typically involve momentary failures to take *repetitive* precautions, such as a driver forgetting to look both ways before entering an intersection, or a railroad's employee's failure—despite company policy—to remember to blow the horn before moving the train.

Obviously compliance errors occur frequently, and they are responsible for many accidents. But how should they be treated by the law? *Perfect* compliance with the dictates of the Hand formula might be very costly. Most people violate some rules of the road routinely when they drive; they fail to look for pedestrians, drive a bit too fast, or forget to check their tire pressure. To eradicate all of these lapses—to keep one's eyes fixed on the road at all times—would be difficult and thus “expensive” in terms of the Hand formula (high *B*). Perhaps what the Hand formula really requires is just the *habit* of watching the road with only occasional lapses. Yet that implies that people should be given a break when those lapses occur, since it's not worth the effort to eradicate them entirely. Should courts therefore be forgiving of the occasional lapse of due care?

The law's usual answer is “no.” In a sense this amounts to a pocket of strict liability within the negligence rule, since it means that once some precaution (such as looking both ways) is considered a necessary feature of reasonable care, any failure to comply with the precaution will result in liability even if it was one of those rare lapses that even a careful person would commit. Thus if a surgeon mistakenly leaves a sponge inside a patient, there is no

room for him to argue that in fact he is a very careful person and that this was a once-in-a-lifetime slipup. But suppose that the same surgeon were to purchase a machine that mechanically kept count of the number of sponges used in an operation and the number of them later removed and thrown away. The machine is more accurate than any human can be expected to be; but the machine nevertheless makes mistakes once per every million sponges that it counts. If a patient were injured by that millionth sponge, could she sue the surgeon? What argument might exist for treating this case differently from the case where the surgeon himself commits a one-in-a-million blunder?

C. CUSTOM AND THE PROBLEM OF MEDICAL MALPRACTICE

We next explore the significance of customs in defining negligence. If a defendant company takes as many precautions in its affairs as most similar companies take, can it be accused of failing to take “reasonable” care? Or suppose the defendant *failed* to take customary precautions: does this necessarily mean the defendant was negligent? When does it make sense to assume that the customary level of care in an industry is the appropriate level? The issue is especially important in the field of medical malpractice, as we shall see, but we begin by taking a broad view of the question.

The T.J. Hooper 60 F.2d 737 (2d Cir. 1932)

[Several coal barges were lost in a storm while being towed by the petitioner’s two tugboats, the *Montrose* and the *Hooper*, along the New Jersey coast. The trial court found the tugboats “unseaworthy”—comparable in admiralty to a finding of negligence in an ordinary tort case—because they did not carry working radios that would have enabled them to hear about the coming bad weather and seek shelter. The tugboat company appealed.]

LEARNED HAND, *Circuit Judge*—[. . .] Taking the situation as a whole, it seems to us that the [masters of the tugboats] would have taken no undue chances, had they got the broadcasts [predicting foul weather].

They did not, because their private radio receiving sets, which were on board, were not in working order. These belonged to them personally, and were partly a toy, partly a part of the equipment, but neither furnished by the owner, nor supervised by it. It is not fair to say that there was a general custom among coastwise carriers so to equip their tugs. One line alone did it; as for the rest, they relied upon their crews, so far as they can be said to have relied at all. An adequate receiving set suitable for a coastwise tug can

now be got at small cost and is reasonably reliable if kept up; obviously it is a source of great protection to their tows. Twice every day they can receive these predictions, based upon the widest possible information, available to every vessel within two or three hundred miles and more. Such a set is the ears of the tug to catch the spoken word, just as the master's binoculars are her eyes to see a storm signal ashore. Whatever may be said as to other vessels, tugs towing heavy coal laden barges, strung out for half a mile, have little power to manoeuvre, and do not, as this case proves, expose themselves to weather which would not turn back stauncher craft. They can have at hand protection against dangers of which they can learn in no other way.

Is it then a final answer that the business had not yet generally adopted receiving sets? There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission. But here there was no custom at all as to receiving sets; some had them, some did not; the most that can be urged is that they had not yet become general. Certainly in such a case we need not pause; when some have thought a device necessary, at least we may say that they were right, and the others too slack. [. . .] We hold the tugs therefore because had they been properly equipped, they would have got the Arlington reports. The injury was a direct consequence of this unseaworthiness.

Decree affirmed.

NOTES

1. *The sandman*. In *Ellis v. Louisville & Nashville Ry.*, 251 S.W.2d 577 (Ky. App. 1952), the plaintiff was responsible for maintaining mechanisms on the defendant's trains that released sand onto slippery railroad tracks to keep the wheels of the engine from spinning. Compressed air forced the sand through pipes and out onto the tracks. One of the plaintiff's tasks was to lean out over the nozzles of the pipes to confirm that the sand was falling through onto the rails. Clouds of dust would arise from the sand when he did this, and he could not avoid breathing some of it. He did other similar work with sand that also caused him to breathe dust. The plaintiff's evidence was that breathing so much dust during his 25 years of employment caused him to contract silicosis. He sued the defendant railroad, claiming it had been negligent in failing to issue him a mask that would have prevented him from inhaling the dust. The defendant put in evidence that the general practice of American railroads was not to supply masks to employees doing the plaintiff's

sort of work. The trial court gave a directed verdict to the defendant railroad, and the court of appeals affirmed:

The general rule as to common experience, usage and custom is well stated in 38 Am. Jur. 'Negligence' §34, pages 679-682, from which we take these excerpts: "The common practices of the people, however, cannot be ignored in determining whether due care was exercised by an individual in a particular situation. It is not to be expected that the law will exact a degree of care in guarding any article which will make the great majority of the possessors of that article chargeable with habitual or continuous negligence. [. . .] Persons who are charged with a duty in relation to a particular matter or thing have a right to rely upon the sufficiency of a structure or contrivance which is in common use for the purpose and has been in fact safely used under such a variety of conditions as to demonstrate its fitness for the purpose. [. . .] Ordinarily, one is not considered negligent in respect of acts which conform to a common practice that has existed for years without resulting in an injury, and that has nothing about it which shows a want of due care. [. . .] In other words, the test of negligence with respect to instrumentalities, methods, etc., is the ordinary usage and custom of mankind." [. . .]

Applying this sound rule [. . .] to the facts in this case, it is manifest defendant was not guilty of negligence in failing to furnish plaintiff safe equipment or a safe place in which to work, since the record plainly shows the practice by railroads generally throughout the nation was not to furnish masks or respirators to men doing the same character of work plaintiff had performed for defendant.

Does the holding of *Ellis v. Louisville & Nashville Ry.* necessarily represent a different rule than *The T.J. Hooper*, or are the two cases distinguishable?

2. *Reason does not have to wait on usage.* In *MacDougall v. Pennsylvania Power and Light Co.*, 166 A. 589 (Pa. 1933), the plaintiff, a plumber, was hired by one Thomas Tiddy to go onto Tiddy's roof and repair a rain spout under the eaves. The defendant power company maintained a fuse box on a pole at the edge of the roof. In wet weather the outside of the box conducted electricity—and it was raining when the plaintiff went to perform the work. At one point he raised his head and bumped into the fuse box. A current entered behind his ear and exited through the base of his spine. He was knocked unconscious and fell 25 feet from the roof, sustaining various injuries. A physician testified that when he arrived at the scene of the accident to render first aid to the plaintiff, he noticed a perceptible odor of burnt flesh.

The plaintiff sued the power company, charging that it had been negligent in putting the box so near the roof of the building despite knowing that it often carried high voltage. The trial court awarded the plaintiff \$10,455. The defendant appealed, arguing that "the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business," and that "no deviation by the defendant from any standard observed by those

engaged in the same business was shown in this case. There is absolutely no competent testimony in this case that the equipment of the defendant or the construction of the equipment was not in accordance with the ordinary usage in the business.” The Pennsylvania Supreme Court affirmed the judgment of the trial court:

Usage becomes important only when the conduct in question is not inherently dangerous. Vigilance must always be commensurate with danger. A high degree of danger always calls for a high degree of care. The care to be exercised in a particular case must always be proportionate to the seriousness of the consequences which are reasonably to be anticipated as a result of the conduct in question. Reason does not have to wait on usage; the latter must wait on reason. Ordinary common sense dictates that if in a harmless looking box there is something lurking that would kill or injure any one touching that box, the latter must be so situated, if it is possible or reasonably practicable to do so, that persons are not likely to come in contact with it. If the box must be placed where persons are likely to come in contact with it, there should be adequate warning given of its dangerous character.

Usage may sometimes be treated as a factor in the measurement of due care, and “in a few cases the courts have considered that due care is established by showing that all precautions and safeguards customarily used in the conduct of a similar business or occupation or in a similar undertaking have been adopted, although this view cannot be carried to the extent of justifying a custom which is so obviously dangerous to life and limb as to be at once recognized as such by all intelligent persons. [. . .] Customary methods or conduct do not furnish a test which is conclusive or controlling on the question of negligence, or fix a standard by which negligence is to be gauged. The standard of due care is such care as a prudent person would exercise under the circumstances of the particular case, and conformity to customary or usual conduct or methods cannot amount to more than a circumstance to be considered together with other circumstances of the case in determining whether due care has been exercised.”

Is there a satisfactory distinction between *MacDougall v. Pennsylvania Power and Light Co.* and *Ellis v. Louisville & Nashville Ry.* (NL for failing to provide the plaintiff with a mask, since masks were not customary in the railroad industry)?

In most jurisdictions today, a defendant’s compliance with custom or violation of it generally is considered probative evidence that the jury may consider in a negligence case, but it is not regarded as conclusive either way. Can you think of situations where it would make sense to give customary practices decisive weight in setting the standard of care?

3. *Undistorted market determinations.* In *Rodi Yachts, Inc. v. National Marine, Inc.*, 984 F.2d 880 (7th Cir. 1993), a company called Transport

Distributors, Inc. (TDI), owned a dock in Chicago. National Marine sent a barge to TDI's dock to be unloaded there. A crew supplied by National Marine lashed the barge to TDI's dock, then left the scene. Several days later, before TDI had been able to obtain a crane to unload the barge, the barge slipped free from its moorings and collided with another dock and two boats, causing more than \$100,000 in damage. The owners of the damaged property brought suit against National Marine, which then impleaded TDI. The primary question in the case was the extent to which National Marine and TDI each had been negligent. TDI claimed that National Marine negligently tied its barge to the dock; National Marine claimed that TDI had been negligent in failing for several days to inspect the ropes used to tie the barge to the dock to see if they were holding up. The district court found National Marine liable for two thirds of the plaintiffs' damages and TDI responsible for the remaining third. The defendants appealed, each claiming that the other was solely at fault. The court of appeals (per Posner, J.) reversed and remanded, holding that the district court had not made sufficient findings to support its conclusions. Said the court:

One of the best known principles of tort law—a principle that received its canonical expression in an admiralty decision written by Learned Hand, *T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932)—is that compliance with custom is no defense to a tort claim. [The principle] is obviously sound when one is speaking of the duty of care to persons with whom the industry whose customary standard of care is at issue has no actual or potential contractual relation. For in that situation the costs of the injury can be made costs to the industry, and thus influence its behavior, only through the imposition of tort liability. R.H. Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1 (1960). It is different when the potential victims are the customers of the potential injurers. For then the latter, even if they are not subject to any tort liability, will have to ponder the possibility that if they endanger their customers they may lose them or may have to charge a lower price in order to compensate them for bearing a risk of injury. In such a case the market itself fixes a standard of care that reflects the preferences of potential victims as well as of potential injurers and then the principal function of tort law, it could be argued, is to protect customers' reasonable expectations that the firms with which they deal are complying with the standard of care customary in the industry, that is, the standard fixed by the market. This consideration is made relevant here by National Marine's argument that by departing without notice from the industry custom regarding inspections by dock operators TDI increased the risk of an accident.

This case illustrates the operation of custom in both the contractual and the noncontractual setting. The owners of the dock and boats that were damaged had no actual or potential contractual relationship with the defendants. The latter in deciding what precautions to take would not be influenced, therefore, by the possible effect on transactions they

might have with those owners; and as a result, the standard of care in the inland trade with regard to preventing runaway barges might be too low because it ignored some of the accident costs to which such runaways give rise. But at the present stage of this lawsuit the focus is not upon the defendants' duties toward strangers (the plaintiffs); it is upon their duties toward each other; and they had a contractual relationship with each other. It was not a direct or explicit relationship. There was no written contract, no writing at all, no money changing hands, no receipts—not even the maritime equivalent of a parking lot claim check. But a barge owner and a dock owner (or operator) are knitted together by their contracts with their customers as tightly as they would be by a contract between themselves. Competition among barge owners and among dock owners to provide their respective legs of a unitary transportation service at the lowest possible price, coupled with tort liability to third parties, will give both types of service provider market incentives to adopt optimal safety precautions. Both face potential liability to third parties such as the plaintiffs in this case. They minimize their liability costs by allocating the responsibility for safety measures between them efficiently. They can do this explicitly or, implicitly, by abiding by the custom that the market has evolved.

Here the custom was for the barge owner (or operator) to moor the barge to the dock with a sufficient number of sound ropes, carefully fastened, and for the dock owner (or operator) to inspect the barge from time to time while it is at the dock, to make sure that the mooring lines remain securely fastened. We do not know whether National Marine violated the duty of care that custom places upon it because we do not know whether the ropes were unsound, insufficient in number (which seems highly unlikely, as we have said), or improperly fastened (also unlikely). And we do not know whether TDI violated the duty that custom imposed upon it to inspect (or in lieu therefore to notify National Marine that it was not inspecting, or to expedite the unloading), because there is no finding about what precisely the duty consists of. Since, however, these customs appear to reflect an undistorted market determination of the best way to minimize runaway barge accidents, we think the focus of the district court's inquiry should be on the parties' respective compliance with and departures from the customs and that the judge and the parties should not feel compelled to conduct a cost benefit analysis of barge transportation from the ground up.

Does the analysis in *Rodi Yachts* imply that *The T.J. Hooper* was wrongly decided on its facts? Is there a good distinction between the two cases? How might the analysis in *Rodi Yachts* apply to *MacDougall v. Pennsylvania Power and Light Co.*, or to *Ellis v. Louisville & Nashville Ry.*?

4. *Custom and contract.* The court in *Rodi Yachts* repeats the proposition that "compliance with custom is no defense to a tort claim," and says that

principle “is obviously sound when one is speaking of the duty of care to persons with whom the industry whose customary standard of care is at issue has no actual or potential contractual relation.” Why? Consider two scenarios. In the first, a railroad is sued when one of its trains drives through a crossing without blowing its horn and runs into the plaintiff’s car. The railroad defends on the ground that it is customary in the railroad industry for trains to blow their horns only when the engineer sees an obstruction on the tracks; here, the car entered the crossing just before the train arrived. In the second scenario, a railroad is sued when one of its passengers is struck by a piece of luggage that falls out of one of the train’s overhead racks. The passenger claims that the railroad should have had enclosed baggage compartments over its seats (similar to the compartments on airplanes), rather than open racks where suitcases rest. The railroad again defends by invoking industry custom, pointing out that no railroads have such enclosed overhead compartments. Should custom be a stronger defense in one of these scenarios than in the other? Why?

