**Negligence**

**Introduction to Negligence**

Now, let's talk about the biggest and baddest concept you're likely to encounter in your first-year torts class: negligence. Now, bear in mind that negligence is a powerful beast. It can't be defeated quickly. Rather, it has to be tackled bit by bit, little by little, until you've mastered it. Hence the reason we're devoting two whole tutorials to it.

**I. Elements of Negligence**

The five basic elements of negligence are as follows: (1) the defendant must owe a duty to the particular plaintiff to conform the defendant's behavior to a particular standard of care, (2) the defendant must breach that duty; said breach of duty must (3) actually and (4) proximately cause (5) legally cognizable harm to the plaintiff, usually consisting of harm to the plaintiff's person or property.

Now, I've stated the requirements of negligence as five elements, but this is not necessarily a universal truth. Some courts phrase the requirements differently, or might use four elements instead of five. Even so, the number of elements we use to understand the legal requirements for a negligence case is not important, so much as an understanding of the fundamental behavior that the law of negligence is meant to address. That behavior is, at its essence, carelessness on the part of the defendant, which directly or indirectly (but foreseeably) causes injury to a person to whom the defendant owed a duty to be more careful than the defendant was.

To put it even more concisely, negligence makes us legally responsible for the harm we cause to other people if we are not as careful as we should be. At its core, this is all negligence law is meant to do.

**II. Duty**

Let's elaborate a little more on duty. In order for the duty element of negligence to be satisfied, there must be a legal duty on the part of the defendant to conform the defendant’s behavior to a particular standard of care, so as to protect the particular plaintiff from an unreasonable risk of injury as a result of defendant's conduct. In many ways, a duty is the foundational element of negligence.

The most negligent defendant in the world will get off scot-free if it is found he owed the particular plaintiff no duty to refrain from being negligent. To put it differently, in order to make out a prima facie case for negligence, the plaintiff must actually prove that under the particular circumstances surrounding the defendant's action, the defendant owed that particular plaintiff a duty under the law not to act negligently.

As you will see, the majority view in the cases is that a duty to refrain from acting negligently is not a duty owed to the world at large. It is a duty that is only recognized under certain, particular circumstances. However, some courts espouse a minority view and hold that a duty to one is a duty to all, so that if a person is careless and someone is hurt, there needs to be no further inquiry as to duty—more on that later.

Therefore, if the defendant behaves negligently and thereby causes the plaintiff severe injuries, but it is found that the defendant did not owe the plaintiff any duty not to behave negligently, then the defendant will not be liable for negligence. Indeed, if the defendant is negligent, and A and B are hurt by it, the defendant may be liable only to A and not to B, because the defendant only owed a duty to A. Since the defendant owed no duty to B, the defendant is not liable to B, even though B was also injured by the defendant’s negligence.

Later videos will treat with more depth the question of when and under what circumstances the law will recognize a duty on the part of the defendant not to behave negligently. The question usually boils down to whether, under the particular circumstances, the relationship between the defendant and the plaintiff is sufficient to give rise to a duty on the part of the defendant to exercise reasonable care not to injure the plaintiff. Usually, if someone in the plaintiff’s position could reasonably foreseeably be injured by the defendant’s conduct if he is not reasonably careful, then that gives rise to a duty on the part of the defendant to exercise the degree of care that a reasonable person in his position would exercise so as to avoid injuring someone in The plaintiff’s position.

**III. Standard of Care**

Now, let's introduce you to the standard, or quantum of care. As we will elaborate on in later videos, where the law does recognize a duty, the substance of that duty is that the defendant must exercise reasonable care under the circumstances. Failure to exercise reasonable care under the circumstances is a breach of duty and constitutes negligence. In other words, the general duty is that we must all act as would an ordinary, reasonable, prudent person under all the circumstances, so as to protect from unreasonable risk of injury those who could foreseeably be injured by our conduct if we do not exercise the proper care.

The core of the reasonable person standard basically requires that we be careful. We must be as careful as a reasonable person in our circumstances would be, so that we do not injure those who might foreseeably be injured if we are not careful. See our later videos for more on this topic.

**IV. Breach**

Now, let's talk about the concept of breach as it relates to negligence. Breach means that the defendant has breached the duty to behave as would an objectively, reasonably prudent person under all the circumstances. Thus, it can be said that breach is the “neglect" in "negligence." It is what the defendant did wrong, so as to subject the defendant to liability for negligence.

**V. Harm**

Now, let's talk about harm. Unlike with intentional torts, in negligence, the plaintiff must actually prove, as part of his prima facie case, that the defendant’s breach of duty actually and proximately caused the plaintiff some legally-cognizable harm. This is because negligence is concerned primarily with making the plaintiff whole for actual harm caused by the defendant’s negligence, rather than vindicating some abstract right, as intentional torts strive to do

Most of the time, legally-cognizable harm consists of bodily harm or property damage, but there are other kinds of recognizable harm. See our later videos for more on harm as it relates to negligence.

**VI. Causation**

A. Actual Causation

Now, let's talk about actual causation. In order for the plaintiff to make out a case for negligence, the plaintiff must prove that the defendant’s breach of duty was an actual cause of the plaintiff’s injury. This makes sense, since it doesn't seem fair to hold Bruno, our resident tortfeasor, liable for harm he didn't actually cause. Nine-point-nine times out of ten, actual causation means but-for causation.

Nevertheless, even though the but for test is the most widely used test for actual causation, it is certainly not the only test, as our later videos will make clear. Thus, there are situations where actual causation can be found even though the defendant’s conduct cannot be proven to be a but for cause. Thus, the defendant’s conduct does not need to be the sole cause—just one cause.

B. Proximate Causation

Now, let's talk about perhaps the most confounding of the five elements of negligence: proximate causation, sometimes called legal causation. Not only must the defendant’s breach of duty be an actual cause of the plaintiff’s injury, but it must also be the case that the causal relationship between the defendant’s conduct and the plaintiff’s injury is close enough that it is fair to hold the defendant liable for the injury. This is the essence of what proximate cause tries to do; it tries to make sure that the causal nexus between the defendant’s conduct and the plaintiff’s injury is not too attenuated or remote to justify imposing liability on the defendant for the plaintiff’s injury.