5. *Medical malpractice cases.* In *Brune v. Belinkoff*, 354 Mass. 102 (1968), the defendant, a specialist in anesthesiology practicing in New Bedford, administered a spinal anesthetic containing eight milligrams of pontocaine to the plaintiff prior to the delivery of her child. This was the customary dose in New Bedford, but in Boston, 50 miles away, the customary dose was five milligrams or less. The defendant said that greater doses of pontocaine were needed in New Bedford because the practice of obstetricians there is to put pressure directly on the uterus during delivery. In any event, when the plaintiff attempted to get out of bed eleven hours after her delivery, she slipped and fell on the floor. She subsequently complained of numbness and weakness in her left leg and brought suit to recover for her injuries; she complained that she had been given too much pontocaine. The trial court instructed the jury to apply the traditional “locality rule” of *Small v. Howard*, 131 Mass. 131 (1880):

[The defendant] must measure up to the standard of professional care and skill ordinarily possessed by others in his profession in the community, which is New Bedford, and its environs, of course, where he practices, having regard to the current state of advance of the profession. If, in a given case, it were determined by a jury that the ability and skill of the physician in New Bedford were fifty percent inferior to that which existed in Boston, a defendant in New Bedford would be required to measure up to the standard of skill and competence and ability that is ordinarily found by physicians in New Bedford.

So instructed, the jury returned a verdict for the defendant. The plaintiff appealed, claiming that the locality rule should be abandoned. The Supreme Judicial Court agreed, and reversed:

We are of opinion that the “locality” rule of *Small v. Howard* which measures a physician’s conduct by the standards of other doctors in similar communities is unsuited to present day conditions. The time has come when the medical profession should no longer be Balkanized by the application of varying geographic standards in malpractice cases. Accordingly, *Small v. Howard* is hereby overruled. The present case affords a good illustration of the inappropriateness of the “locality” rule to existing conditions. The defendant was a specialist practicing in New Bedford, a city of 100,000, which is slightly more than fifty miles from Boston, one of the medical centers of the nation, if not the world. This is a far cry from the country doctor in *Small v. Howard*, who ninety years ago was called upon to perform difficult surgery. Yet the trial judge told the jury that if the skill and ability of New Bedford physicians were “fifty percent inferior” to those obtaining in Boston the defendant should be judged by New Bedford standards, “having regard to the current state of advance of the profession.” This may well be carrying the rule of *Small v. Howard* to its logical conclusion, but it is, we submit, a *reductio ad absurdum* of the rule.

The proper standard is whether the physician, if a general practitioner, has exercised the degree of care and skill of the average qualified practitioner, taking into account the advances in the profession. In applying this standard it is permissible to consider the medical resources available to the physician as one circumstance in determining the skill and care required. Under this standard some allowance is thus made for the type of community in which the physician carries on his practice.

Notice two features of *Brune v. Belinkoff*. First, the court takes for granted that custom plays a decisive role in setting the defendant’s standard of care: the question is not whether the jury thinks he acted reasonably, but whether the jury thinks he acted with the skill ordinarily found in some community of physicians, whether national or local. All courts agree on this general approach to deciding medical cases; medical malpractice is an unusual area of tort law where compliance with custom is decisive rather than just evidentiary. What is it about medical cases that might make it better to ask whether the defendant used customary care than to ask whether the defendant acted reasonably? Is the reason related to the contractual theory discussed in the *Rodi Yachts* case, or are different considerations in play?

One consequence of deferring to custom is that a plaintiff in a medical malpractice case normally must present expert testimony to show how the plaintiff’s situation customarily would have been handled. This brings us to the second issue raised by *Brune*: handled in which community? No court today adheres to the strict locality rule that once required a plaintiff to show that the defendant’s conduct did not measure up to the usual standard of care in the defendant’s own town or city. (What are the strongest objections to such an approach?) Most courts use a national standard of care, usually

with allowances similar to those noted in *Brune* if the defendant had below-average resources available. Some courts continue to use a modified locality rule, however; consider the following example.

6. *Similar localities.* In *Gambill v. Stroud*, 531 S.W.2d 945 (Ark. 1976), the defendant, Stroud, was a surgeon at a hospital in Jonesboro, Arkansas. He was to perform an operation on the plaintiff's wife, Yvonne Gambill, but the operation was aborted because of complications with her anesthesia; as a result of the complications, Mrs. Gambill suffered cardiac arrest and brain damage. The plaintiff alleged that the complications were the product of Dr. Stroud's negligence. The jury was given the following instruction:

In diagnosing the condition of and treating of a patient, a physician must possess and apply with reasonable care the degree of skill and learning ordinarily possessed and used by members of his profession in good standing engaged in the same type of service or specialty in the location in which he practices or in a similar locality. A failure to meet this standard is negligence.

So instructed, the jury brought in a verdict for the defendant. The plaintiff appealed, contending that the instruction represented a "locality rule" and so was erroneous. The Arkansas Supreme Court affirmed:

The thrust of appellants' argument is that [the locality rule represented by the instruction] is no longer applicable to modern medicine, because doctors practicing in small communities now have the same opportunities and resources as physicians in large cities to keep abreast of advances in the medical profession, due to availability of the Journal of the American Medical Association and other journals, drug company representatives and literature, closed circuit television, special radio networks, tape recorded digests of medical literature, medical seminars and opportunities for exchange of views between doctors from small towns and those from large cities where there are complexes of medical centers and modern facilities.

However desirable the attainment of this ideal may be, it remains an ideal. It was not shown in this case, and we are not convinced, that we have reached the time when the same postgraduate medical education, research and experience is equally available to all physicians, regardless of the community in which they practice. The opportunities for doctors in small towns, of which we have many, to leave a demanding practice to attend seminars and regional medical meetings cannot be the same as those for doctors practicing in clinics in larger centers. It goes without saying that the physicians in these small towns do not and cannot have the clinical and hospital facilities available in the larger cities where there are large, modern hospitals, and medical centers or the same advantage of observing others who have been trained, or have developed expertise,

in the use of new skills, facilities and procedures, or consulting and exchanging views with specialists, other practitioners and drug experts, of utilizing closed circuit television, special radio networks or of studying in extensive medical libraries found in larger centers.

The rule we have established is not a strict locality rule. It incorporates the similar community into the picture. The standard is not limited to that of a particular locality. Rather, it is that of persons engaged in a similar practice in similar localities, giving consideration to geographical location, size and character of the community. The similarity of communities should depend not on population or area in a medical malpractice case, but rather upon their similarity from the standpoint of medical facilities, practices and advantages. [. . .]

It also seems that appellants have overlooked the impact of better medical education, modern technology, and improved means of travel and communication upon the law as it now exists. If the impact is as great as they theorize then no change in the law is necessary. These factors have already elevated the degree of skill and learning ordinarily possessed and used by members of the medical profession in every locality, if that premise is correct.

Which sorts of jurisdictions do you think would be most eager to adopt a national standard of care, and which most likely to retain a rule keyed to the type of community involved? The court in *Gambill* added that “We certainly are not unaware of the difficulties experienced by small towns and rural communities in attracting qualified physicians. A complete abolition of the locality rule would certainly add to these difficulties.” Tennessee provides for a similar approach by statute: a plaintiff in a medical malpractice case must establish “[t]he recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred.” T.C.A. §29-26-115. Who benefits from this rule? Who is made worse off by it?

7. *Medicine vs. facilities.* In *Johnson v. Wills Memorial Hospital & Nursing Home*, 343 S.E.2d 700 (Ga. App. 1986), the plaintiff’s decedent, one Columbus Johnson, was a patient in the defendant’s hospital. One night he began behaving strangely, running down a hospital corridor while swinging a pitcher of water and shouting “help me.” He was forcibly returned to his room by two sheriff’s deputies and then sedated by a nurse. A half hour later he still appeared to witnesses to be “very agitated.” An orderly was stationed outside Johnson’s room to ensure that he stayed there. About three hours later, the orderly reported that Johnson’s room was empty; the window to the room was open and the screen had been cut. Johnson was found about eight hours later in the yard of a nearby residence. He was returned to the hospital and pronounced dead on arrival. His treating physician diagnosed the cause of death as overexposure to cold, but no autopsy was conducted.

The plaintiff's suit alleged that the hospital, acting through its personnel, failed to adequately monitor Johnson, failed to inform the treating physician of Johnson's condition, and failed to treat him as the physician directed. The jury was instructed that the standard of care applicable to the hospital was the standard of care exercised in similar hospitals in similar communities. So instructed, the jury brought in a verdict for the defendant. The plaintiff appealed, alleging that the instruction incorrectly applied a "locality rule" to the case. The Georgia Court Appeals affirmed:

The "locality rule" is appropriate in a case in which the adequacy of a hospital's facilities or services is questioned. Inroads on the "local" standard of care rule have been made in cases in which a plaintiff asserts negligence in the medical care and treatment provided by a hospital's professional personnel. In the case at bar, appellant alleged in her complaint that the nursing care her late husband received was substandard and that appellee's facilities were deficient since it had failed to protect her decedent adequately. The protection of patients is not a medical function of a hospital; rather, it is a service provided by a hospital to its patients, and the ability of a small rural hospital to provide such a service is limited by its location and resources. In light of the pleadings, a charge on the locality rule was called for, and the trial court committed no error in so instructing the jury.

What is the basis for the distinction the court draws between medical care and medical facilities? Why are facilities judged by reference to custom at all? (The more usual approach would be to judge them without reference to custom or locality.)

8. *Legal malpractice*. In *Cook v. Irion*, 409 S.W.2d 475 (Tex. App. 1966), the plaintiff tripped and fell on a sidewalk in El Paso. There were three possible defendants she might have sued: the shopping center that owned the sidewalk, the organization of tenants occupying the shopping center, and the television station that owned the cable on which she tripped. Her lawyer, Irion, sued only the corporation that owned the shopping center. She lost. She then sued Irion for malpractice, claiming that in bringing her tort suit he should have sued the other possible defendants as well; the statute of limitations on claims against them had since expired. The plaintiff's expert was a lawyer from the town of Alpine, Texas, who testified that Irion "had failed to exercise the standard of care of the average general practitioner in the State of Texas in not suing all three of the possible defendants." The trial court gave a directed verdict to the defendant, Irion. The Court of Appeals affirmed, in part because the plaintiff had not offered adequate expert testimony:

[A]n attorney practicing in a vastly different locality would not be qualified to second guess the judgment of an experienced attorney of the El

Paso County Bar as to who should be joined as additional party defendants. In this case Mr. Allen practiced law in Alpine, which is 220 miles from El Paso, and it is further significant that the population of Brewster County is 6,434, as compared to 314,070 in El Paso County. As admitted by Mr. Allen, the probable make up of the jury panel is an important consideration of whom to sue where there is an option. The importance of knowledge of the local situation is fully demonstrated by the well recognized practice among the lawyers of this State in associating local counsel in the trial of most important jury cases.

In cases of legal and other professional malpractice, as in cases of medical malpractice, the standard of care generally is set by reference to the customary behavior of professionals in the relevant community. Is the rationale for this approach in suits against lawyers as strong as it is in suits against doctors? The relevant community usually is said to be the lawyers practicing in the defendant's state. Can you think of any reason why the state, rather than the town or nation, would be the appropriate frame of reference when considering a claim of legal malpractice? Can the decision in *Cook v. Irion* be understood as a sensible exception to that usual rule?

9. *Custom and consent.* One area of medical practice where custom does not necessarily set the standard is informed consent. When a patient complains that a physician failed to disclose a risk of a procedure and that the risk then materialized, some courts will ask whether such disclosures were customary among skilled practitioners of good standing; but they also will ask—and some courts *only* will ask—whether the physician disclosed all “material” risks. The question then becomes whether the risk of the harm the patient suffered was neither so obvious nor so rare that it should not be considered “material.” Evidence on that question may be supplied by experts—i.e., other physicians—but the test, strictly speaking, is not just whether the defendant made customary disclosures; even a customary level of disclosure can be found inadequate. Why does custom have less force in this context than in assessing a doctor's care in operating? The problem of informed consent in medical malpractice cases is further addressed in the chapter on cause in fact.

D. NEGLIGENCE PER SE: CRIMINAL STATUTES AND JUDGE-MADE RULES

Tort cases that we characterize as resulting in “liability” usually are cases where a court of appeals says that a jury is *permitted* to find the defendant negligent, not where a jury is required to do so. Some major exceptions to this pattern arise in cases where a defendant is held to be *negligent per se*: the court determines that the defendant has violated some sort of rule, either statutory or

judge-made, and that the violation establishes the defendant's negligence as a matter of law. In other instances, however, courts may treat such violations of rules as mere evidence of negligence for the jury to consider—or as no evidence of negligence at all.

1. Violations of Criminal Statutes

Martin v. Herzog

126 N.E. 814 (N.Y. 1920)

CARDOZO, J. The action is one to recover damages for injuries resulting in death. Plaintiff and her husband, while driving toward Tarrytown in a buggy on the night of August 21, 1915, were struck by the defendant's automobile coming in the opposite direction. They were thrown to the ground, and the man was killed. At the point of the collision the highway makes a curve. The car was rounding the curve, when suddenly it came upon the buggy, emerging, the defendant tells us, from the gloom. Negligence is charged against the defendant, the driver of the car, in that he did not keep to the right of the center of the highway. Highway Law, §286, subd. 3, and section 332. Negligence is charged against the plaintiff's intestate, the driver of the wagon, in that he was traveling without lights. Highway Law, §329a, as amended by Laws 1915, c. 367. There is no evidence that the defendant was moving at an excessive speed. There is none of any defect in the equipment of his car. The beam of light from his lamps pointed to the right as the wheels of his car turned along the curve toward the left; and, looking in the direction of the plaintiff's approach, he was peering into the shadow. The case against him must stand, therefore, if at all, upon the divergence of his course from the center of the highway. The jury found him delinquent and his victim blameless. The Appellate Division reversed, and ordered a new trial.

We agree with the Appellate Division that the charge to the jury was erroneous and misleading. [. . .] In the body of the charge the trial judge said that the jury could consider the absence of light "in determining whether the plaintiff's intestate was guilty of contributory negligence in failing to have a light upon the buggy as provided by law. I do not mean to say that the absence of light necessarily makes him negligent, but it is a fact for your consideration." The defendant requested a ruling that the absence of a light on the plaintiff's vehicle was "prima facie evidence of contributory negligence." This request was refused, and the jury were again instructed that they might consider the absence of lights as some evidence of negligence, but that it was not conclusive evidence. The plaintiff then requested a charge that "the fact that the plaintiff's intestate was driving without a light is not negligence in itself," and to this the court acceded. The defendant saved his rights by appropriate exceptions.

We think the unexcused omission of the statutory signals is more than some evidence of negligence. It is negligence in itself. Lights are intended for the guidance and protection of other travelers on the highway. Highway Law, §329a. By the very terms of the hypothesis, to omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform. That, we think, is now the established rule in this state. [. . .]

In the case at hand, we have an instance of the admitted violation of a statute intended for the protection of travelers on the highway, of whom the defendant at the time was one. Yet the jurors were instructed in effect that they were at liberty in their discretion to treat the omission of lights either as innocent or as culpable. They were allowed to “consider the default as lightly or gravely” as they would (Thomas, J., in the court below). [. . .] Jurors have no dispensing power, by which they may relax the duty that one traveler on the highway owes under the statute to another. It is error to tell them that they have. The omission of these lights was a wrong, and, being wholly unexcused, was also a negligent wrong. No license should have been conceded to the triers of the facts to find it anything else.

We must be on our guard, however, against confusing the question of negligence with that of the causal connection between the negligence and the injury. A defendant who travels without lights is not to pay damages for his fault, unless the absence of lights is the cause of the disaster. A plaintiff who travels without them is not to forfeit the right to damages, unless the absence of lights is at least a contributing cause of the disaster. [. . .]

There may, indeed, be times when the lights on a highway are so many and so bright that lights on a wagon are superfluous. If that is so, it is for the offender to go forward with the evidence, and prove the illumination as a kind of substituted performance. The plaintiff asserts that she did so here. She says that the scene of the accident was illumined by moonlight, by an electric lamp, and by the lights of the approaching car. Her position is that, if the defendant did not see the buggy thus illumined, a jury might reasonably infer that he would not have seen it anyhow. We may doubt whether there is any evidence of illumination sufficient to sustain the jury in drawing such an inference; but the decision of the case does not make it necessary to resolve the doubt, and so we leave it open. It is certain that they were not required to find that lights on the wagon were superfluous. They might reasonably have found the contrary. They ought, therefore, to have been informed what effect they were free to give, in that event, to the violation of the statute. They should have been told, not only that the omission of the light was negligence, but that it was “prima facie evidence of contributory negligence”; i. e., that it was sufficient in itself unless its probative force was overcome to sustain a verdict that the decedent was at fault.

Here, on the undisputed facts, lack of vision, whether excusable or not, was the cause of the disaster. The defendant may have been negligent in

swerving from the center of the road; but he did not run into the buggy purposely, nor was he driving while intoxicated, nor was he going at such a reckless speed that warning would of necessity have been futile. Nothing of the kind is shown. The collision was due to his failure to see at a time when sight should have been aroused and guided by the statutory warnings. Some explanation of the effect to be given to the absence of those warnings, if the plaintiff failed to prove that other lights on the car or the highway took their place as equivalents, should have been put before the jury. The explanation was asked for and refused.

Order affirmed.

NOTES

1. *Criminal and civil liability.* Why treat a provision of the *criminal* law as setting the standard of care for *civil* purposes? Is it because the reasonable person always complies with whatever statutes and ordinances are in place? (Can it be that a reasonable person sometimes might not comply with them?) Or is the doctrine of negligence per se better understood as a guess at what the legislature wanted when it enacted the criminal provision? Sometimes such provisions provide explicitly for civil liability if they are violated, and in that case there generally is no controversy about their application in tort suits. The difficulties arise when a statute prohibits conduct without specifying whether a violation gives an injured party a right to sue for damages.

2. *Flexible commands.* In *Tedla v. Ellman*, 19 N.E.2d 987 (N.Y. 1939), Anna Tedla and her brother, John Bachek, were walking along a road known as the Sunrise Highway. They were wheeling baby carriages containing junk and wood which they had collected at a nearby incinerator. It was about six o'clock on a Sunday evening in December, and it was already dark; Bachek was carrying a lantern. A car driven by the defendant, Ellman, struck them, injuring Tedla and killing Bachek. Tedla brought suit against Ellman to recover for her injuries.

Sunrise Highway was a two-lane road with no footpaths on either side. State law provided as follows:

Pedestrians walking or remaining on the paved portion, or traveled part of a roadway shall be subject to, and comply with, the rules governing vehicles, with respect to meeting and turning out, except that such pedestrians shall keep to the left of the center line thereof, and turn to their left instead of right side thereof, so as to permit all vehicles passing them in either direction to pass on their right. Such pedestrians shall not be subject to the rules governing vehicles as to giving signals.

Tedla and Bachek were violating the statute by walking east on the east-bound or righthand roadway. At trial, however, Tedla put in evidence that the

side of the road they were using was much less trafficked and thus safer than the side the law said they should use. The trial court entered judgment on a jury verdict finding that the accident was due solely to Ellman's negligence. Ellman appealed on the ground that the trial court should have held Tedla and her brother negligent as a matter of law. The Court of Appeals affirmed:

The plaintiffs showed by the testimony of a State policeman that "there were very few cars going east" at the time of the accident, but that going west there was "very heavy Sunday night traffic." Until the recent adoption of the new statutory rule for pedestrians, ordinary prudence would have dictated that pedestrians should not expose themselves to the danger of walking along the roadway upon which the "very heavy Sunday night traffic" was proceeding when they could walk in comparative safety along a roadway used by very few cars. It is said that now, by force of the statutory rule, pedestrians are guilty of contributory negligence as matter of law when they use the safer roadway, unless that roadway is left of the center of the road.

[The statute provides] rules of the road to be observed by pedestrians and by vehicles, so that all those who use the road may know how they and others should proceed, at least under usual circumstances. A general rule of conduct—and, specifically, a rule of the road—may accomplish its intended purpose under usual conditions, but, when the unusual occurs, strict observance may defeat the purpose of the rule and produce catastrophic results. [. . .]

[W]here a statutory general rule of conduct fixes no definite standard of care which would under all circumstances tend to protect life, limb or property but merely codifies or supplements a common-law rule, which has always been subject to limitations and exceptions; or where the statutory rule of conduct regulates conflicting rights and obligations in a manner calculated to promote public convenience and safety, then the statute, in the absence of clear language to the contrary, should not be construed as intended to wipe out the limitations and exceptions which judicial decisions have attached to the common-law duty; nor should it be construed as an inflexible command that the general rule of conduct intended to prevent accidents must be followed even under conditions when observance might cause accidents. We may assume reasonably that the Legislature directed pedestrians to keep to the left of the center of the road because that would cause them to face traffic approaching in that lane and would enable them to care for their own safety better than if the traffic approached them from the rear. We cannot assume reasonably that the Legislature intended that a statute enacted for the preservation of the life and limb of pedestrians must be observed when observance would subject them to more imminent danger. [. . .]

Even under that construction of the statute, a pedestrian is, of course, at fault if he fails without good reason to observe the statutory rule of

conduct. The general duty is established by the statute, and deviation from it without good cause is a wrong and the wrongdoer is responsible for the damages resulting from his wrong. Here the jury might find that the pedestrians avoided a greater, indeed an almost suicidal, risk by proceeding along the east bound roadway; that the operator of the automobile was entirely heedless of the possibility of the presence of pedestrians on the highway; and that a pedestrian could not have avoided the accident even if he had faced oncoming traffic.

What is the distinction between *Tedla v. Ellman* and *Martin v. Herzog* (where the plaintiff was found negligent per se for driving a buggy without lights in violation of statute)? Is it fair to conclude from these cases that the Hand formula trumps statutory commands when the two conflict?

3. *Never on Sunday*. In *Tingle v. Chicago, B. & Q. Ry.*, 14 N.W. 320 (Iowa 1882), the defendant's train ran over the plaintiff's cow on a Sunday. The plaintiff sued, alleging no specific negligence on the railroad's part but pointing out that state law prohibited the operation of trains on Sundays. The trial court gave judgment to the plaintiff. The Iowa Supreme Court reversed:

While the injury could not have been inflicted if the defendant's train had not been operated, still, as it is not claimed that the train was operated in a negligent manner, the proximate cause of the injury was not the operation of the train, but it resulted from an accident for which the defendant is not responsible.

Cf. Restatement (Second) of Torts §286, Illustration 5:

A statute, which requires railroads to fence their tracks, is construed as intended solely to prevent injuries to animals straying onto the right of way who may be hit by trains. In violation of the statute, the A Railroad fails to fence its track. As a result, two of B's cows wander onto the track. One of them is hit by a train; the other is poisoned by weeds growing beside the track. The statute establishes a standard of conduct as to the cow hit by the train, but not as to the other cow.

4. *Sunday hat*. In *White v. Levarn*, 108 A. 564 (Vt. 1918), the plaintiff and defendant went squirrel hunting together on a Sunday, each armed with a shotgun. The plaintiff was wearing a hat that was the color of a gray squirrel; the defendant mistook the hat for a squirrel and shot at it, injuring the plaintiff. The plaintiff sued on the theory that hunting and discharging firearms on Sunday was forbidden by state law. The trial court gave judgment to the defendant. The Vermont Supreme Court reversed:

Hunting and shooting wild game or other birds or animals, or discharging firearms, on Sunday (with some exceptions not material here), are unlawful by statute. The shooting which injured the plaintiff was therefore an

unlawful act voluntarily done by the defendant, and he is answerable, in an action of trespass, for the injury which happened to the plaintiff, either by carelessness or accident.

Against objection and exception, the defendant was permitted to introduce evidence for the purpose of showing contributory negligence by the plaintiff, and facts are found thereon. [. . .] [C]onsent to an assault is no justification, for, since the state is wronged by it, the law forbids it on public grounds. [. . .] From this it must logically follow that contributory negligence is no defense in an action of trespass for a similar offense in law.

Is there a satisfactory distinction between *White v. Levarn* and *Tingle v. Chicago, B & Q. Ry.*? Which decision makes more sense? How might you argue that *both* cases were wrongly decided?

5. *Uses of statutes.* From the Restatement (Second) of Torts §288B (1965):

Illustration 2. A statute, construed as intended only to prevent misbreeding of animals, provides that hogs shall be confined by fences of specified strength. In violation of the statute, A fences in his hogs with a fence of less strength. One of the hogs breaks through the fence, escapes into the highway, and is struck by B's car, as a result of which B is injured. Although the statute does not define a standard of conduct which will be adopted as a matter of law for B's action, its provisions are admissible and relevant evidence as to the necessity of a fence of the specified strength for the proper confinement of hogs.

What is the difference between the way the Restatement recommends using the statute in this example and the way it is used in *Martin v. Herzog* and *White v. Levarn*?

6. *Controlling the jury.* Much of the law of torts is focused on when questions are decided by judges and when they are left to juries. As the introduction to the book explains, a plaintiff's usual goal throughout much of a tort suit is to get in front of a jury; the defendant's usual goal is to avoid that result, obtaining a dismissal of the case as a matter of law. That is why we speak of cases as involving "liability" if the court says that the plaintiff's case was good enough to be sent to a jury (or, equivalently, that the jury would be *permitted* to find liability on the plaintiff's facts), and "no liability" if the court says the case that a jury would not be permitted to find liability given the plaintiff's allegations or evidence.

But notice that this description leaves out a possibility: the court could award judgment to the *plaintiff* as a matter of law. Such rulings are made relatively rarely. The reason is that in a conventional negligence case the plaintiff is assigned the burden of proving all the elements of the case, including the defendant's failure to use reasonable care. A court may be able to say that

the plaintiff has failed to discharge this burden—that no rational jury could conclude from the plaintiff’s evidence that the defendant was negligent. It is more difficult, however, for a court to declare that a plaintiff *has* proven the defendant’s negligence as a matter of law, or (the same thing) that a rational jury would be *required* to find the defendant liable. Even if the plaintiff’s evidence seems very strong, the jury usually is free to disbelieve or discount it, in which case the plaintiff must lose. Likewise, a determination that the defendant failed to act reasonably traditionally has to come from a jury.

Doctrines of “negligence per se” are exceptions to these general rules. Where they apply they require a finding that the defendant was negligent (or that the plaintiff was contributorily negligent). The decision is made as a matter of law by the judge. As a practical matter this can be considered precisely the point of the doctrines: a finding of negligence per se is distinctive and important not just because the defendant ends up being held negligent, but because this result is reached without resort to a jury.

These points should help you answer the question immediately above regarding the difference between §288B of the Second Restatement and the holding of *Martin v. Herzog*. What is the role of the jury in the two situations?

7. *Man’s best friend*. In *Selger v. Steven Brothers, Inc.*, 222 Cal. App. 3d 1585 (1990), dog excrement often accumulated on the sidewalk in front of the defendant’s business, Steven’s Nursery and Hardware. The defendant’s employees usually used hoses or brooms to clean the sidewalk each morning. On the morning in question, however, the defendant’s manager saw excrement on the sidewalk when he opened the store but delayed in directing an employee to clean it up. Just as the manager was issuing that instruction, he heard the plaintiff scream. She had slipped and fallen while observing a flower display outside the store. Her shoe, her clothing, and a skid mark on the sidewalk left no doubt about the cause of the accident. The plaintiff previously had undergone a hip implant, and as a result of her fall required extensive additional surgery. She sued the defendant, basing her claim of negligence on Los Angeles Municipal Code §41.46. It provided that “No person shall fail, refuse or neglect to keep the sidewalk in front of his house, place of business or premises in a clean and wholesome condition.”

The trial judge instructed the jury that the defendant should be found negligent per se if it violated the ordinance. The trial court entered judgment on a jury verdict of \$402,050 for the plaintiff. The defendant appealed on the ground that the trial court erred in instructing the jury on the doctrine of negligence per se. The court of appeals reversed and held the evidence against the defendant insufficient as a matter of law:

Applying well-established authority, we hold the ordinances imposed a duty on defendant which was owed only to the city. The ordinances did not create a standard of care owed to the traveling public; therefore the trial court erred in instructing the jury that violation of the ordinances constituted negligence per se. [. . .]

[B]ecause the municipality has the primary responsibility for maintaining the public sidewalks, statutes and ordinances which require the abutting landowner to maintain the sidewalk in a condition that will not endanger pedestrians have almost uniformly been interpreted not to create a standard of care toward pedestrians but only a liability of the owner to the municipality.

Selger represents the usual result when plaintiffs slip on snow or ice and sue nearby property owners for violating similar statutes. The court in *Selger* noted, however, that “[t]he dog’s owner is primarily to blame for the creation of this hazard,” and that Los Angeles had a “pooper scooper” law imposing a \$20 fine on dog owners who failed to clean up behind their animals. The court declined to take a position on whether the dog’s owner, if found, could have been held negligent per se for violating that ordinance. What result would you expect in such a case?

8. *Ignorance as an excuse*. From the Restatement (Second) of Torts §288A (1965):

Comment f. Knowledge. Where the actor neither knows nor should know of any occasion or necessity for action in compliance with the legislation or regulation, his violation of it will ordinarily be excused.

Illustration 3. A statute provides that no vehicle shall be driven on the public highway at night without front and rear lights. While A is driving on the highway at night his rear light goes out because of the failure of an electric bulb. A has used all reasonable diligence and care in the inspection of his car, and is unaware that the light has gone out. Before he has had any reasonable opportunity to discover it, the absence of the light causes a collision with B’s car, approaching from the rear, in which B is injured. A is not liable to B on the basis of the violation of the statute.

Is this provision consistent with the analysis and result in *Martin v. Herzog*?

9. *Confusing laws (problem)*. In *Sparkman v. Maxwell*, 519 S.W.2d 852 (Tex. 1975), the plaintiff and the defendant were involved in an automobile accident. The plaintiff was driving through an intersection with a green light when the defendant, Sparkman, traveling in the opposite direction, attempted to make a left turn in front of her. The cars collided, causing each party various injuries. As Sparkman entered the intersection she saw a traffic light displaying a red arrow pointing to the left. She never had seen a traffic light displaying an arrow before, and interpreted it to mean that she was free to turn left; it did not occur to her that since the color of the arrow was red, it was indicating that she should not turn. Apparently this was the first time that such an arrow signal had been used in Texas, and it was soon removed by the city engineer.

A jury found that Sparkman had not been negligent. The plaintiff sought judgment as a matter of law on the ground that Sparkman had committed negligence per se. What result?

10. *Legislative intent.* As noted earlier, the question of legislative intent usually is critical when attempting to determine whether a provision of a criminal code creates civil liability. There have been attempts in some states to settle the question with meta-provisions such as the following from California:

- (a) The failure of a person to exercise due care is presumed if:
 - (1) He violated a statute, ordinance, or regulation of a public entity;
 - (2) The violation proximately caused death or injury to person or property;
 - (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
 - (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.
- (b) This presumption may be rebutted by proof that:
 - (1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; or
 - (2) The person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications.

Cal. Evid. Code §669.