1. Foreseeability

The heart of proximate cause is foreseeability. If it was foreseeable to a reasonable person in the defendant’s position that the plaintiff would be hurt by the defendant’s negligence, then often that will suffice for proximate cause. Some courts like to say that the injury must be the "natural and probable consequence" of defendant's conduct. Of course, if it is foreseeable to a reasonable person in the defendant’s position that someone in the plaintiff’s position could be hurt by his negligence, that also gives rise to a duty, but we'll talk more about this in later videos.

C. Causation Generally

Now, let's do a brief aside to discuss the significance of causation throughout tort law. Whenever the elements of a tort, negligence or otherwise, dictate that something must be caused by defendant's conduct, then that means that the defendant’s conduct must actually and proximately cause the thing. Causation gets the most attention in the law of negligence, but just keep it mind that it really matters no matter what kind of tort we're talking about.

D. Foreseeable v. Conceivable

Now, let's make one quick observation about foreseeability before we close. When we say that something should be foreseeable, we do not mean that it must be conceivable. Rather, what we mean is that the thing must be reasonably foreseeable. In the case of reasonably foreseeable danger or harm, it means that a reasonable person in the defendant's position would deem the occurrence of the harm to be likely enough to warrant taking precautions against it.

**Duty to Foreseeable Victims**

Remember how in the video on Introduction to Negligence, we learned that there can be no liability for negligence unless the defendant owed a duty to the particular plaintiff to conform his or her conduct to a particular standard of care? In this video, we talk about the pivotal issue of when the duty generally arises.

There are two basic views on to what persons our duty of reasonable care generally arises: They are the Cardozo view and the Andrews view. Whenever we do anything, anything at all, we generally create a risk that other people could be hurt if we do not use reasonable care under all the circumstances. Moreover, to a reasonable person in our shoes, it should be foreseeable that we will hurt someone if we are not reasonably careful.

However, that coin has another side. Since we live in a society with other people, and since other people do not often exercise abundant caution as they go about their activities, the law expects us to put up with some risk of harm as part of our daily existence. Thus, the tension between the Cardozo and the Andrews views seems to stem from just where we are to strike the best balance between (1) making those people whom we injure by our negligence whole and (2) limiting the possible scope of negligence liability in light of the basic rule that we all assume some risk as a part of living in a civilized society.

**I. *Palsgraf v. Long Island Railroad Co.***

The Cardozo view and the Andrews view take their names from the respective judges on the New York Court of Appeals (the highest court in New York) who articulated them in the majority and dissenting opinions in the seminal case of *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928).

A. The Cardozo View

Judge Cardozo wrote for the majority in *Palsgraf*, and his view has since become the majority view in most jurisdictions. The Cardozo view is the stingier view from the perspective of a prospective plaintiff, because it sets forth a much narrower view of just to whom we owe a duty of care than does the Andrews view. Under the Cardozo view, we are not liable to someone just because that someone was hurt by our failure to exercise reasonable care. Rather, according to Judge Cardozo, our duty of using reasonable care runs only to whose whom a reasonable person in our position could foresee getting hurt if we do not use reasonable care.

Thus, in order for the defendant to have a duty to the plaintiff, then to a reasonable person under the defendant’s circumstances, the defendant’s conduct must create a risk of foreseeable injury to a person in the plaintiff’s position. To state it yet another way, a duty to use reasonable care arises if we do anything that a reasonable person in our shoes should know creates an unreasonable risk of harm to other people.

A plaintiff is only owed that duty if it could be reasonably foreseen that **someone in that particular plaintiff's position** might be hurt by, or fall within the foreseeable zone of danger created by, unreasonably risky conduct. Therefore, it must be the case that a reasonable person in the defendant's position should be able to foresee that a person in the plaintiff's position might get hurt by the defendant’s negligence.

B. The Andrews View

The Andrews view adopts a much broader interpretation of the issue of just to whom we owe a duty. It was the dissenting opinion in *Palsgraf*, and it is now the minority view amongst the various jurisdictions in the United States. Wisconsin, at least as far back as 2003, followed the Andrews view, and probably still does, since it followed that view for a long time.

To put it simply, Judge Andrews believed that we all owe the whole world a duty to use reasonable care under the circumstances. To Judge Andrews, a duty to one is a duty to all. Judge Andrews wrote that "[e]veryone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Under the Andrews view, every person has a duty to use reasonable care in all activities, and the duty arises whenever a reasonable person in the defendant's position should foresee that the defendant’s actions might hurt someone. Thus, according to Judge Andrews, if a defendant fails to use reasonable care, and someone is hurt, then the defendant is liable—period. It does not matter whether the defendant should reasonably have foreseen that a person in the particular plaintiff's position would be hurt. The person was hurt, and that's all that matters.

A court adopting the Andrews view will still place foreseeability-based limitations on the scope of the defendant's ultimate liability. However, the foreseeability question is taken up in the proximate cause analysis, not in the question of whether a duty was owed. Thus, in summary, in an Andrews jurisdiction, you owe a duty—period.

Now, go be reasonably careful under the circumstances.

**II. Special Duties**

A. Rescue Doctrine

Next, it is worth noting that a rescuer will always be a foreseeable plaintiff. Judge Cardozo himself stated the rule fairly concisely, when he stated that "[d]anger invites rescue." In other words, if it is foreseeable that a defendant’s failure to exercise reasonable care places the plaintiff at a risk of harm, then it is also foreseeable that somebody will come and try to save the plaintiff, and could get hurt in the process. Remember, then, that it is always foreseeable that rescuers could get hurt trying to help someone that our negligence has placed in jeopardy. Thus, I owe a duty not only to the plaintiff I injured, but to anyone else who is injured trying to save the plaintiff, unless perhaps the rescuer recklessly disregarded his or her own safety, since that is not as foreseeable.

Some cases discussing the rescue doctrine have hinted at the need for a spontaneous, gratuitous attempt at rescue as a humanitarian gesture. Thus, the rescue doctrine may not apply if the rescuer was under a legal or contractual obligation to try to effectuate the rescue, such as a policeman, fireman, or EMT. One case described the need for a continuous transaction, commencing on the rescuer's actual perception of the injury, so that the rescuer sees the injury and starts trying to help as a matter of spontaneity. In other words, the rescue doctrine usually contemplates a Good Samaritan type of scenario.

The rescue doctrine has an interesting twist. If I injure myself through my own negligence and put myself at risk, and a Good Samaritan comes along and gets hurt trying to rescue me, then I owe a duty to the rescuer and might be liable to the rescuer for his or her injuries.

B. Viable Fetus

A viable fetus is also deemed to be a reasonable plaintiff. Thus, if I hurt Jill through my negligence, and she is pregnant, she can sue me not only on her own behalf, but also on behalf of her baby, assuming Jill herself was a foreseeable plaintiff in the first instance.

C. Duty of Care While Undertaking a Rescue

Also, hearkening back to the rescue doctrine a bit, a rescuer is also under a duty to use reasonable care in effectuating a rescue. This is because, whenever someone undertakes, gratuitously or for compensation, to do something that they should recognize as necessary for the protection of a person or their property, he or she is liable for injury caused by failure to exercise reasonable care. Thus, the Good Samaritan who actually exacerbates the victim's injuries may be found liable, because he was under a duty to use reasonable care in helping.

If the asserted negligence of the voluntary undertaker is inaction, or nonfeasance, only, then the plaintiff must have reasonably relied on the defendant to do something that he promised or otherwise undertook to do, but didn't wind up doing.

D. Duty Resulting from Creation of Risk

Another discrete application of the general rule is a situation if we subjectively perceive that our actions, even though not negligent or careless in any way, happen to have the effect of causing bodily harm to another person and thereby putting that other person at further risk of harm.

Thus, suppose that Jack is lying on the side of the road, injured, because Bruno hit him with a car, despite Bruno's exercise of reasonable care. Bruno is not liable for whatever injuries have accrued up to this point, because he exercised reasonable care. However, Bruno's actions have placed Jack at risk of further harm, because they have left Jack on the side of the road, unable to protect himself. From this point forward, Bruno has a duty to use reasonable care to see to it that no further harm comes to Jack because of Bruno's non-negligent but still injury-inducing action. Thus, under this rule, if Bruno does nothing, and another car comes along and hits Jack, Bruno could be liable.

**III. Summary and Conclusion**

Summary and conclusion: The bottom line is that, in negligence, a duty of care arises whenever a reasonable person in the defendant's position should perceive that the defendant’s conduct places someone at an unreasonable risk of harm. The only difference between Cardozo and Andrews is whether that duty is limited to those we can reasonably foresee hurting, or whether it extends to the world at large.

In this video, bear in mind that we are not fleshing out the precise quantum of care we must exercise in order to fulfill our duty to use reasonable care under the circumstances. Rather, the only issue we have addressed here is the question of to whom the duty is owed in the first instance.

**Reasonable Care Under the Circumstances**

You've heard us talk about "reasonable care under the circumstances," and you’re probably wondering what it means. The last video was all about the issue of just when a duty of reasonable care under the circumstances arises. This video now delves into just what the duty of reasonable care under the circumstances requires once we've determined that there is a duty.

**I. The Reasonable Person**

In every negligence case, when it comes time to assess whether the defendant acted with reasonable care under the circumstances, the defendant's conduct will be evaluated against a hypothetical legal construct. This hypothetical construct is called the "objectively reasonable, prudent person," or more succinctly, the "reasonable person."

In order to determine whether the defendant acted with the requisite degree of care, the court will look to this hypothetical reasonable person and ask what he or she would have done under the same circumstances. If the defendant's conduct measures up to what the reasonable person would have done, then the defendant will not be found to have breached his or her duty; if not, then we have a breach.

A. Attributes

As you probably already deduced, the standard is objective. However, there can be some consideration of the defendant's individual characteristics to the extent they inform the overall analysis. Since the defendant's conduct will be evaluated against what the reasonable person would have done, it is important to understand the attributes of the reasonable person to get a sense of how he behaves generally.

1. Physical Attributes

The reasonable person usually has the same physical attributes as the defendant. For example, if the defendant has a physical handicap, then so does the reasonable person, who is also deemed to know about the handicap and is expected to act with reasonable care in light of that knowledge. Thus, if the defendant is blind, then the reasonable person in that situation would not drive a car, because that creates foreseeable, unreasonable risk and thus violates the general duty of care. Of course, that knife might also cut the other way. For example, a defendant who is blind won't be expected to see or take notice of the same kinds of things as a person with good eyesight.

2. Mental Attributes

Nevertheless, even though the reasonable person is deemed to have the same physical characteristics of the defendant, he is not always deemed to have the same mental characteristics as the defendant. Rather, the reasonable person is always deemed to have the intelligence of at least an average person. Thus, even if the defendant has below-average intelligence, the defendant might still be expected to conform his or her conduct to that of a person of average intelligence. Of course, the case might arguably, but not necessarily, be different if the defendant can show that he has a genuine mental disability, especially one linked to a biological or physiological cause, such as perhaps a traumatic brain injury or some mind-altering disease (since, remember, the reasonable person has the same physical characteristics as the defendant).

However, not all defendants are held to the standard of the average person. If it can be shown that the defendant has significantly above-average intelligence, or some other special skill or ability or talent or specialized knowledge or expertise of any kind, then so will the reasonable person. Thus, even though the low IQ defendant is held to the standard of a person with average intelligence, the defendant with high IQ or specialized skills or advanced knowledge or expertise or ability of any kind will be held to the standard of a person with these enhanced attributes.

As it is with intelligence, so it is with knowledge. The reasonable person has the same knowledge as the average member of the community would have, whether or not the defendant actually has that level of knowledge. Thus, the merely ignorant or unlearned defendant gains no advantage from the defendant’s lack of knowledge. However, as we touched on before, if it is shown that the defendant has greater knowledge than the average person in the community (such as specialized education, training, or expertise), then the defendant will be held to the standard of a person with such advanced knowledge.

The reasonable person will usually be deemed to be sane, even if the actual defendant is insane. In short, the care of a reasonable, prudent, sane person of average intelligence and knowledge is the absolute minimum standard of care that the defendant is generally expected to exercise in light of the defendant’s physical characteristics. This is the case even if the defendant is unintelligent or insane.

One way to put it is that, if the reasonable person in the defendant's situation would recognize that the defendant’s conduct creates an unreasonable risk of harm to others, the defendant must take such precautions as the reasonable person would take to eliminate the risk.