11. *Legislative intent revisited.* In *Vesely v. Sager*, 486 P.2d 151 (Cal. 1971), the defendant was the owner of the Buckhorn Lodge, a roadhouse near the top of Mount Baldy. The plaintiff alleged that late one evening the Lodge served one of its patrons, a man named O'Connell, a series of alcoholic beverages that intoxicated him. At about 5:00 A.M., O'Connell left the lodge and proceeded to drive down the steep, narrow, and winding road that was the only way to descend the mountain. He veered into the wrong lane and ran into the plaintiff's car, causing the plaintiff various injuries. The plaintiff's suit alleged, among other things, that the defendant should be held negligent per se for violating California Bus. & Prof. Code §25602. The statute provided: "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor." The plaintiff

also cited Cal. Evid. Code §669, described a moment ago. The trial court dismissed the plaintiff's complaint. The California Supreme Court reversed:

From the facts alleged in the complaint it appears that plaintiff is within the class of persons for whose protection section 25602 was enacted and that the injuries he suffered resulted from an occurrence that the statute was designed to prevent. Accordingly, if these two elements are proved at trial, and if it is established that Sager violated section 25602 and that the violation proximately caused plaintiff's injuries, a presumption will arise that Sager was negligent in furnishing alcoholic beverages to O'Connell. [. . .]

[T]he Legislature has expressed its intention in this area with the adoption of Evidence Code §669, and Business and Professions Code §25602. The California Law Revision Commission's recommendation relating to Evidence Code §669 states that the presumption contained in the section "should be classified as a presumption affecting the burden of proof. In order to further the public policies expressed in the various statutes, ordinances, and regulations to which it applies." It is clear that Business and Professions Code §25602 is a statute to which this presumption applies and that the policy expressed in the statute is to promote the safety of the people of California. To accept defendant's contentions and hold that plaintiff's complaint does not state a cause of action would be to thwart the legislative policies expressed in both statutes.

In 1978 the legislature responded to *Vesely* and cases following it with this provision:

CAL. BUS. & PROF. CODE §25602. SALES TO DRUNKARD OR INTOXICATED PERSON; OFFENSE; CIVIL LIABILITY.

(a) Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.

(b) No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.

(c) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as *Vesely v. Sager* [. . .] be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

The California Supreme Court upheld §25602 against constitutional challenge:

Each day the devastating effects of the drinking driver rage unabated with all of their tragic social and economic consequences. We do not speculate on the influences that might have prompted the Legislature to answer this acute and growing problem by narrowly *restricting* rather than *enlarging* civil liability. In the final analysis the Legislature must answer to an informed, and perhaps ultimately aroused, public opinion for its action. We do not substitute our judgment for its own. [. . .]

The Legislature's decision to abrogate *Vesely* [. . .], and thereby preclude or substantially limit the liability of a provider of alcoholic beverages, may have been based upon a premise that it is unfair to require the provider (and his insurer) to share both the supervisory responsibility and the legal blame with the consumer, whose voluntary consumption of alcoholic beverages is perhaps the more direct and immediate cause of any consequent injuries. We deem such a determination to be a rational one because for many years prior to *Vesely* the courts of this state (including ours) uniformly had followed such provider-immunity rule.

The Legislature also reasonably might have assumed that the imposition of sole and exclusive liability upon the consumer of alcoholic beverages would encourage some heightened sense of responsibility in the drinker for his acts, thereby ultimately reducing the frequency of alcohol-caused injuries. For these reasons we conclude that the general rule of immunity announced in the 1978 amendments is both founded upon a possible rational basis and reasonably related to a legitimate state purpose.

Corg v. Shierloh, 629 P.2d 8 (Cal 1981). What do you make of this dialogue between California's Supreme Court and its legislature? Is it all a sign of well-functioning political and judicial institutions? Does it cause you to prefer one of those organs to the other as an author of solutions to social problems?

Other states vary considerably in how they interpret the civil consequences of "dram shop statutes" similar to the one considered in *Vesely*. The issue also has generated a great deal of common-law development; for further discussion, see the entry on liability of social hosts in the chapter on Duties and Limitations.

12. *Taking license*. In *Brown v. Shyne*, 151 N.E. 197 (N.Y. 1926), the plaintiff sought treatment from the defendant chiropractor, Shyne, for her laryngitis. She testified that on her ninth visit, Shyne "took ahold of my head, both sides of my head, and gave it a very violent turn, twist one way and then back, which gave a very bad snap," and that these manipulations later caused numbness in her arms and, finally, paralysis. The plaintiff alleged that Shyne's treatments had been negligent; she also alleged that Shyne had been negligent per se in practicing medicine without possessing the license

required by the state's Public Health Law. After instructing the jury to assess whether Shyne's treatments measured up to the "standards of skill and care which prevail among those treating disease," the trial judge also gave the following instruction:

This is a little different from the ordinary malpractice case, and I am going to allow you, if you think proper under the evidence in the case, to predicate negligence upon another theory. The public health laws of this state prescribe that no person shall practice medicine unless he is licensed so to do by the board of regents of this state and registered pursuant to statute. . . . This statute to which I have referred is a general police regulation. Its violation, and it has been violated by the defendant, is some evidence, more or less cogent, of negligence which you may consider for what it is worth, along with all the other evidence in the case. If the defendant attempted to treat the plaintiff and to adjust the vertebrae in her spine when he did not possess the requisite knowledge and skill as prescribed by the statute to know what was proper and necessary to do under the circumstances, or how to do it, even if he did know what to do, you can find him negligent.

So instructed, the jury returned a verdict for the plaintiff, and the trial court entered judgment on it. The defendant appealed.

Held, for the defendant, that the jury instruction regarding the licensing law was error, and that the defendant could be held liable only if the jury found on retrial that his treatment of the plaintiff was in fact negligently rendered. Said the court:

Proper formulation of general standards of preliminary education and proper examination of the particular applicant should serve to raise the standards of skill and care generally possessed by members of the profession in this state; but the license to practice medicine confers no additional skill upon the practitioner, nor does it confer immunity from physical injury upon a patient if the practitioner fails to exercise care. Here, injury may have been caused by lack of skill or care; it would not have been obviated if the defendant had possessed a license yet failed to exercise the skill and care required of one practicing medicine. True, if the defendant had not practiced medicine in this state, he could not have injured the plaintiff, but the protection which the statute was intended to provide was against risk of injury by the unskilled or careless practitioner, and, unless the plaintiff's injury was caused by carelessness or lack of skill, the defendant's failure to obtain a license was not connected with the injury.

Crane, J., dissented:

The prohibition against practicing medicine without a license was for the very purpose of protecting the public from just what happened in

this case. The violation of this statute has been the direct and proximate cause of the injury. The courts will not determine in face of this statute whether a faith healer, a patent medicine man, a chiropractor, or any other class of practitioner acted according to the standards of his own school, or according to the standards of a duly licensed physician. The law, to insure against ignorance and carelessness, has laid down a rule to be followed; namely, examinations to test qualifications and a license to practice. If a man, in violation of this statute, takes his chances in trying to cure disease, and his acts result directly in injury, he should not complain if the law, in a suit for damages, says that his violation of the statute is some evidence of his incapacity.

Suppose that an airplane crashes and it appears that the pilot was unlicensed. Or suppose that a driver with an expired driver's license strikes a pedestrian. Would these cases be distinguishable from *Brown v. Shyne*?

13. *Sheep overboard (problem)*. In *Gorris v. Scott*, 9 L.R. Ex. 125 (1874), the defendant, a shipowner, undertook to carry the plaintiffs' sheep from a foreign port to England. The sheep were swept overboard in a storm and drowned. A statute, the Contagious Diseases (Animals) Act, had required that animals in these circumstances be kept in pens to prevent the spread of diseases among them. The defendant had failed to pen the sheep, however; assume that if he had done so, they would not have been washed overboard. A case of negligence per se?

14. *Keys in the ignition (problem)*. In *Ross v. Hartman*, 139 F.2d 14 (D.C. Cir. 1943), the defendant's driver left a truck unlocked, with an unlocked gear shift and with the keys in the ignition, near a garage in a public alley. The driver expected an attendant to move the truck into the garage, but apparently did not notify anyone of this expectation. An unknown miscreant drove away in the truck and ran down the plaintiff. The plaintiff sued the truck driver's employer, claiming the driver had committed negligence per se by violating the following traffic ordinance:

Locks on Motor Vehicles. Every motor vehicle shall be equipped with a lock suitable to lock the starting lever, throttle, or switch, or gear-shift lever, by which the vehicle is set in motion, and no person shall allow any motor vehicle operated by him to stand or remain unattended on any street or in any public place without first having locked the lever, throttle, or switch by which said motor vehicle may be set in motion.

What result would you expect in this case? What arguments for each side might be made from the cases considered above?

2. *Judge-made Rules*

Oliver Wendell Holmes, Jr., *The Common Law*
111-129 (1881)

[A]ny legal standard must, in theory, be one which would apply to all men, not specially excepted, under the same circumstances. It is not intended that the public force should fall upon an individual accidentally, or at the whim of any body of men. The standard, that is, must be fixed. In practice, no doubt, one man may have to pay and another may escape, according to the different feelings of different juries. But this merely shows that the law does not perfectly accomplish its ends. The theory or intention of the law is not that the feeling of approbation or blame which a particular twelve may entertain should be the criterion. They are supposed to leave their idiosyncrasies on one side, and to represent the feeling of the community. The ideal average prudent man, whose equivalent the jury is taken to be in many cases, and whose culpability or innocence is the supposed test, is a constant, and his conduct under given circumstances is theoretically always the same.

Finally, any legal standard must, in theory, be capable of being known. When a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was.

If, now, the ordinary liabilities in tort arise from failure to comply with fixed and uniform standards of external conduct, which every man is presumed and required to know, it is obvious that it ought to be possible, sooner or later, to formulate these standards at least to some extent, and that to do so must at last be the business of the court. It is equally clear that the featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances. The standard which the defendant was bound to come up to was a standard of specific acts or omissions, with reference to the specific circumstances in which he found himself. If in the whole department of unintentional wrongs the courts arrived at no further utterance than the question of negligence, and left every case, without rudder or compass, to the jury, they would simply confess their inability to state a very large part of the law which they required the defendant to know, and would assert, by implication, that nothing could be learned by experience. But neither courts nor legislatures have ever stopped at that point. [. . .]

When a case arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of tort has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men taken from the practical part of the

community can aid its judgment. Therefore it aids its conscience by taking the opinion of the jury.

But supposing a state of facts often repeated in practice, is it to be imagined that the court is to go on leaving the standard to the jury forever? Is it not manifest, on the contrary, that if the jury is, on the whole, as fair a tribunal as it is represented to be, the lesson which can be got from that source will be learned? Either the court will find that the fair teaching of experience is that the conduct complained of usually is or is not blameworthy, and therefore, unless explained, is or is not a ground of liability; or it will find the jury oscillating to and fro, and will see the necessity of making up its mind for itself. There is no reason why any other such question should not be settled, as well as that of liability for stairs with smooth strips of brass upon their edges. The exceptions would mainly be found where the standard was rapidly changing, as, for instance, in some questions of medical treatment.

If this be the proper conclusion in plain cases, further consequences ensue. Facts do not often exactly repeat themselves in practice; but cases with comparatively small variations from each other do. A judge who has long sat at nisi prius ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury. He should be able to lead and to instruct them in detail, even where he thinks it desirable, on the whole, to take their opinion. Furthermore, the sphere in which he is able to rule without taking their opinion at all should be continually growing. [. . .]

The same principle applies to negligence. If the whole evidence in the case was that a party, in full command of his senses and intellect, stood on a railway track, looking at an approaching engine until it ran him down, no judge would leave it to the jury to say whether the conduct was prudent. If the whole evidence was that he attempted to cross a level track, which was visible for half a mile each way, and on which no engine was in sight, no court would allow a jury to find negligence. Between these extremes are cases which would go to the jury. But it is obvious that the limit of safety in such cases, supposing no further elements present, could be determined almost to a foot by mathematical calculation.

The trouble with many cases of negligence is, that they are of a kind not frequently recurring, so as to enable any given judge to profit by long experience with juries to lay down rules, and that the elements are so complex that courts are glad to leave the whole matter in a lump for the jury's determination.

NOTES

1. *Stop, look, and listen*. In *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927), Goodman was killed when his truck was hit by a train coming through a crossing at approximately 60 miles per hour. His administratrix sued the railroad. The Supreme Court described the facts as follows: "Goodman

was driving an automobile truck in an easterly direction and was killed by a train running southwesterly across the road at a rate of not less than 60 miles an hour. The line was straight but it is said by the respondent that Goodman 'had no practical view' beyond a section house 243 feet north of the crossing until he was about 20 feet from the first rail, or, as the respondent argues, 12 feet from danger, and that then the engine was still obscured by the section house. He had been driving at the rate of 10 or 12 miles an hour but had cut down his rate to 5 or 6 miles at about 40 feet from the crossing. It is thought that there was an emergency in which, so far as appears, Goodman did all that he could." The trial court denied the defendant's motion for a directed verdict, and the jury brought in a verdict for the plaintiff. The defendant appealed.

Held, for the defendant, that the trial court should have directed a verdict in its favor. Holding that the plaintiff's failure to "stop, look and listen" was negligence as a matter of law, Holmes, J., said:

When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If at the last moment Goodman found himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop. It is true, as said in *Flannelly v. Delaware & Hudson Co.*, that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts.

2. *The Wabash Cannonball*. In *Pokora v. Wabash Ry.*, 292 U.S. 98 (1934), the plaintiff, Pokora, was struck by a train and injured when he drove his truck across a railway crossing. As Pokora left the northeast corner of the intersection where his truck had been stopped, he looked to the north for approaching trains. He did this at a point about ten or fifteen feet east of a switch that lay ahead of him. A string of box cars standing on the switch cut off Pokora's view of the tracks beyond him to the north. At the same time he listened, but heard neither bell nor whistle. Still listening, he crossed the switch; as he reached the main track he was struck by a passenger train coming from the north at a speed of 25 to 30 miles per hour.

The district court held that the plaintiff had committed contributory negligence as a matter of law and directed a verdict for the defendant. The Supreme Court reversed. In holding that the plaintiff was not guilty of contributory negligence as a matter of law, and that the issue should have been given to the jury, Cardozo, J., wrote for the Court:

The argument is made, however, that our decision in *B. & O. R. Co. v. Goodman* is a barrier in the plaintiff's path, irrespective of the conclusion that might commend itself if the question were at large. [. . .] Here the fact is not disputed that the plaintiff did stop before he started to cross the tracks. If we assume that by reason of the box cars, there was a duty to stop again when the obstructions had been cleared, that duty did not arise unless a stop could be made safely after the point of clearance had been reached. For reasons already stated, the testimony permits the inference that the truck was in the zone of danger by the time the field of vision was enlarged. No stop would then have helped the plaintiff if he remained seated on his truck, or so the triers of the facts might find. His case was for the jury, unless as a matter of law he was subject to a duty to get out of the vehicle before it crossed the switch, walk forward to the front, and then, afoot, survey the scene. We must say whether his failure to do this was negligence so obvious and certain that one conclusion and one only is permissible for rational and candid minds. Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life. To get out of a vehicle and reconnoiter is an uncommon precaution, as everyday experience informs us. Besides being uncommon, it is very likely to be futile, and sometimes even dangerous. If the driver leaves his vehicle when he nears a cut or curve, he will learn nothing by getting out about the perils that lurk beyond. By the time he regains his seat and sets his car in motion, the hidden train may be upon him. [. . .] Where was Pokora to leave his truck after getting out to reconnoiter? If he was to leave it on the switch, there was the possibility that the box cars would be shunted down upon him before he could regain his seat. The defendant did not show whether there was a locomotive at the forward end, or whether the cars were so few that a locomotive could be seen. If he was to leave his vehicle near the curb, there was even stronger reason to believe that the space to be covered in going back and forth would make his observations worthless. One must remember that while the traveler turns his eyes in one direction, a train or a loose engine may be approaching from the other.

Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury. The opinion in *Goodman's* case has been a source of confusion in the federal courts to the extent that it imposes a

standard for application by the judge, and has had only wavering support in the courts of the states. We limit it accordingly.