3. Emergencies

The existence of an emergency, which allows for little deliberation or reflection, does not alter the standard of care, but it is part of the overall circumstances. This makes sense, since the reasonable person will alter how he behaves in light of an emergency. Particularly, an emergency usually allows for much less deliberation or reflection than the reasonable person would exercise outside of the emergency situation. Thus, in short, courts usually cut the defendant some slack when it is shown that he had to make a decision in an emergency situation. However, if the emergency was itself the reasonably foreseeable product of the defendant's own negligence, then some courts will not consider the emergency situation in evaluating whether the defendant acted reasonably. Thus, the defendant will not get any lenience if the emergency was the defendant’s own negligent fault.

**II. Circumstances**

Okay, so we've discussed at some length the attributes of the reasonable person, but that's not the end of the inquiry. As you have probably gathered, there are not too many bright-line rules governing the conduct of the reasonable person. It is an inquiry that has to take into account all the relevant circumstances. Indeed, establishing just what a reasonable person would have done under the circumstances is often an integral part of the plaintiff's prima facie case. That said, courts have lots of experience conducting this analysis, and there are certain things that courts look to in order to ascertain what the defendant should have done under the particular circumstances.

A. Custom and Usage

An important, but certainly not decisive, factor is custom, usage, and common practice in a particular trade or business. These things convey what society at large, and in certain cases what a particular industry or trade at large, deems to be reasonable care.

Bear in mind that customs, usages, and industry standards may not themselves be reasonable, and the particular facts of a discrete situation may make it unreasonable to follow them, so use them with some care. However, they are a fine resource when they cut in your client's favor. Custom, usage, and industry standards might also prove that a risk was foreseeable (since the custom was adopted to guard against it) or that a particular safety precaution was feasible. In order for a custom, usage, or common practice to be relevant, it must be narrowed down to the defendant's locality, trade, business, or other relevant context, and it must also be so generally known that the defendant must be rightly charged with knowing it.

B. Internal Operating Procedures

Relatedly, if an organizational or institutional defendant has internal operating procedures, these can be cited to communicate what the defendant itself viewed as being reasonable care. Then again, they might be viewed as extraordinary, or more than reasonable, care. Courts usually consider these to be informative, but not decisive.

**III. Alternate Standards**

We've so far discussed only the general rule requiring reasonable care under the circumstances. However, there are many particular situations in tort law where a different standard might supplant the general rule requiring reasonable care under the circumstances.

One such situation is if a statute or regulation speaks directly to the situation at hand. If a statute is applicable, it can supplant the common law rule of reasonable care. Statutes have two basic functions in tort law. If the doctrine of negligence per se is applicable, the rule in the statute becomes the standard of care, replacing reasonable care. (We'll talk more about negligence per se in another video). Even if negligence per se does not apply, courts might look to a statute informally to get a sense of what the law itself considers reasonable.

Bear in mind that, just because the defendant conformed his or her conduct to an applicable statute, regulation, custom, usage, industry standard, etc., does not necessarily mean that the defendant’s conduct was reasonable under the circumstances. Depending on the situation, the defendant might be expected to go above what would have been called for.

A. Standard of Care for a Child

If the defendant is a child, especially a child of tender years, the standard is much more subjective. Here, the child is held to the standard of a person of the same age, intelligence, and experience as a child. Thus, whereas an adult's insanity or mental deficiencies are not usually taken into account, a child's are. However, one situation where even children of tender years will be held to an adult standard of care is if they engage in adult activities, such as driving a car, that create significant risk of harm and are typically undertaken only by adults.

**Duties to Occupants**

Let's talk about one particular situation in which the general duty might give way to more specific standards in certain discrete, factual contexts. Namely, we're doing a brief survey here of the duties of owners and possessors of land to occupants of their property.

Typically, jurisdictions in the United States take one of two approaches when it comes to defining the scope of a landowner's duty to those who occupy the property. The first approach, which has been the dominant approach throughout U.S. history, is to define the landowner's duty to occupants of his property with reference to one of three basic classifications of the occupant. The landowner’s duty of care to the occupant will depend on the occupant's classification. The emerging trend, though, is not to adhere to these rigid classifications so much as to impose the traditional standard of reasonable care under all the circumstances, which may entail consideration of the occupant's status.

**I. Occupant Classifications**

That said, now let's talk about the three basic occupant classifications and how they affect the scope of the landowner's duty. They are first, licensees; second, invitees; and third, trespassers. Trespassers can be further broken down into known or discovered trespassers, of whose presence the owner is or has reason to be aware, and unknown trespassers.

The landowner’s duty is not defined solely with reference to the classification of the occupant, but also what caused the injury. The duty will vary depending on whether the causal agent of the injury was an activity in which the landowner was engaged, or a dangerous condition on the premises, and whether the landowner knew or reasonably should have known of the condition.

**II. Trespassers**

What constitutes a trespasser for purposes of determining the duty of a landlord is basically the same as what we discussed in the video on trespass to land. However, there may be a very subtle difference here. In determining the duty of a landowner to an occupant, a trespasser will generally be anyone who is on the property without the consent of the landowner or other overriding privilege, even if he is not on the property by his own intentional act, for example, a case in which someone shoves him onto the property. The lack of an intentional act will defeat liability for trespass to land, but it will not save the party from being considered a trespasser for purposes of determining the landowner's duty of care to him in negligence law. Thus, in determining what constitutes a trespasser for purposes of a landowner's duty of care, it might be best to think of a trespasser as someone who is neither a licensee nor an invitee, as we’ll define later.

For more on just what constitutes a trespasser generally, see the separate video on trespass to land.

A. Unknown Trespassers

Typically, the duty of care that a landowner owes to an undiscovered trespasser, of whose presence he neither is nor should be aware, is extremely limited. The only real duty a landowner owes to an unknown trespasser is to refrain from intentional or reckless injury, for example, no deathtraps. As to an unknown trespasser, there is no duty to make the premises safe or to use any kind of care in activities so as not to endanger them.

One exception to this limitation might exist in certain, very limited situations where the landowner knows, first, that unknown trespassers frequent a very specific area; second, there is a dangerous condition that the landowner reasonably should know involves a serious risk of death or grievous bodily harm to these trespassers; third, the owner has created or maintains the condition; and fourth, the owner should reasonably know that the trespassers will not likely discover the condition. In this very narrow situation, the duty is only to warn of the existence of the condition and the nature of the risk.

B. Known Trespassers

A trespasser is known if the owner knows or has reason to know that the trespasser is on the premises. There is a greater duty to known trespassers than to unknown ones.