3. *Wake up, Louis!* In *Theisen v. Milwaukee Automobile Mut. Ins. Co.*, 118 N.W.2d 140 (Wis. 1963), the plaintiff, Sharon Theisen, and the defendant, Louis Shepherd, were high school students who attended a cast party after their senior class play. At about 3:00 A.M. the party broke up and five girls, including the plaintiff, got into Shepherd's car to be driven home. After traveling about four miles, the car gradually veered from the right lane to the left and then onto the shoulder of the road. Shepherd had fallen asleep at the wheel. One of the girls in the front seat shouted, "Louis, lookout," but there was no reaction; another girl hollered "Louie," but Shepherd did not move. The car proceeded 270 feet and then hit a large tree stump, causing injuries for which the plaintiff sought to recover. The Wisconsin Supreme Court held that the driver was negligent as a matter of law:

[W]e find no justification in the common experience of mankind for one's falling asleep with his foot on the accelerator, his hands on the wheel and his auto transformed into an instrument of destruction. The process of falling asleep—normal and healthy sleep—is a matter of common experience and usually attended by premonitory warnings or is to be expected. Such warnings or reasonable expectations of sleep are especially accentuated when one is conscious of his duty to stay awake while driving and the failure to heed such warnings and permitting oneself to fall asleep while driving an automobile must be deemed negligence as a matter of law. If while driving a car one is in such a state of exhaustion that he falls asleep without any premonitory warning, he is chargeable with the knowledge of any ordinarily prudent man that such exhaustion is reasonably likely to cause sleep while driving. [. . .]

We exclude from this holding those exceptional cases of loss of consciousness resulting from injury inflicted by an outside force or fainting or heart attack, epileptic seizure, or other illness which suddenly incapacitates the driver of an automobile and when the occurrence of such disability is not attended with sufficient warning or should not have been reasonably foreseen. When, however, such occurrence should have been reasonably foreseen, we have held the driver of a motor vehicle negligent as a matter of law, as in the sleep cases.

The trial court excluded an offer of proof made by the defendant which would have shown Shepherd was not an habitual user of alcoholic beverages and was physically exhausted from the loss of considerable sleep for some six weeks prior to the accident practicing for the play, getting to bed later than his normal bedtime and continuing his usual farm chores. It was not error of the trial court to reject this evidence offered to prove a justification for going to sleep. On the contrary, such proof would have tended to show Shepherd should have known, as a

reasonable prudent man, he was likely to have fallen asleep. Such offer of proof, of course, is immaterial under our holding that falling asleep while driving is negligence as a matter of law.

Why might *Theisen v. Milwaukee Automobile Mut. Ins. Co.* be a better candidate for a judge-made rule than *Pokora v. Wabash Ry.*?

4. *Dust storm.* In *Blaak v. Davidson*, 529 P.2d 1048 (Wash. 1975), the defendant was driving an 18,000-pound gasoline truck on the Pasco Kahlotus highway. Farmlands adjoining the highway had recently been plowed, leaving the soil dusty. As the defendant was proceeding towards Kahlotus, a dust cloud engulfed his truck and completely obscured his visibility. He reduced his speed to 5 to 10 miles per hour. As he was proceeding through the dust cloud, his truck struck the rear of the plaintiff's car, which had slowed to 2 to 3 miles per hour. No traffic citations were issued to either driver. The jury brought in a verdict for the defendant; the trial court entered judgment n.o.v. (judgment notwithstanding the verdict) for the plaintiff. The defendant appealed.

The Washington Supreme Court defined the issue in the case as follows: "When the visibility of a driver of a vehicle is completely obscured by atmospheric conditions, e.g., a dust storm, is the driver (a) negligent as a matter of law for failure to stop the vehicle, or (b) should the question of negligence ordinarily be submitted to the jury for consideration in view of the facts and surrounding circumstances?" The court adopted the latter position:

A consideration of whether an absolute rule should be formulated must focus upon the subject matter involved and the potential variables as to facts and circumstances. In these respects, the automobile and its use in our mobile society is particularly unique. Seldom, if ever, are the facts and circumstances surrounding a collision the same. Thus, particularly with respect to automobiles, the propriety of solidifying the law into mechanistic rules for universal application is dubious, and this legal reasoning or philosophy is clearly on the wane.

In this regard, human experience has proved unworkable and unjust: the attempt by Justice Holmes, in *Baltimore & Ohio R. R. v. Goodman*, to establish an absolute rule that a driver approaching a railroad must stop, look, listen and, if necessary, get out of the car before crossing the tracks. Consequently the Holmes rule in its absolute form was subsequently rejected by Justice Cardozo in *Pokora v. Wabash Ry.*, and most other jurisdictions have followed suit. Similarly, the range of vision rule, i.e., that a driver of a vehicle is negligent as a matter of law unless he can stop within the range of his vision, has undergone a process of atrophy when it became apparent that an unwavering application of the rule would be unjust.

The excessive rigidity of an absolute duty to stop is underscored by the facts of the instant case. Since it is the very nature of dust clouds—as

well as of fog—that their density and the corresponding lack of visibility may vary considerably within a few yards, the defendant herein could not assume that all vehicles behind him would necessarily be stopped. Moreover, the defendant’s truck was loaded with gasoline; there was no place to immediately pull off the highway; and the defendant feared being rear ended on this heavily traveled road. That the defendant’s fears were not solely the figment of an overactive imagination is well illustrated by the fact that a car which had stopped close to the place of the accident herein was struck by a tanker traveling in the opposite direction. In any event, it is at least debatable whether stopping on the highway for an indeterminate period of time would be safer, with respect to other users of the highway, than slowly proceeding to a known, safe, pull out a short distance ahead.

On the basis of the foregoing analysis, we reject the rule holding a driver of a vehicle negligent as a matter of law for failure to stop when his vision is completely obscured, because such a rule would be too rigid to cope with the numerous situations presenting new or additional factors and variables. [. . .] When vision is partially or completely obscured, the jury should determine whether the defendant’s failure to stop constitutes negligence under the general test of whether defendant acted as a reasonable man in view of all the facts and circumstances. Only in the most unusual and exceptional circumstances indicating clear fault and liability should the court hold defendant negligent as a matter of law.

What distinctions might you draw between *Blaak v. Davidson* and *Theisen v. Milwaukee Automobile Mut. Ins. Co.* (negligence per se when a driver falls asleep)? What analogy might be drawn between *Blaak v. Davidson* and *Tedla v. Ellman* (holding the plaintiff not negligent as a matter of law when she walked on the wrong side of the road in violation of statute)?

5. *Seat belts.* Suppose a plaintiff injured in an automobile accident concedes that he was not wearing his seat belt. Assuming there is no statutory requirement that seat belts be worn in the jurisdiction, should the court instruct the jury that this is a case of negligence per se? (What result if there *is* such a statute?) Might there be an argument for instructing the jury that as a matter of law a failure to wear a seat belt is *not* negligent? That was indeed a popular position in many jurisdictions during the era when a plaintiff’s contributory negligence prevented him from recovering anything from a negligent defendant, and it remains the law in some jurisdictions today. See *Swajian v. General Motors Corp.*, 559 A.2d 1041 (R.I. 1989). What are the strongest arguments for or against treating the failure to wear a seat belt as a case of negligence as a matter of law?

6. *Not one of his more astute predictions.* In *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989), a case concerning the imposition

of sanctions against lawyers under the Federal Rules of Civil Procedure, Easterbrook, J., wrote: “Many judges and lawyers are concerned about the lack of uniformity in the application of Rule 11. Legitimate though this concern is, it is in the end no more serious than the same concern among physicians about uniformity in medical malpractice cases, or among manufacturers of drugs about uniformity in failure-to-warn cases. Fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise. Justice Holmes believed that courts would (at least, should) slowly reduce all of tort law to objective, readily applied rules. This is not viewed today as one of his more astute predictions.”

E. RES IPSA LOQUITUR

The negligence cases considered so far in this chapter generally have involved claims that the defendant failed to take some specific precaution that would have prevented an accident. But it is not always easy or even possible for a plaintiff to determine how an accident happened, much less to identify a specific untaken precaution that would have prevented it. At the same time, sometimes an accident seems obviously to be the result of a defendant’s negligence: it probably would not have occurred unless someone had been negligent, and the defendant had control over the thing that caused the harm. Courts in such cases thus may allow a plaintiff to invoke the doctrine of *res ipsa loquitur* (“the thing speaks for itself”) to establish the defendant’s negligence. This section considers the elements of *res ipsa loquitur* and the different circumstances in which the doctrine can be used.

Byrne v. Boadle

159 Eng. Rep. 299, 2 H. & C. 722 (Exch. 1863)

[Action for negligence. The plaintiff’s declaration stated that he was passing on the road in front of the defendant’s premises when a barrel of flour fell on him from a window above. The defendant had a jigger-hoist and other machinery over that window for the purpose of lowering barrels. Several witnesses testified that they had seen the barrel fall on the plaintiff, but there was no other evidence of how the accident occurred. The trial court nonsuited the plaintiff on the ground that there was no evidence that the defendant was negligent for a jury to consider. At the argument that followed in the Court of Exchequer, the defendant’s counsel contended, first, that no evidence connected the defendant with the occurrence, and that a complete stranger may have been supervising the lowering of flour barrels when the barrel fell on the plaintiff. Pollock, C.B., replied: “The presumption is that the defendant’s servants were engaged in removing the defendant’s flour. If they were not it was competent to the defendant to prove it.” The defendant’s

attorney argued, further, that the plaintiff had failed to present any affirmative proof of the defendant's negligence, beyond the mere fact that the barrel had fallen. Counsel argued that the fact that accidents like this *could* be caused by negligence did not entitle the plaintiff to a presumption that negligence necessarily caused the barrel to fall. Said Pollock, C.B.: "There are certain cases of which it may be said *res ipsa loquitur*, and this seems one of them. In some cases the Courts have held that the mere fact of the accident having occurred is evidence of negligence, as, for instance, in the case of railway collisions." Said Bramwell, B.: "Looking at the matter in a reasonable way it comes to this—an injury is done to the plaintiff, who has no means of knowing whether it was the result of negligence; the defendant, who knows how it was caused, does not think fit to tell the jury." The subsequent decision of the Court of Exchequer was as follows.]

POLLOCK, C.B.—We are all of opinion that the rule must be absolute to enter the verdict for the plaintiff. The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think that those whose duty it was to put it in the right place are *prima facie* responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case upon the evidence comes to this, a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had the control of it; and in my opinion the fact of its falling is *prima facie* evidence of negligence, and the plaintiff who was injured by it is not bound to show that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

NOTES

1. *The defendant does not think fit to tell the jury.* Note that in the comments the judges made during the argument of the case, two kinds of theories emerged to support a presumption that the defendant was negligent: the

accident very likely resulted from negligence (Pollock's point); and the parties did not have the same access to evidence bearing on how the accident occurred (Bramwell's point). As you read the cases in this section, consider the presence or absence of those two rationales for the doctrine.

2. *The falling of the wedge*. In *Combustion Engineering Co. v. Hunsberger*, 187 A. 825 (Md. App. 1936), the plaintiff, one Hunsberger, was a workman on a project that involved rebuilding a boiler room. Hunsberger worked on the floor; the defendant's workmen were building a nearby shaft that was 30 feet tall. At one point one of the defendant's workers, a man called Durdella, was lying on a platform at the top of the shaft and attempting to hammer a metal wedge between two plates. The wedge slipped out of place and fell down the shaft onto Hunsberger, causing injuries for which he sought to recover. The jury brought in a verdict for Hunsberger, and the trial court entered judgment upon it. The court of appeals reversed, holding the evidence of Durdella's negligence insufficient to support the verdict:

The plaintiff's case was rested on an assumption that the mere fact of the falling of the wedge afforded evidence of negligence, and the trial court, on a prayer of the plaintiff's instructed the jury that this was true. But this court does not agree in that view. There must be evidence from which the jury might reasonably and properly conclude that there was negligence. And apart from any question of the effect on a prima facie presumption, if there should be one, of evidence of the facts produced by a defendant (*Byrne v. Boadle*, 2 H.C. 722), the court is of opinion that the mere fall of a tool being used within the building, in work of construction, cannot be presumed to result from negligence, because it cannot be supposed that such a thing is probably the result of negligence every time it occurs. On the contrary, it would seem likely that with workmen handling loose tools continually, the falling of some of them at times must be expected despite all precautions. To presume otherwise would be to presume a perfection in men's work which we know does not exist. Precautions that will ordinarily keep falling objects from an adjacent highway are required, for the work should not invade the highway. And temporary covered walks built below construction work are common sights. When objects have dropped on highways it has been presumed, prima facie, that the dropping resulted from lack of the requisite precautions to keep them off. [. . .] But as stated, it seems to the court plain that there must be some falling of small tools and other objects handled with ordinary care in the course of the work, and that therefore a particular fall cannot, of itself and without more, afford proof of negligence. [. . .]

The facts given in Durdella's evidence leave it open to speculation whether despite his belief that the wedge was held fast he had driven it in more lightly than usual, or whether the plates offered unusual and unexpected resistance. That the wedge jumped out when struck would seem to indicate unexpected resistance. If there was a miscalculation

on Durdella's part as to the resistance, or otherwise, that fact alone would not indicate negligence unless it could be said that every such miscalculation on the part of a workman is probably due to lack of ordinary care. And plainly, we think, it cannot.

What is the distinction between *Combustion Engineering Co. v. Hunsberger* and *Byrne v. Boadle*? Might the cases be distinguished using the Hand formula?

3. *Falling armchairs*. In *Larson v. St. Francis Hotel*, 188 P.2d 513 (Cal. App. 1948), the plaintiff was walking on a sidewalk in San Francisco on V-J Day, August 14, 1945, when a heavy, overstuffed armchair fell onto her head, knocking her unconscious and causing her various injuries. None of the people in the vicinity of the accident saw where the chair came from; nobody saw the chair at all until it was within a few feet of the plaintiff's head. The chair bore no identifying marks. The court nevertheless found it reasonable to infer that the chair had fallen from one of the windows of the St. Francis Hotel, the marquee of which the plaintiff had just passed; it appeared that the ejection of the chair from one of the hotel's windows was a result of "the effervescence and ebullition of San Franciscans in their exuberance of joy on V-J Day." At trial the plaintiff, after proving the foregoing facts and the extent of her injuries, rested, relying on the doctrine of *res ipsa loquitur*. The court granted the defendant's motion for a nonsuit; the court of appeals affirmed:

In *Gerhart v. Southern California Gas Co.*, 56 Cal. App. 2d 425, cited by plaintiff, the court sets forth the test for the applicability of the doctrine. ". . . for a plaintiff to make out a case entitling him to the benefit of the doctrine, he must prove (1) that there was an accident; (2) that the thing or instrumentality which caused the accident was at the time of and prior thereto under the exclusive control and management of the defendant; (3) that the accident was such that in the ordinary course of events, the defendant using ordinary care, the accident would not have happened. . . . The doctrine of *res ipsa loquitur* applies only where the cause of the injury is shown to be under the exclusive control and management of the defendant and can have no application . . . to a case having a divided responsibility where an unexplained accident may have been attributable to one of several causes, for some of which the defendant is not responsible, and when it appears that the injury was caused by one of two causes for one of which defendant is responsible but not for the other, plaintiff must fail, if the evidence does not show that the injury was the result of the former cause, or leaves it as probable that it was caused by one or the other."

Applying the rule to the facts of this case, it is obvious that the doctrine does not apply. While, as pointed out by plaintiff, the rule of exclusive control "is not limited to the actual physical control but applies to the

right of control of the instrumentality which causes the injury” it is not clear how this helps plaintiff’s case. A hotel does not have exclusive control, either actual or potential, of its furniture. Guests have, at least, partial control. Moreover, it cannot be said that with the hotel using ordinary care “the accident was such that in the ordinary course of events would not have happened.” On the contrary, the mishap would quite as likely be due to the fault of a guest or other person as to that of defendants. The most logical inference from the circumstances shown is that the chair was thrown by some such person from a window. It thus appears that this occurrence is not such as ordinarily does not happen without the negligence of the party charged, but, rather, one in which the accident ordinarily might happen despite the fact that the defendants used reasonable care and were totally free from negligence. To keep guests and visitors from throwing furniture out windows would require a guard to be placed in every room in the hotel, and no one would contend that there is any rule of law requiring a hotel to do that.

What is the distinction between *Larson v. St. Francis Hotel* and *Byrne v. Boadle*?

4. *Here’s mud in your eye!* In *Connolly v. Nicollet Hotel*, 95 N.W.2d 657 (Minn. 1959), the plaintiff was walking along the sidewalk next to the defendant’s hotel when she was suddenly struck in the eye with “a mud-like substance.” The only place from which the falling substance could have come was the hotel. At the time the hotel was serving as headquarters for the 1953 convention of the National Junior Chamber of Commerce. The convention was lively. During its course, liquor was sold and dispensed free of charge at hospitality centers throughout the hotel. A mule was stabled in the hotel’s lobby, and a small alligator was kept on the fourth floor. Bottles, ice cubes, and bags of water were thrown from the building’s windows. Guns were fired in the lobby. An inspection made after the convention found that there were missing window screens, mirrors pulled off the walls in bathrooms, light fixtures and signs broken, hall lights and exit lights broken, and holes drilled through door panels; the bowl in the men’s washroom was torn off the wall, and 150 face towels had to be removed from service. The day before the accident, the hotel’s general manager issued a memorandum to his staff reading in part as follows:

WE HAVE ALMOST ARRIVED AT THE END OF THE MOST HARROWING EXPERIENCE WE HAVE HAD IN THE WAY OF CONVENTIONS, AT LEAST IN MY EXPERIENCE! WHEN WE BECAME INVOLVED AND SAW WHAT THE SITUATION WAS, WE HAD NO ALTERNATIVE BUT TO PROCEED AND “TURN THE OTHER CHEEK.” HOWEVER, IT INVOLVES CERTAIN EXPENSES THAT I DO NOT PROPOSE TO FOREGO WITHOUT AT LEAST AN ARGUMENT—AND MAYBE LEGAL SUIT.

The jury brought in a verdict for the plaintiff; the trial court gave judgment notwithstanding the verdict to the defendant hotel, finding that the plaintiff failed to prove negligence on the hotel's part. The court of appeals reversed:

We have said many times that the law does not require every fact and circumstance which make up a case of negligence to be proved by direct and positive evidence or by the testimony of eye-witnesses, and the circumstantial evidence alone may authorize a finding of negligence. Negligence may be inferred from all the facts and surrounding circumstances, and where the evidence of such facts and circumstances is such as to take the case out of the realm of conjecture and into the field of legitimate inference from established facts, a prima facie case is made.

Gallagher, J., dissented:

It is difficult to speculate as to what further precautions should reasonably have been required of defendant without making it an absolute insurer. Obviously, it could not direct its employees to enter guest rooms at random or to remain therein to prevent possible misconduct when it lacked evidence that any misconduct was occurring or was contemplated by room occupants. Not only would such procedure deprive guests of room privileges for which they had paid, but, if carried to its logical conclusion, it would require that defendant, to be exonerated from any claim of negligence, employ and station a guard in every convention guest room of the hotel during the entire convention.

In what way, if any, was the hotel negligent? What is the distinction between *Connolly v. Nicollet Hotel* and *Larson v. St. Francis Hotel* (res ipsa loquitur inapplicable when armchair falls from hotel window)?

5. *Black Angus*. In *Brauner v. Peterson*, 557 P.2d 359 (Wash. 1976), the plaintiff drove his car into the defendant's Black Angus cow, which had strayed onto the highway. In the plaintiff's subsequent lawsuit to recover for his damages, he produced no evidence as to how the cow escaped from the defendants' property. The trial court found for the defendants and dismissed the plaintiff's action; the Washington Supreme Court affirmed the trial judge's finding that the plaintiff's evidence was insufficient to support a verdict in his favor:

With regard to res ipsa loquitur, the presence of an animal at large on the highway is not sufficient to warrant application of the rule, i.e., the event must be of a kind not ordinarily occurring in the absence of someone's negligence. A cow can readily escape from perfectly adequate confines.

6. *Incident at the county fair*. In *Guthrie v. Powell*, 290 P.2d 834 (Kan. 1955), the defendants bought and sold livestock and other merchandise at the Cowley County Fair. Their main premises consisted of a two-story building,

with inanimate objects for sale on the first floor and a livestock pavilion on the second floor. One day the plaintiff came onto the defendants' premises, took a seat on the first floor, and engaged in conversation with her friends. Suddenly there was a loud commotion and noise overhead, and bits of plaster and debris began to fall from the ceiling onto the plaintiff and others near her. This was immediately followed by a six-hundred-pound steer falling through the ceiling immediately over the plaintiff's position; the beast landed on the plaintiff, knocking her unconscious, flattening her chair, and causing her various injuries. She sued the defendants. They responded that the bare facts just recited provided no basis for holding them liable, because "reasonable conclusions other than the negligence of the defendants can be drawn to explain the occurrence." The trial court overruled the defendants' demurrer, and the Kansas Supreme Court affirmed, holding that the plaintiff was entitled to a trial and that this was an appropriate case for *res ipsa loquitur*.

What is the distinction between *Brauner v. Peterson* (*res ipsa inapplicable* when cow strays onto highway) and *Guthrie v. Powell* (*res ipsa applicable* when cow strays through ceiling)?

7. *Unusual occurrences.* In *Wilson v. Stillwill*, 309 N.W.2d 898 (Mich. 1981), the defendant, Stillwill, was an orthopedic surgeon. The plaintiff, Wilson, complained to him of trouble with his right arm. Stillwill performed an operation on the arm, and afterwards the arm became infected; as a result the arm eventually became paralyzed altogether. Wilson brought suit against Stillwill, attempting to rely on *res ipsa loquitur*. The trial court gave a directed verdict to Stillwill. The Michigan Supreme Court affirmed:

The testimony showed that the defendant hospital had a post-operative infection rate well below the national average. [. . .] The plaintiffs suggest that the low incidence of infection at the defendant hospital means that infection does not ordinarily occur. From this statement they seek to apply *res ipsa loquitur*. Although it is true that statistically infections did not ordinarily occur at the defendant hospital, this fact does not suggest that when an infection does occur, it is the result of negligence. [. . .] The mere occurrence of a post-operative infection is not a situation which gives rise to an inference of negligence when no more has been shown than the facts that an infection has occurred and that an infection is rare.

Why not? What is the distinction between *Wilson v. Stillwill* and *Guthrie v. Powell* (the case of the cow that fell through the ceiling)?

8. *The likelihood of negligence.* What does it mean when a court says that the doctrine of *res ipsa loquitur* applies to a case? Consider some possible interpretations:

- a. If due care had been used, the accident would have been unlikely to occur.

- b. The type of accident that occurred becomes much more likely when someone is negligent than it is when due care is used.
- c. When accidents of this sort occur, they usually result from negligence.

What are the differences between these formulations? Consider Guthrie, Rachlinski and Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 777 (2001):

The inverse fallacy refers to the tendency to treat the probability of a hypothesis given the evidence (for example, the probability that a defendant was negligent given that a plaintiff was injured) as the same as, or close to, the probability of the evidence given the hypothesis (for example, the probability that the plaintiff would be injured if the defendant were negligent). [. . .]

To test whether judges would commit the inverse fallacy, we gave the judges in our study a *res ipsa loquitur* problem. In an item labeled “Evaluation of Probative Value of Evidence in a Torts Case,” we presented all of the judges with a paragraph-long description of a case based loosely on the classic English case, *Byrne v. Boadle*:

The plaintiff was passing by a warehouse owned by the defendant when he was struck by a barrel, resulting in severe injuries. At the time, the barrel was in the final stages of being hoisted from the ground and loaded into the warehouse. The defendant’s employees are not sure how the barrel broke loose and fell, but they agree that either the barrel was negligently secured or the rope was faulty. Government safety inspectors conducted an investigation of the warehouse and determined that in this warehouse: (1) when barrels are negligently secured, there is a 90% chance that they will break loose; (2) when barrels are safely secured, they break loose only 1% of the time; (3) workers negligently secure barrels only 1 in 1,000 times.

The materials then asked: “Given these facts, how likely is it that the barrel that hit the plaintiff fell due to the negligence of one of the workers”? The materials provided the judges with one of four probability ranges to select: 0-25%, 26-50%, 51-75%, or 76-100%.

When presented with a problem like this one, most people commit the inverse fallacy and assume the likelihood that the defendant was negligent is 90%, or at least a high percentage. [. . .] In fact, however, the actual probability that the defendant was negligent is only 8.3%. [. . .] Because the defendant is negligent .1% of the time and is 90% likely to cause an injury under these circumstances, the probability that a victim would be injured by the defendant’s negligence is .09% (and the probability that the defendant is negligent but causes no injury is .01%). Because the defendant is not negligent 99.9% of the time and is 1% likely to cause an injury under these circumstances, the probability that on any given occasion a victim would be injured even though the

defendant took reasonable care is 0.999% (and the probability that the defendant is not negligent and causes no injury is 98.901%). As a result, the conditional probability that the defendant is negligent given that the plaintiff is injured equals .090% divided by 1.089%, or 8.3%.

Of the 159 judges who responded to the question, 40.9% selected the right answer by choosing 0-25%; 8.8% indicated 26-50%; 10.1% indicated 51-75%; and 40.3% indicated 76-100%. Overall, the judges did well; more than 40% of them got the correct answer to a difficult question in a short period of time. Those judges who did not get the correct answer, however, exhibited a significant tendency to choose the highest range. Although we did not inquire into the reasoning process that led these judges to their answers, the number of judges who chose the highest range suggests that many committed the inverse fallacy. [. . .]

As Professor Kaye has noted, the doctrine of *res ipsa loquitur* (upon which the problem in our questionnaire is based) historically includes a radical misunderstanding of probability theory. According to the Restatement (Second) of Torts, a jury can infer that the defendant is negligent from the occurrence of an event that is “of a kind which ordinarily does not occur in the absence of negligence.” [But e]ven if an event does not ordinarily occur when negligence is absent, the event still may be more likely to be the product of non-negligence than negligence. In the problem that we used in this study, for example, the accident was unlikely to occur when the defendant was not negligent. Nevertheless, because negligence was rare, the event was still unlikely to have been caused by negligence. Although the most recent version of the Restatement (Third) of Products Liability and drafts of the Restatement (Third) of Torts both remedy this logical error, it has lingered in the courts for over a century.

9. *Procedural consequences.* Where it applies, *res ipsa loquitur* typically permits (but does not require) a jury to find the defendant negligent on the basis of nothing more than the accident and its circumstances; the plaintiff need not put in particular evidence that the defendant should have done anything differently. Indeed, in some jurisdictions a plaintiff must choose between trying to prove “specific negligence” (particular things the defendant should have done differently) or relying on *res ipsa loquitur*. If a plaintiff does rely on “*res ipsa*,” the defendant is free to submit evidence to rebut the presumption created by the doctrine. Again, the procedural details then vary by jurisdiction. Usually the presumption created by *res ipsa loquitur* is treated simply as evidence for the jury to consider, so that as a practical matter the doctrine is a way for plaintiffs to avoid summary judgment despite having uncovered no untaken precaution that the defendant should have used to avoid the accident. In some jurisdictions, however, the *res ipsa* presumption may require judgment for the plaintiff if the defendant fails to respond with some evidence to rebut it; and occasionally courts have found the circumstantial evidence

of negligence in a case so strong as to require a directed verdict for the plaintiff.

Judson v. Giant Powder Co.
107 Cal. 549, 40 P. 1020 (1895)

GAROUTTE, J.—Respondents recovered judgment for the sum of \$41,164.75, as damages for acts of negligence. This appeal is prosecuted from such judgment, and from an order denying a motion for a new trial. The damages to respondents' property were occasioned by an explosion of nitroglycerine in process of manufacture into dynamite, in appellant's powder factory, situated upon the shore of the Bay of San Francisco. Appellant's factory buildings were arranged around the slope of a hill facing the bay. Nearest to respondents' property was the nitroglycerine house; next was the washing house; next were the mixing houses; then came the packing houses; and finally the two magazines used for storing dynamite. These various buildings were situated from 50 to 150 feet apart, and a tramway ran in front of them. The explosion occurred in the morning during working hours, and originated in the nitroglycerine house. There followed, within a few moments of time, in regular order, the explosion of the other buildings, the two magazines coming last; but, though last, they were not least, for their explosion caused the entire downfall and destruction of respondents' factory, residences, and stock on hand. There is no question but what the cause of this series of explosions following the first is directly traceable, by reason of fire or concussion, to the nitroglycerine explosion. Of the many employees of appellant engaged in and about the nitroglycerine factory at the time of the disaster, none were left to tell the tale. Hence any positive testimony as to the direct cause of the explosion is not to be had. The witnesses who saw and knew, like all things else around, save the earth itself, were scattered to the four winds. [. . .]

[The defendants-appellants argued first that the plaintiffs-respondents had assumed the risk of an explosion by selling to the defendant the land on which it built its factory. The court rejected the argument:] In making the grant, respondents had a right to assume that due care would be exercised in the conduct of the business, and certainly they have a right to demand that such care be exercised. It is argued that the explosion of all powder works is a mere matter of time; that such explosions are necessarily contemplated by every one who builds beside such works, or who brings dynamite into his dooryard. It is further contended that appellant gave to respondents actual notice of the dangerous character of its business by a previous explosion, which damaged respondents' property, and that respondents, by still continuing in business after such notice, in a degree assumed and ratified the risk, and cannot now be heard to complain. The only element of strength in this line of argument is its originality. The contention that, in the ordinary course of events, all powder factories explode, conceding such to be the fact, presents an element foreign

to the case. The doctrine of fatalism is not here involved. In the ordinary course of events the time for this explosion had not arrived, and appellant had no legal right to hasten that event by its negligent acts. [. . .]

It is contended that respondents offered no evidence tending to show that the explosion of the nitroglycerine factory was occasioned by the negligence of appellant, and this contention brings us to the consideration of a most important principle of law. [. . .] Does the proof of the explosion draw with it a presumption of negligence sufficient to establish a prima facie case for a recovery? [. . .] Presumptions arise from the doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created from the experience of the past. What has happened in the past, under the same conditions will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown. Based upon the foregoing principles, a rule of law has been formulated, bearing upon a certain class of cases, where damages either to person or property form the foundation of the action. This rule is well declared in Shearman and Redfield on Negligence: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of care." [. . .]

In England the authorities are in entire accord. Plaintiff was passing along a highway, under a railroad bridge, when a brick used in the construction of the bridge fell and injured him. Negligence in the railroad was presumed. *Kearney v. Railway Co.*, L. R. 5 Q. B. 411. A barrel of flour rolled out of the window of a warehouse, injuring a person passing upon the street. Negligence in the warehouseman was presumed. *Byrne v. Boadle*, 2 Hurl. & C. 722. The explosion of a boiler of a steamboat is prima facie evidence of negligence. In the *Rose* case it is said: "In the present case the boiler which exploded was in the control of the employees of the defendant. As boilers do not usually explode when they are in a safe condition and are properly managed, the inference that this boiler was not in a safe condition, or was not properly managed, was justifiable." [. . .]