1. Landowner’s Activities

With respect to the landowner's activities on the premises, there is the duty to use reasonable care under the circumstances to avoid injuring the trespasser. If the activity has a risk of death or serious injury, the standard lessens and moves from reason to know of the trespasser’s presence to reason to perceive the trespasser is on the premises and may be hurt by the activity.

2. Dangerous Conditions

Concerning dangerous conditions on the premises, the duty varies, depending on whether the condition is natural or artificial, or manmade. With respect to natural conditions, the case law has said very little about whether or to what extent there is a duty, but the duty here might be conterminous with the duty arising concerning artificial conditions, which we’ll discuss now.

If there is an artificial condition on the land, which involves a risk of death or serious injury, the landowner is under a duty to use reasonable care to warn a known trespasser if, first, the landowner knows or has reason to know that the trespasser is dangerously close to the condition; in other words, within the zone of foreseeable danger, and second, the landowner has reason to believe that the trespasser will neither discover the condition, nor realize the risk involved.

If the landowner is in immediate control of a moving force, whether or not he set it into motion, and knows or has reason to know that trespassers are dangerously close to it, the landowner must use reasonable care to prevent the force from harming them, or give a warning that is reasonably adequate to allow the trespassers to protect themselves.

**III. Invitees**

Now, let's talk about invitees. When we say invitee, we are not necessarily talking about someone who was invited to be on the premises by the landowner. Indeed, the definition of invitee has a much narrower and more particular definition in the law of negligence.

There are two types of invitees, public invitees and business invitees.

A. Public Invitees

A public invitee is someone who is on the premises as a member of the general public, if the premises are held open to the public, but only if the invitee is there for the particular purpose for which the premises are held open to the public.

For example, suppose a jogger goes for a run in a public park. If the jogger remains in the park during its operating hours and confines herself to those areas of the park that are open to the public, she's a public invitee. However, suppose a park employee with the required authority allows the jogger to remain in the park after hours or to enter a portion of the park not typically open to the public, such as the park's administrative offices. In that event, the jogger would become a mere licensee.

B. Business Invitees

A business invitee is someone who is on the premises with the landowner's permission, and for some business-related purpose connected with the business dealings of the landowner.

For example, if the landowner calls in the exterminator to kill some bugs, the exterminator is a business invitee unless he wanders off to someplace where he has no reason to be for the purpose of killing bugs, or he remains after the expiration of a reasonable time to conduct his business, at which point he takes on another status.

C. Scope of Invitation

For either public or business invitees, the visit need not be directly related to the owner's public or business purpose, if there is at least an indirect relation. For example, as the Restatement illustrates, if Jack is a paying guest at a hotel, he is obviously a business invitee. So is Bruno, when he comes to visit Jack socially at the hotel, since hotels usually allow their paying guests to have social visitors.

A person is only an invitee if the person remains within the scope of the invitation. If the invitee strays to a part of the property that is not reasonably related to a business or public purpose, or if the purpose is consummated or expires, then the person is actually a licensee or a trespasser, depending on whether or to what extent the landowner consents to the person’s continued presence.

**IV. Licensees**

Now, let's talk about licensees. A licensee is someone who is on the premises with the landowner's permission but does not meet the precise definition of either a trespasser or an invitee. In other words, a licensee is someone who is on the premises essentially by the landowner's gratuitous permission. The archetypal licensee is a social guest.

**V. Duties to Licensees**

Let's talk about the duties to licensees first, because that will give us a foundation for understanding the duties to invitees.

A. Dangerous Conditions

With respect to dangerous conditions on the premises, the landowner must warn of, or make safe, foreseeably dangerous conditions that are or should be known to the landowner, and that the landowner knows or should know the licensee is not likely to discover himself or herself.

B. Activities

The landowner must use reasonable care in conducting all activities on the premises. A landowner need not take pains to warn a licensee of the risks of the landowner’s activities if the licensee reasonably should be aware of them, and likewise with dangerous conditions.

In other words, a landowner must use reasonable care in conducting activities, and must make the property as safe as it appears to be to a reasonable person in the licensee's position, or at least warn about dangers of which the landlord should know that the licensee has no reason to be aware.

**VI. Duties to Invitees**

Concerning invitees, the landowner owes to an invitee all the same duties he owes to a licensee, plus a little bit more. With respect to dangerous conditions on the premises, the landowner generally owes no duty to licensees to affirmatively inspect the property for dangerous conditions. Indeed, as to invitees, the landowner must use reasonable care to search for and anticipate dangerous conditions, warn of them, and/or make them safe. Thus, a landowner owes an invitee a duty proactively to inspect the property and remedy, or at least warn about, any dangerous conditions that a reasonable person in the landowner's position would be aware of after a reasonable inspection.

With respect to the landowner's activities on the premises, there is of course the duty to use reasonable care under the circumstances to avoid injuring the invitee.

Lastly, bear in mind that when we say that the risk or danger of something should reasonably be apparent or known to someone, what we mean is that a reasonable person, in that person's position, would appreciate both the existence and the possible magnitude of the danger.

**Establishing Breach**

Now that we've discussed what the duty of care is and under what circumstances it arises, let's talk about breach. Generally in the law of negligence, the defendant commits a breach of the general duty of reasonable care if the defendant engages in conduct that a reasonable person knows puts other people at unreasonable risk of harm. Stated differently, the defendant breaches the general duty if the defendant fails to exercise the care that a reasonable person in the defendant’s shoes would exercise in order to avert reasonably foreseeable harm that could accrue to other people as a result of the defendant’s conduct.

Previous videos have discussed the characteristics of the reasonable person. This video primarily discusses how the plaintiff goes about proving that the defendant did not conform to the conduct of the reasonable person.

**I. Ingredients of Breach**

Generally, the prima facie case for breach is a recipe with three basic ingredients. The ingredients are the things the plaintiff must usually show in order to establish breach.

They are:

(1)  The plaintiff must establish the events that actually transpired during the alleged breach.

(2)  The plaintiff must establish what the standard of care was to which the defendant should have conformed the conduct. As we have learned, this is usually reasonable care under the circumstances, but there are many particular situations where that standard will be different, such as the duty of landowners to certain classes of occupants of their property or the duties of children of tender years.

(3)  The third, and most important, ingredient is that the plaintiff must show that the defendant's conduct was unreasonable.

The emphasis here is on unreasonable. The general standard does not require an abundance of caution, extraordinary care, or heroic care, but only reasonable care.