There is another class of cases in all essentials fully supporting our views upon this question of negligence. These cases arise in the destruction of property caused by fire escaping from locomotive engines, and, while there is some conflict in the authorities as to the true rule, it is said in Shearman and Redfield on Negligence (section 676): "The decided weight of authority and of reason is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used all those precautions for confining sparks and cinders (as the case may be) which have been already mentioned as necessary. This is the common law of England, and the same rule has been followed in New York, Maryland," etc., citing many other states. [. . .]

In the case at bar, [. . .] respondents placed before the court expert evidence to the effect that, if the correct process of manufacturing and handling dynamite was carefully carried out, an explosion would not occur. This evidence is stronger than in the smokestack cases, for here it declares as a certainty what there is only stated to be the probable or ordinary result; but, be that as it may, if this character of evidence was relevant and material in the smokestack cases, it is equally relevant and material here. If it was sufficient there to complete and perfect a *prima facie* case of negligence, it is ample here to do the same. Again, if appellant had the right, under the laws of the state, to manufacture dynamite (which is conceded), and, if by reason of the existence of such right, courts may assume that, if dynamite is properly handled in the process of manufacture, explosions will not probably occur, then respondents' case is doubly proven, for here we have, not only the presumption of the existence of certain conditions, but the evidence of witnesses as to the existence of them. [. . .]

Appellant was engaged in the manufacture of dynamite. In the ordinary course of things, an explosion does not occur in such manufacture if proper care is exercised. An explosion did occur, ergo, the real cause of the explosion being unexplained, it is probable that it was occasioned by a lack of proper care. The logic is unassailable, and the principle of law of presumptions of fact erected thereon is as sound as the logic upon which it is based.

For the foregoing reasons, the judgment and order are affirmed.

NOTES

1. *Double bind*. If you have studied strict liability, consider the relationship between that doctrine and *res ipsa loquitur*. If the plaintiffs in a case like *Judson* were to argue that the defendants should be held strictly liable for damage caused by their gunpowder factory, what response might the defendants make? Might that response then become a part of the plaintiff's argument that *res ipsa loquitur* should apply?

If the plaintiff obtains the benefit of the *res ipsa loquitur* presumption in a case like *Judson*, how—if at all—can the defendant respond? What rationale for the *res ipsa* doctrine is suggested by its use in cases like *Judson*? What would be the consequences of not applying *res ipsa* in such cases?

2. *The newspaper of record*. From *The New York Times*, July 10, 1892, at 1:

MIGHTY FORCE OF POWDER

TERRIFIC EXPLOSIONS IN THE VICINITY OF SAN FRANCISCO.

Five white workmen known to have been killed and a number of chinese—seven shocks that shook buildings miles away and caused a panic.

San Francisco, July 9.—There was a terrific explosion this morning at the works of the Giant Powder Company at West Berkeley, across the bay from San Francisco. Seven distinct shocks were felt, and 300 tons of giant powder brought death and destruction to the immediate neighborhood, and caused great damage in Oakland and San Francisco. People for some moments, in both cities, were panic-stricken.

There were 180 men employed at the works when the explosion occurred, and probably it will never be known how many were killed. The majority of the workmen were Chinese.

Only five white men are known to have been killed. These include John Boe, Charles Gobertig, and Wallace Dickinson. [. . .]

The damage to buildings in San Francisco and Oakland will reach \$100,000. In this city the scene on the principal streets was one of wild confusion. Men, pale-faced and bareheaded, rushed from business houses and anxiously looked about for some indication of where the explosion had taken place. [. . .]

The prisoners confined in the City Prison were in a panic. The shock came like a violent gust of wind that shook the building. Even prison officials were excited, as the rickety old building rocked to and fro from the repeated shocks. When at last the heaviest explosion came, every gas jet in the prison went out, leaving the dismal place in darkness. From without came sounds of crashing glass and cries of excited and frightened people as they ran for places of safety. Prisoners raved, cursed, and prayed in one breath. They begged piteously to be released and then swore terribly at the officials, who were deaf to their entreaties.

In Chinatown the wildest terror prevailed. Frightened Chinese did not stop to find their doors, but dashed head foremost through their windows. Several were badly cut, and one on Bartlett Alley was severely injured by jumping from a veranda on the second floor. About fifty persons sustained slight injuries in this city and in Oakland.

3. *Without a trace.* In *Haasman v. Pacific Alaska Air Express*, 100 F. Supp. 1 (Alaska 1951), the plaintiffs' decedents were passengers on an airplane headed to Seattle from Yakutat, Alaska. The plane vanished during the trip. No icing or storm conditions were in effect along the plane's route, and no trace of the plane, its cargo, or its passengers ever was found. The plaintiffs sued the airline, basing their allegations of negligence on the doctrine of *res ipsa loquitur*. The defendants moved to dismiss the claims; the trial court denied the motion and gave judgment to the plaintiffs:

The defendant's contention that [*res ipsa loquitur*] is not applicable to a case such as this is based primarily on the ground that since the plane disappeared without a trace, the defendant can have no knowledge of the cause of the loss of the plane superior to that possessed by the plaintiffs.

The rule precluding the application of the doctrine where the plaintiff's knowledge is equal to that of the defendant [. . .] is applied to

cases where the plaintiff has equal knowledge or where knowledge of the cause is equally accessible to the plaintiff—not to cases in which there is an equality of ignorance as in the instant case. Since inability, because of a lack of knowledge, to show specific acts of negligence is a prerequisite to the application of the doctrine itself, it follows that equality of knowledge precludes its application. But from this it does not follow that conversely equality of ignorance will likewise preclude applicability, for the function of the doctrine is to supply a fact, i.e. defendant's negligence, which must have existed in the causal chain stretching from the act or omission by the defendant to the injury suffered by the plaintiff, but which the plaintiff because of circumstances surrounding the causal chain, cannot know and cannot prove to have actually existed. I conclude, therefore, that the rule barring the application of the doctrine where there is equality of knowledge is not applicable to the case at bar.

What is the meaning of the court's distinction between equality of knowledge and equality of ignorance? What is the analogy between *Haasman v. Pacific Alaska Air Express* and *Judson v. Giant Powder Co.*?

4. *The sea itself contains many hazards.* In *Walston v. Lambertsen*, 349 F.2d 660 (9th Cir. 1965), the plaintiff's decedent was a member of the crew on a crab fishing boat. The boat sank, and its master and crew were drowned. The cause of the boat's disappearance was unknown. It occurred off the coast of Washington on a day when a light breeze was blowing and when the seas were calm, the weather was clear, and the visibility was about six miles. The plaintiff sued the boat's owners, claiming that the boat was unseaworthy because it was equipped with a large live crab tank that may have impaired its stability; she also based her allegations of negligence on the doctrine of *res ipsa loquitur*. There was a trial, and judgment was entered for the defendants. The trial judge found that "The adding of the 'live tank' to the vessel was at the instance of a competent and long experienced skipper, accomplished by a construction firm of good repute, and there is not the slightest indication that it was improper or negligently done in any particular." The trial judge also refused to apply *res ipsa loquitur* to the case. The court of appeals affirmed, holding that the evidence of negligence was insufficient to support a verdict for the plaintiff:

The appellant contends that the district court erroneously failed to apply the doctrine of *res ipsa loquitur* to her advantage. Our court has held that if a claimant establishes that a vessel is unseaworthy, the trial court may presume that the unseaworthiness was the proximate cause of the sinking, otherwise unexplained, of a vessel in calm seas. [. . .] A review of the opinions in these cases and all others which might seem somewhat analogous to the case at bar makes it clear that the presumption which appellant would apply has been indulged only when the claimant has been able to establish to the satisfaction of the trial court that the vessel

was unseaworthy at the time it departed on its last voyage. The sea itself contains many hazards, and an inference of liability of the shipowner for the mysterious loss of his vessel should not be lightly drawn. The court below obviously and properly believed that there could be no foundation for the inference absent satisfactory proof of an unseaworthy condition which might reasonably be expected to relate directly to the sinking of the vessel.

What is the distinction between *Walston v. Lambertsen* and *Haasman v. Pacific Alaska Air Express* (L when defendant's plane disappeared without a trace)?

5. *The sleeping hitchhiker (problem)*. In *Archibeque v. Homrich*, 543 P.2d 820 (N.M. 1975), a man named Perkins was driving from Idaho to Texas. When he reached Utah he telephoned ahead to his destination to say that he might arrive early; he said he had picked up a hitchhiker who had offered to help with the driving and would enable them to drive "straight through." Three days later Perkins' car was discovered at the bottom of a gully next to a state highway in New Mexico. Perkins and the hitchhiker were found dead inside the car; the hitchhiker was in the drivers' seat, and Perkins was on the passenger side. There were no witnesses to the crash.

Perkins' estate sued the hitchhiker's estate for negligence, relying on *res ipsa loquitur*. An investigation of the marks the car left behind on the road suggested that it had traveled for a while on the right hand shoulder of the highway, then veered across the road and over the left shoulder into the gully. The highway was straight, level, and dry at the point of the accident. The investigating officer suggested that the driver may have fallen asleep at the wheel, allowing the car to drift off the road to the right; the sound of the wheels hitting gravel awoke him, and he overcorrected to the left, plunging into the gully. The hitchhiker's estate countered that "in accidents such as this one an insect could have been in the car; cigarette ashes could have blown into the eyes of the driver; an animal could have run out in front of the driver; the driver could have been ill; or another vehicle could have run this vehicle off the road."

What result?

6. *Res ipsa loquitur and types of precautions*. How is it possible to say whether an accident probably was caused by negligence without knowing the details of how it occurred? Consider the amount of care and the type of care needed to safely conduct some activity—hoisting barrels, fencing in a cow, or flying an airplane. For which of these activities does reasonableness require the most care to be used? What differences exist between the kinds of precautions needed in each situation? In which case is it easiest to conclude that if there is an accident, somebody made a mistake—perhaps a "compliance error" in failing to carry out some repetitive precaution? Consider

Mark F. Grady, *Res Ipsa Loquitur and Compliance Error*, 142 U. Pa. L. Rev. 887 (1994):

The possibilities for compliance error on a Cessna are fewer than on a commercial airliner because there are not as many gauges to watch. At the birth of aviation, when a plane disappeared without a trace—Amelia Earhart’s plane for instance—compliance error was much less likely to have been the cause of the disaster than in the *Haasman* crash. The reason is almost tautological: by virtue of the greater safety equipment aboard, the *Haasman* pilots had many more opportunities for compliance error than Amelia Earhart did. This theory suggests a paradox that we will see confirmed in the cases. In most instances where technology has made an activity unusually safe, that same technology has multiplied the possibilities for compliance error relative to those for unavoidable accidents. Hence, the paradox: accidents in areas with the most safety equipment are the strongest *res ipsa* cases. When a modern commercial airliner goes down, it is a much better *res ipsa* case than when a DC-3 disappears. If a nuclear reactor were to melt down, it would be an exceptionally strong *res ipsa* case.

Crab boats are almost the opposite of commercial aircraft. The required rate of precaution is lower because the danger rate is lower. The boat travels more slowly into harm’s way and fewer people are on board. Since crab boat technology is so primitive, there are many hazards that will lead to its destruction without anyone having been negligent. Indeed, the cruder safety technology leads to a higher rate of unavoidable accident than there is in the air. Also, with more rudimentary technology, the required rate of precaution is lower than on a commercial aircraft. Hence, the possibilities for compliance error are lower at sea. A strong *res ipsa* case is one in which the expected rate of compliance error is high relative to the normal rate of unavoidable accident. The *Haasman* air crash was that case, but the *Walston* sinking was not. [. . .]

In recent debates about the tort system, some commentators have argued that something must be seriously wrong when negligence claims are rising at the same time as objective measures of safety (fatalities per passenger mile) are improving. Far from indicating flaws in the system, this is a normal and usual relationship when technology progresses. The invention of the dialysis machine saves hundreds of lives each year, but it also adds a number of negligence claims (from compliance error) that did not exist before. The paramount purpose of the negligence system is to regulate compliance error in the use of technology. It is therefore natural that advances in technology tend to increase the number of claims.

We need to distinguish the number of claims from the claims’ magnitude. The development of antiseptic techniques generally decreases the magnitude of tort claims. Consider someone accidentally injured

in a hunting accident before and after Lister conducted his research on the modern antiseptic. Once good antiseptic techniques exist, negligent hunters will generally pay lower damages. Although a technology may reduce the magnitude of claims, it can still increase the number of claims. After the development of antiseptic techniques, when someone forgets to use them, there is a new negligence claim—against a doctor—which could not have existed before.

Ybarra v. Spangard
154 P.2d 687 (Cal. 1944)

GIBSON, C.J.—This is an action for damages for personal injuries alleged to have been inflicted on plaintiff by defendants during the course of a surgical operation. The trial court entered judgments of nonsuit as to all defendants and plaintiff appealed.

On October 28, 1939, plaintiff consulted defendant Dr. Tilley, who diagnosed his ailment as appendicitis, and made arrangements for an appendectomy to be performed by defendant Dr. Spangard at a hospital owned and managed by defendant Dr. Swift. Plaintiff entered the hospital, was given a hypodermic injection, slept, and later was awakened by Drs. Tilley and Spangard and wheeled into the operating room by a nurse whom he believed to be defendant Gisler, an employee of Dr. Swift. Defendant Dr. Reser, the anesthetist, also an employee of Dr. Swift, adjusted plaintiff for the operation, pulling his body to the head of the operating table and, according to plaintiff's testimony, laying him back against two hard objects at the top of his shoulders, about an inch below his neck. Dr. Reser then administered the anesthetic and plaintiff lost consciousness. When he awoke early the following morning he was in his hospital room attended by defendant Thompson, the special nurse, and another nurse who was not made a defendant.

Plaintiff testified that prior to the operation he had never had any pain in, or injury to, his right arm or shoulder, but that when he awakened he felt a sharp pain about half way between the neck and the point of the right shoulder. He complained to the nurse, and then to Dr. Tilley, who gave him diathermy treatments while he remained in the hospital. The pain did not cease but spread down to the lower part of his arm, and after his release from the hospital the condition grew worse. He was unable to rotate or lift his arm, and developed paralysis and atrophy of the muscles around the shoulder. He received further treatments from Dr. Tilley until March, 1940, and then returned to work, wearing his arm in a splint on the advice of Dr. Spangard.

Plaintiff also consulted Dr. Wilfred Sterling Clark, who had X ray pictures taken which showed an area of diminished sensation below the shoulder and atrophy and wasting away of the muscles around the shoulder. In the opinion of Dr. Clark, plaintiff's condition was due to trauma or injury by pressure or strain applied between his right shoulder and neck.

Plaintiff was also examined by Dr. Fernando Garduno, who expressed the opinion that plaintiff's injury was a paralysis of traumatic origin, not arising from pathological causes, and not systemic, and that the injury resulted in atrophy, loss of use and restriction of motion of the right arm and shoulder.

Plaintiff's theory is that the foregoing evidence presents a proper case for the application of the doctrine of *res ipsa loquitur*, and that the inference of negligence arising therefrom makes the granting of a nonsuit improper. Defendants take the position that, assuming that plaintiff's condition was in fact the result of an injury, there is no showing that the act of any particular defendant, nor any particular instrumentality, was the cause thereof. They attack plaintiff's action as an attempt to fix liability "en masse" on various defendants, some of whom were not responsible for the acts of others; and they further point to the failure to show which defendants had control of the instrumentalities that may have been involved. Their main defense may be briefly stated in two propositions: (1) that where there are several defendants, and there is a division of responsibility in the use of an instrumentality causing the injury, and the injury might have resulted from the separate act of either one of two or more persons, the rule of *res ipsa loquitur* cannot be invoked against any one of them; and (2) that where there are several instrumentalities, and no showing is made as to which caused the injury or as to the particular defendant in control of it, the doctrine cannot apply. We are satisfied, however, that these objections are not well taken in the circumstances of this case.