A. Reasonable Alternative

In order to show that the defendant breached a duty, usually the plaintiff must show that there was available to the defendant some alternative course of action which, had the defendant taken it, more likely than not would have prevented, or at least mitigated, the plaintiff’s injury. However, in order for the defendant’s failure to take the alternative course of action to constitute a breach, the plaintiff must show that the alternative was reasonable under the circumstances. In deciding whether the plaintiff’s proposed alternative course of action was reasonable under the circumstances, the classic test was formulated in a famous case by Judge Learned Hand, called *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

When evaluating the reasonableness of the plaintiff’s proposed alternative course of conduct, three factors generally come into play:

(1)  The probability that harm will result from the defendant’s conduct.

(2)  The severity of potential harm from the defendant’s conduct.

(3)  The burden or cost that the defendant (and society at large) would have incurred had the defendant taken the plaintiff’s proposed alternative course of conduct.

Boiled down to its essence, the test for determining whether the plaintiff's proposed alternative course of conduct is reasonable or not is a cost-benefit analysis. Courts will weigh the expected costs and burdens on the defendant (and society) as a result of the plaintiff's proposed alternative conduct against the likely benefit to the plaintiff and society if the defendant follows the alternative conduct. If the likely burden on the defendant is greater than the likely benefit to society and the plaintiff (considering the existence, nature, and scope of the risk of harm to the plaintiff and the overall benefit that accrues to society as a result of the defendant's conduct) then the plaintiff's alternative conduct will likely be found unreasonable. Therefore, in that case, the plaintiff will not have carried the burden of showing that the defendant's conduct was unreasonable.

Rather than analyzing the matter as a rigid mathematical formula, as Judge Hand did, most courts implement his basic concept by engaging in an equitable balancing of factors like:

(1)  The cost of making the defendant’s activity safer—is it unfair to expect the defendant to incur the cost of the plaintiff’s proposed alternative course of conduct?

(2)  The social usefulness of the activity in which the defendant engaged and which produced the risk. Here, it is good to ask: Is the defendant's activity beneficial to society, so that we don’t want to discourage it by imposing the costs associated with the plaintiff’s proposed alternative course of conduct?

(3)  Courts also consider the probability that some harm will result to persons in the plaintiff's position from the defendant's activity, as well as the risk of harm from the plaintiff's proposed alternative conduct.

(4)  The likely degree or scope of harm the plaintiff will suffer, in the event that harm actually occurs as a result of the defendant's conduct.

All this may sound convoluted, but what we mean to say is that all we expect of a defendant is reasonable care under the circumstances. We do not expect that a reasonable person will incur exorbitant costs and loathsome inconvenience in order to guard against a relatively slight risk of relatively minor injury. The greater the reasonably foreseeable risk, and the greater the reasonably foreseeable likely magnitude of the harm is, the more time, trouble, and expense we expect a reasonable person to take in order to avoid the injury.

The bottom line inquiry is whether it is fair, under the circumstances, to expect a reasonable person in the defendant’s position to have taken the plaintiff’s proposed alternative course of conduct. In many cases, the cost to the defendant is minimal and the potential risk avoidance to plaintiff is great—avoid driving recklessly, avoid running red lights, avoid discharging firearms into the air for the fun of it, avoid texting while driving, avoid driving drunk, clean up your spills soon after they occur to avoid a slipping hazard, or look ahead of you when you walk.

The analysis tends to become more complex in the case of business enterprises with large-scale operations. In these cases, the analysis of costs and likely benefits of the plaintiff's proposed alternative course of conduct can often be what makes or breaks the case.

**Res Ipsa Loquitur and Negligence Per Se**

Let's start with a discussion of negligence per se.

**I. Negligence Per Se**

Negligence per se is a specific theory that is used to establish the duty and breach elements of negligence. Sometimes, the defendant's allegedly negligent conduct will be not only a violation of the general rule requiring reasonable care, but a violation of a specific statutory requirement that governs the situation. In such a situation, where a specific statute governs, the particular behavioral requirements of the statute may become the applicable standard of care, replacing the general rule requiring reasonable care under the circumstances.

A. Elements of Negligence Per Se

In order for the statute to apply, rather than the usual reasonable care requirement, several elements must be shown.

(1)  The statute must prohibit or require some conduct; this mandatory command will usually be indicated by the imposition of a penalty of some kind for a violation of the statute, such as a fine.

(2)  The plaintiff must be within the particular class of persons that the statute was designed to protect.

(3)   The particular injury, which the plaintiff suffered, must be the specific harm against which the statute was designed to protect persons in the plaintiff's position.

B. Caveats

Nevertheless, even where the elements of negligence per se are met, a court may refuse to apply the doctrine if:

(1)  Compliance with the statute under the particular circumstances will cause more danger or harm than non-compliance.

(2)  Compliance is beyond the defendant's control under the particular circumstances of the case, or the defendant is unable to comply after reasonable diligence or care.

(3)  Non-compliance with the statute is reasonable because of some incapacity or disability, such as a mental deficiency or a sudden and non-foreseeable heart attack, which causes the driver to violate traffic laws

(4)  The defendant is confronted with an emergency not due to the defendant’s own misconduct.

(5)  The defendant neither knows nor has reason to know that circumstances offer an occasion to comply with the statute, such as a situation where the defendant's taillight is out on his car, but he has not had occasion yet to realize this.

(6)  The statute provides expressly, or necessarily implies, that the statute is not to be used as the standard of conduct in a tort case.

(7)  The statute is so vague and confusing that nobody can reasonably be expected to figure out what they are supposed to do or refrain from doing in light of it.

Bear in mind that negligence per se is permissive to a degree. Unless the statute expressly or necessarily by implication provides for tort liability for its violation, it is ultimately up to the courts to decide whether to use the statute as the standard of conduct in a torts case. Even so, if the elements of negligence per se are met, courts usually will apply the statute's requirements in place of the general duty of reasonable care.

The quizzes and test that follow will give you a chance to see how negligence per se is usually applied.

**II. Res Ipsa Loquitur**

Next, let's talk about Res Ipsa Loquitur. Res ipsa loquitur is another theory specifically geared towards establishing breach, as well as perhaps duty. Res ipsa loquitur literally means “the thing speaks for itself.” Res ipsa loquitur is a way to prove breach without knowing exactly what the breach was, or exactly what the defendant did that was negligent. Sometimes, the circumstances are such that the accident speaks for itself, and cries out for responsibility on the part of the defendant, even though no one knows precisely what breach of duty the defendant committed.

In trying to prove res ipsa loquitur, the plaintiff essentially points at the defendant and says, "I don't know how you did it, but you must have done it." In other words, sometimes the mere occurrence of the accident itself is evidence of negligence on the part of the defendant, and can be presented as such. If the elements of res ipsa loquitur are met, then the effect is usually to permit, but not require, the jury to find that the defendant owed a duty of care and breached it.

In some jurisdictions, res ipsa loquitur puts the burden on the defendant to show the defendant did use due care, creating a "rebuttable presumption" of negligence.

A. Elements of Res Ipsa Loquitur

The elements of res ipsa loquitur, which the plaintiff must show, are:

(1)  The kind of accident that occurred only tends to occur if someone in the defendant's position breaches a duty of care to someone in plaintiff's position.

(2)  The next element of res ipsa loquitur is that potential causes of the injury other than the defendant's negligence, especially the plaintiff's negligence or recklessness, are eliminated by the evidence.

This is often, but not always, done by showing that the instrumentality that caused the plaintiff's injury was within the exclusive control of the defendant or his agents (people working for the defendant). If the plaintiff cannot show that the instrumentality was in the defendant's exclusive control, the plaintiff should at least show that the defendant's control or prerogative of control over it was so great that it is more likely than not that the defendant’s negligence (if anyone's) caused the injurious event. Some jurisdictions require that the instrument be in the defendant's exclusive control, but the trend is merely to require the defendant to have sufficient control that it is more likely than not that the defendant, as opposed to someone else, is responsible for whatever negligence took place.

B. Multiple Defendants

The analysis gets tricky when more than one person was in charge of the instrumentality, especially at different times. Historically, this would preclude application of res ipsa loquitur, since it cannot be shown that the instrumentality was in the exclusive control of one person, or that one defendant was more likely than not the negligent party. However, there is a line of cases indicating that, in the specific situation where a plaintiff is unconscious when he goes in for surgery or other medical treatment and wakes up with an injury that must have been caused by at least one member of hospital staff or a surgical team, the plaintiff can invoke the doctrine of res ipsa loquitur, and then everyone who had control over the instrumentality must prove they were not negligent.

Moreover, this doctrine may be relaxed to allow for some negligence on the part of the plaintiff, or for some other cause of the injury besides the defendant's negligence, in a jurisdiction that has adopted comparative fault rules—more on that in a later video.

C. *Byrne v. Boadle*

A classic example of res ipsa loquitur is the old English common law case of *Byrne v. Boadle*, 159 Eng. Rep. 299 (Ex. 1863).

The plaintiff is walking along the street, and he suddenly blacks out close to a warehouse where heavy barrels are stored. The defendant owns the warehouse and the barrels. Witnesses say that a barrel fell out of the warehouse and landed on the plaintiff, knocking him out.

This kind of case demonstrates res ipsa loquitur. Generally, this kind of thing would not happen but for the negligence of the warehouse owner, and the warehouse and the barrel (the injurious instrumentality) were under the owner’s exclusive control. There is no evidence that the plaintiff caused the barrel to fall on him, or disregarded a risk that a barrel would fall on him walking by the warehouse. There is no indication whatsoever that anything other than the defendant's negligence could have caused the barrel to fall out of the warehouse and hit the plaintiff.

Thus, all the elements of res ipsa loquitur seem to be met, so the fact finder is permitted to find that the defendant was negligent.

**Negligence II**

**Actual Harm**

Now, let's talk about another element of the prima facie case for negligence: actual harm.

Harm can be broken down into three basic categories: physical harm, emotional harm, and economic harm. In real life, usually, where you find one of these three, you will find at least one of the other two. However, for our purposes here, we will consider each one separately. Even so, before we consider the three separate types of harm, let's have a discussion of what constitutes harm generally. Under the Restatement (Second) of Torts, harm means actual loss to a person or thing. Loss happens due to a change in a person or the person’s belongings. The loss can impact the person’s well-being, reputation, intangible rights, or other legally recognized interests.

Thus, we see that harm, in a broad sense, exists only if the plaintiff is worse off in some recognizable way because of the defendant's conduct. If the plaintiff is no worse off for the defendant's conduct, then there is no harm, and hence no cause of action for negligence.

**I. Physical Harm**

Now, let's talk about the particular kind of harm for which people virtually always sue in negligence: physical harm. Quoting the Third Restatement of Torts,

“Physical harm” means the physical impairment of the human body (“bodily harm”) or of real property or tangible personal property (“property damage”). Bodily harm includes physical injury, illness, disease, impairment of bodily function, and death.

**II. Emotional Harm**

Next, we'll talk about emotional harm.

According to the Restatement, emotional harm is an impairment or injury to a person's emotional tranquility. Emotional harm includes a variety of mental states, including fright, fear, sadness, sorrow, despondency, anxiety, humiliation, depression, and other mental conditions.

**III. Economic Harm**

Now, let's talk about economic harm. This time, we turn to Black's Law Dictionary for a good working definition of economic loss. Economic loss is, quote, “A monetary loss such as lost wages or lost profits.”

**IV. Purposes**

Now that we've generally defined the three types of harm, let's talk about the two purposes that the concept of harm” serves in the context of a negligence lawsuit.

Harm, in a negligence lawsuit, serves two functions:

(1)  To meet the harm element of a prima facie case for negligence (we'll call this “prima facie harm”),

(2)  To give the plaintiff a basis upon which to recover money from the defendant (we'll call this “recoverable damages”).

All prima facie harm equals recoverable damages, but not all recoverable damages equal prima facie harm. However, once the plaintiff shows prima facie harm and meets the other elements of negligence, then if can recover for all harm suffered as a result of the defendant's conduct, whether it's prima facie harm or recoverable damages.

A. Prima Facie Harm

So, what kinds of harm are prima facie harm, so as to unlock the door for recovery of both prima facie harm and recoverable damages? Economic loss alone is, as a general rule, not prima facie harm in a typical negligence case, but the general rule has a lot of exceptions. One case where economic harm is prima facie harm is in cases of professional negligence, also known as malpractice, where a professional person (like an accountant or an attorney) is negligent and thereby causes economic harm to a client. Moreover, economic loss is very often recoverable, so long as it arises in conjunction with physical damage to a person or his property. Otherwise, if the only harm suffered is economic loss, then the lawsuit probably belongs in contract law, which is beyond the scope of this course.