The doctrine of *res ipsa loquitur* has three conditions: "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." Prosser, *Torts*, p. 295.

There is, however, some uncertainty as to the extent to which *res ipsa loquitur* may be invoked in cases of injury from medical treatment. This is in part due to the tendency, in some decisions, to lay undue emphasis on the limitations of the doctrine, and to give too little attention to its basic underlying purpose. The result has been that a simple, understandable rule of circumstantial evidence, with a sound background of common sense and human experience, has occasionally been transformed into a rigid legal formula, which arbitrarily precludes its application in many cases where it is most important that it should be applied. If the doctrine is to continue to serve a useful purpose, we should not forget that "the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person." 9 Wigmore, *Evidence*, 3d Ed., §2509, p. 382.

The present case is of a type which comes within the reason and spirit of the doctrine more fully perhaps than any other. The passenger sitting awake in a railroad car at the time of a collision, the pedestrian walking along the street and struck by a falling object or the debris of an explosion, are surely not more entitled to an explanation than the unconscious patient on the operating table. Viewed from this aspect, it is difficult to see how the doctrine can, with any justification, be so restricted in its statement as to become inapplicable to a patient who submits himself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from instrumentalities used in his treatment. Without the aid of the doctrine a patient who received permanent injuries of a serious character, obviously the result of some one's negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability. If this were the state of the law of negligence, the courts, to avoid gross injustice, would be forced to invoke the principles of absolute liability, irrespective of negligence, in actions by persons suffering injuries during the course of treatment under anesthesia. But we think this juncture has not yet been reached, and that the doctrine of *res ipsa loquitur* is properly applicable to the case before us.

The condition that the injury must not have been due to the plaintiff's voluntary action is of course fully satisfied under the evidence produced herein; and the same is true of the condition that the accident must be one which ordinarily does not occur unless some one was negligent. We have here no problem of negligence in treatment, but of distinct injury to a healthy part of the body not the subject of treatment, nor within the area covered by the operation. The decisions in this state make it clear that such circumstances raise the inference of negligence and call upon the defendant to explain the unusual result.

The argument of defendants is simply that plaintiff has not shown an injury caused by an instrumentality under a defendant's control, because he has not shown which of the several instrumentalities that he came in contact with while in the hospital caused the injury; and he has not shown that any one defendant or his servants had exclusive control over any particular instrumentality. Defendants assert that some of them were not the employees of other defendants, that some did not stand in any permanent relationship from which liability in tort would follow, and that in view of the nature of the injury, the number of defendants and the different functions performed by each, they could not all be liable for the wrong, if any.

We have no doubt that in a modern hospital a patient is quite likely to come under the care of a number of persons in different types of contractual and other relationships with each other. For example, in the present case it appears that Drs. Smith, Spangard and Tilley were physicians or surgeons commonly placed in the legal category of independent contractors; and Dr. Reser, the anesthetist, and defendant Thompson, the special nurse, were employees of Dr. Swift and not of the other doctors. But we do not believe that either

the number or relationship of the defendants alone determines whether the doctrine of *res ipsa loquitur* applies. Every defendant in whose custody the plaintiff was placed for any period was bound to exercise ordinary care to see that no unnecessary harm came to him and each would be liable for failure in this regard. Any defendant who negligently injured him, and any defendant charged with his care who so neglected him as to allow injury to occur, would be liable. The defendant employers would be liable for the neglect of their employees; and the doctor in charge of the operation would be liable for the negligence of those who became his temporary servants for the purpose of assisting in the operation.

It may appear at the trial that, consistent with the principles outlined above, one or more defendants will be found liable and others absolved, but this should not preclude the application of the rule of *res ipsa loquitur*. The control at one time or another, of one or more of the various agencies or instrumentalities which might have harmed the plaintiff was in the hands of every defendant or of his employees or temporary servants. This, we think, places upon them the burden of initial explanation. Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants; it is manifestly unreasonable for them to insist that he identify any one of them as the person who did the alleged negligent act.

The other aspect of the case which defendants so strongly emphasize is that plaintiff has not identified the instrumentality any more than he has the particular guilty defendant. Here, again, there is a misconception which, if carried to the extreme for which defendants contend, would unreasonably limit the application of the *res ipsa loquitur* rule. It should be enough that the plaintiff can show an injury resulting from an external force applied while he lay unconscious in the hospital; this is as clear a case of identification of the instrumentality as the plaintiff may ever be able to make. [. . .]

[I]f we accept the contention of defendants herein, there will rarely be any compensation for patients injured while unconscious. A hospital today conducts a highly integrated system of activities, with many persons contributing their efforts. There may be, e.g., preparation for surgery by nurses and interns who are employees of the hospital; administering of an anesthetic by a doctor who may be an employee of the hospital, an employee of the operating surgeon, or an independent contractor; performance of an operation by a surgeon and assistants who may be his employees, employees of the hospital, or independent contractors; and post surgical care by the surgeon, a hospital physician, and nurses. The number of those in whose care the patient is placed is not a good reason for denying him all reasonable opportunity to recover for negligent harm. It is rather a good reason for re-examination of the statement of legal theories which supposedly compel such a shocking result.

We do not at this time undertake to state the extent to which the reasoning of this case may be applied to other situations in which the doctrine of *res ipsa loquitur* is invoked. We merely hold that where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those

defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct.

The judgment is reversed.

NOTES

1. *Something they did not appreciate.* On remand, *Ybarra v. Spangard* was retried without a jury. All of the defendants (except the hospital's owner, who was not present in the operating room) testified, and all said they had seen nothing occur which could have produced the plaintiff's injuries. The trial judge said that he thought the defendants' explanations were "honest," but that "something they did not appreciate happened in the course of the operation, in the course of handling the patient." He gave judgment to the plaintiff, and the court of appeals affirmed. Is the trial court's handling of the case on remand consistent with the *Ybarra* opinion? If the *res ipsa* presumption successfully induced the defendants to testify honestly, and they said that they knew nothing, then why should the presumption continue to allow the plaintiff to obtain judgments against them?

2. *Substance and procedure.* Are there uses of *res ipsa loquitur* that might be considered obsolete in view of the aggressive pretrial discovery now permitted to plaintiffs in tort cases? What is the difference between those two ways of forcing defendants to reveal what they know?

3. *Common knowledge.* Apart from the problem of identifying who caused the plaintiff's injury, the *Ybarra* case also raises questions about the application of *res ipsa loquitur* to cases of medical malpractice. How are jurors untutored in medicine to decide whether an untoward result of a complicated medical procedure "speaks for itself" and suggests that the defendant was negligent? Some states give the plaintiff in such cases the option of deciding whether to present expert witnesses; others require expert testimony in certain instances, but then struggle to distinguish between those claims of medical negligence so egregious that an inference of negligence can be drawn by lay jurors as a matter of "common knowledge" and those where any such inference must be supported by testimony from an expert. Consider this attempt by the Nevada legislature to settle the distinction by statute:

N.R.S. 41A.100. EXPERT TESTIMONY REQUIRED; EXCEPTIONS;
REBUTTABLE PRESUMPTION OF NEGLIGENCE

1. Liability for personal injury or death is not imposed upon any provider of medical care based on alleged negligence in the performance of that care unless evidence consisting of expert medical testimony, material from recognized medical texts or treatises or the regulations of the

licensed medical facility wherein the alleged negligence occurred is presented to demonstrate the alleged deviation from the accepted standard of care in the specific circumstances of the case and to prove causation of the alleged personal injury or death, except that such evidence is not required and a rebuttable presumption that the personal injury or death was caused by negligence arises where evidence is presented that the personal injury or death occurred in any one or more of the following circumstances:

- (a) A foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery;
 - (b) An explosion or fire originating in a substance used in treatment occurred in the course of treatment;
 - (c) An unintended burn caused by heat, radiation or chemicals was suffered in the course of medical care;
 - (d) An injury was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto;
- or
- (e) A surgical procedure was performed on the wrong patient or the wrong organ, limb or part of a patient's body.

4. *The author of the wrong.* In *Wolf v. American Tract Society*, 58 N.E. 31 (N.Y. 1900), the defendants were among 19 independent contractors working on the construction of a 23-story building in New York City. One day when work was progressing on the ninth story of the building, the plaintiff, Wolf, was on the street outside delivering pipe. A brick fell on his head. There was no evidence to suggest where the brick came from or who dropped it. Wolf sued two of the contractors at work on the building. The trial court dismissed the complaint and the Court of Appeals affirmed:

In a case like this, where the building in process of construction is in charge of numerous contractors and their workmen, each independent of the other, and none of them subject to the control or direction of the other, some proof must be given to enable the jury to point out or identify the author of the wrong. There is no principle that I am aware of that would make all of the contractors or all the workmen engaged in erecting this building liable *in solido*. And yet there is just as much reason for that as there is for holding two of these contractors for no other reason than that one of them had charge of the carpenter work and the other of the mason work. The plaintiff, we must assume, suffered injury from the negligence of some one; but I am not aware of any ground, in reason or law, for imputing the wrong to the two contractors who are defendants, or for selecting them from all the others as responsible to the plaintiff, unless they can conclusively show that they are not.

Cases must occasionally happen where the person really responsible for a personal injury cannot be identified or pointed out by proof, as in

this case; and then it is far better and more consistent with reason and law that the injury should go without redress, than that innocent persons should be held responsible, upon some strained construction of the law developed for the occasion. The idea suggested in this case, that all or any of the 19 contractors may be held, since the plaintiff is unable by proof to identify the real author of the wrong, is born of necessity, but embodies a principle so farreaching and dangerous that it cannot receive the sanction of the courts.

Haight, J., dissented:

Injuries of this character are not uncommon, but it is seldom that the injured party is able to show who the negligent person was; and if the principle contended for is to be sustained in its entirety, without limitation, the public has little protection from the dangers liable to occur from the construction of high buildings upon the lines of streets in our large and populous cities. A person walking along a street, who is suddenly crushed to the earth by a brick falling from a high building filled with workmen, has but slight opportunity to ascertain who the person was who caused the brick to fall, and such person seldom confesses to his misconduct. It was owing to this difficulty that the rule of presumption of negligence to which we have alluded was established. It was a rule founded upon necessity, designed for the protection of the public, and, in my judgment, should not be abrogated because the owner sees fit to contract with two or more persons to construct his building.

What is the distinction between *Wolf v. American Tract Society* and *Byrne v. Boadle* (the L case of the falling barrel)? What is the distinction between *Wolf v. American Tract Society* and *Ybarra v. Spangard*?

5. *Free fall*. In *Bond v. Otis Elevator Company*, 388 S.W.2d 681 (Tex. 1965), the plaintiff entered an elevator on the ninth floor of the Adolphus Tower Building in Dallas. The elevator went into “free fall”; after plummeting to the fifth or sixth floor it stopped and bounced violently on its cord. The plaintiff was thrown to the floor and injured her ankle. She sued the owner of the building and the Otis Elevator Company. She did not attempt to prove that either defendant committed any specific act of negligence, but relied entirely on the doctrine of *res ipsa loquitur*. Otis installed the elevator and had a contract with the building to maintain it. In the contract, Otis provided in part that “we do not assume possession or management of any part of the equipment but such remains yours exclusively as the owner (or lessee) thereof.” Neither defendant offered any explanation for the elevator’s fall. The trial court found the defendants jointly and severally liable to the plaintiff. The Supreme Court of Texas held that the trial court did not err in allowing the plaintiff to rely on *res ipsa loquitur*:

It appears from the contract between Adolphus and Otis with reference to the maintenance of the elevators that the mechanism controlling the movement of the elevators is quite complicated and from the very nature of things the facts which would reveal how this “free fall” happened were peculiarly within the knowledge of respondents. If there is any explanation of this unusual occurrence of the elevator going into a “free fall”, then the respondents are in a far better position to come forward with it than is the petitioner.

We think that the evidence conclusively shows that the elevator was under the joint control of Adolphus Tower and Otis Elevator. A mere reading of that part of the contract quoted above shows this. Otis Elevator says that the contract places the exclusive control in Adolphus Tower. [. . .] It is true that the Adolphus Tower retained possession and management of the elevators by that contract, but with the understanding that Otis was to examine, lubricate, adjust and if in its judgment conditions warrant, it was to repair or replace all necessary equipment. In other words, what maintenance was required depended upon the judgment of Otis, not that of Adolphus Tower. It would be difficult to imagine a relationship between two parties with reference to certain equipment where joint control is more conclusively shown. The petitioner pleaded joint control and under this evidence we think the trial court was correct in its necessary holding, in support of its judgment, that both parties were in joint control of the elevator in question.

We know of no case which holds that in order for the doctrine of *res ipsa loquitur* to apply that the instrumentality causing the injury must be under the exclusive control of a single entity. [. . .]

What is the distinction between *Bond v. Otis Elevator Company* and *Wolf v. American Tract Society* (the NL case of the falling brick)?

6. *A mystery that cannot be accounted for.* In *Actiesselskabet Ingrid v. Central R. Co. of New Jersey*, 216 F. 72 (2d Cir. 1914), DuPont made a contract to have dynamite shipped by railway from its plant in Kenville, New Jersey, to a port in Jersey City. DuPont also hired a crew managed by one Healing to move the dynamite from the railroad car onto a ship Healing owned called the *Katherine W.*, which in turn was to carry it to Uruguay. One of the railroad’s cars, which contained about 40,000 pounds of dynamite, exploded while the dynamite was being transferred from the train to the boat. The *Katherine W.* was demolished by the explosion, which was felt as far away as lower Manhattan; among the other ships damaged was the plaintiff’s vessel, the *Ingrid*, which recently had arrived from Buenos Aires with a cargo of bones meant to be unloaded into the cars of the same railroad that was handling the dynamite. The *Ingrid* could not be salvaged and was auctioned off as scrap iron. The owners of the *Ingrid* sued DuPont, the railroad, and Healing, basing one theory of recovery on the doctrine of *res*

ipsa loquitur. The district court dismissed the libel, and the court of appeals affirmed:

According to the libelant's own theory as presented upon the argument, the accident might have been caused by the negligence of either the railroad company, the powder company, or Healing. It is also true that the explosion may have been caused by the act of outsiders entirely unconnected with any of the respondents. If the explosion itself is evidence of negligence, such negligence may have been that of the powder company in the manufacture of the dynamite or the packing of it in the boxes; or it may have been the negligence of the railroad company in improperly handling the car; or it may have been the negligence of Healing in carelessly transferring the boxes from the car into the lighter; or it may have been the negligence of unauthorized persons who may have interfered with some of these operations. And any one of these theories is almost as probable as another. The cause of the explosion is a mystery and cannot be accounted for.

Is there a satisfactory distinction between this case and *Bond v. Otis Elevator Co.*? Between this case and *Judson v. Giant Powder Co.*?

7. *Turkey salad (problem)*. In *Samson v. Riesing*, 215 N.W.2d 662 (Wis. 1974), the plaintiff attended a luncheon at the Wauwatosa Trinity Episcopal Church. The luncheon was hosted by eleven members of the Wauwatosa High School Band Mothers Association. The plaintiff ate turkey salad and dessert. She subsequently experienced salmonella poisoning and suffered permanent digestive injuries as a result. The plaintiff's evidence was that the turkey salad had been contaminated with salmonella bacteria. Nine members of the Band Mothers Association had participated in the preparation of the turkey salad. Each of the nine cooked a turkey in her own kitchen before the event; the ladies then brought the turkeys to the church kitchen where the salad was prepared. It was impossible to determine whose turkey had contaminated the batch. The plaintiff brought an action for negligence against all of the women who had cooked the turkeys and prepared the salad, attempting to rely on the doctrine of *res ipsa loquitur*. What result?