The case is similar with emotional harm. In most cases, mere emotional harm is not prima facie harm. Therefore, if the only kind of harm the plaintiff can show is emotional harm, the plaintiff will not likely be able to sustain a cause of action for negligence. The one exception to this general rule is if a plaintiff can make out a cause of action for negligent infliction of emotional distress (NIED). NIED is a plaintiff’s claim against another whose negligence caused the plaintiff to suffer severe emotional harm. If the plaintiff can establish a claim for NIED, then emotional harm will serve as prima facie harm.

Now, as you've probably already deduced, physical harm is always prima facie harm. Thus, if the plaintiff can show physical harm, then emotional harm (and perhaps certain kinds of economic loss) can be piggybacked onto the physical harm as recoverable damages. Physical harm encompasses all collateral damage related to it, including aggravation of a pre-existing injury or disease, medical expenses, lost bodily function, disfigurement, pain and suffering, diminished quality of life, emotional distress, and property damage with the costs of fixing it (and perhaps lost or impairment of value).

B. The Lost-Opportunity Doctrine

One last type of harm merits discussion: lost opportunity. Under the lost-opportunity doctrine, a plaintiff can show actual harm without showing that the defendant's conduct necessarily caused the plaintiff's injury, if the plaintiff can show that the defendant's conduct deprived the plaintiff of a certain percentage probability of a better outcome than what the plaintiff actually had. Some jurisdictions may treat the reduced chance of a good outcome as an independent harm, distinct from whatever injury actually transpired. Suppose, for example, that the plaintiff comes to the hospital with a broken leg, which is not at all attributable to the hospital's negligence. If the hospital uses reasonable care, the plaintiff has a 90 percent chance of retaining the full use of his leg. However, the hospital is negligent, and the plaintiff loses some of the use in his leg. The plaintiff cannot prove that the hospital's negligence caused this outcome, but only that it decreased the plaintiff’s chances of retaining full use of his leg to 49 percent. This is where the lost-opportunity doctrine comes into play. Some, but not all, jurisdictions may treat the 41 percent reduction in the chance for a good outcome as the actual harm that a plaintiff needs to prove negligence.

A case with a good, concise discussion of the lost-opportunity rule and the basic approaches that the jurisdictions have adopted to set forth when lost opportunities can serve as either prima facie harm or recoverable damages is *Weymers v. Khera*, 563 N.W.2d 647 (1997), from Michigan's highest court. Be careful, though. The courts tend to conflate causation rules with actual harm rules in their discussion of the lost-opportunity doctrine, so it might be easy to get confused.

**Actual Causation**

Now, let's talk about actual causation. Actual causation, otherwise known as causation-in-fact, means that the plaintiff's injury was actually caused by the defendant's negligent conduct. Actual causation is fairly intuitive, but it is not always as straightforward as you might think, especially in situations where multiple forces combine to cause the plaintiff's injury.

**I. Tests for Actual Causation**

Courts have developed four basic tests to deal with the issue of actual causation. They are: (1) the but-for test, (2) the concurrent causes doctrine, (3) the substantial factor test, and (4) the alternative causes doctrine.

A. The But-For Test

Let's start with the but-for test. The but-for test is the easiest, most intuitive, and by far the most often-applied test for actual causation. To borrow phraseology from the Model Penal Code, under the but-for test, the defendant's conduct is an actual cause of the plaintiff's injury if the conduct is a direct antecedent to the injury, "but for" which the injury would not have occurred. In other words, (1) the defendant's negligent conduct happened before the injury, and (2) the injury would not have occurred absent defendant's negligent conduct.

The but-for test works well most of the time, but it begins to break down when we're dealing with multiple concurrent or successive causes of a plaintiff's injury, so that the defendant's negligence is only one of several possible (or actual) causes. This is one species of the but-for test.

B. The Concurrent Causes Test

The concurrent causes test is fairly specialized, in that it usually applies only when (A) multiple acts or forces combined to cause an injury and (B) neither force alone would have been sufficient to cause the injury.

For example, Bruno, driving his car negligently, causes Jack to swerve to the side in order to avoid hitting Bruno. In swerving to avoid Bruno, Jack drives his own car negligently, causing him to crash into Jill, a pedestrian, injuring her. Jill sues both Jack and Bruno. Notice that neither negligent act, by itself, was sufficient to cause Jill’s injury. Bruno’s negligence made it necessary for Jack to swerve to avoid him, but Jack’s negligent driving in avoiding Bruno injured Jill.  Neither act alone would have caused Jill’s injury, but the confluence of both did cause it.

C. The Substantial Factor Test

The substantial factor test is fairly similar in feel to the concurrent causes doctrine, but with one key distinction. In contrast to the concurrent causes test, the substantial factor test is used if (1) multiple acts or forces combine, at the same time, to cause an injury, and (2) either by itself would have been sufficient, and (3) it is impossible to tell which force caused what portion of the injury, if any. The substantial factor test holds that, if the defendant’s negligent act was one of these things that would have been sufficient to cause the injury by itself, then it was a substantial factor in causing the injury, and thus actual causation will be met—even though technically the but-for test fails, since there existed another force which would have caused the injury anyway.

The classic example of the substantial factor test in torts is gleaned from the case whose citation appears on the screen (*Anderson v. Minn. St. Paul & Sault Ste. Marie Rwy*., 146 Minn. 430 (1920)). The following illustration is adapted loosely from its facts.

Bruno negligently starts a big fire. Natural forces start another big fire. Both fires meet at Jack’s barn, and Jack’s barn is burned down. Either fire alone would have been sufficient to burn down the barn. Here, Bruno’s fire is not a but-for cause of the barn burning down, since, because of the natural fire, the barn would have burned down anyway, even if Bruno had not been negligent and started his own fire. However, since Bruno’s fire also would have burned down the barn by itself, even without the natural fire, courts would deem Bruno’s negligent fire to be a substantial factor in the barn’s destruction.

Thus, actual causation is met.

D. The Alternative Causes Doctrine

Now, let's talk about the alternative causes doctrine. Sometimes, multiple defendants will be negligent under circumstances where the plaintiff will prove that one of the defendants caused the plaintiff’s injury, but will be unable to prove which one. In these cases, once the plaintiff proves that one of the several defendants must have caused the injury, the burden will shift to each possible “causer” to show that the causer’s particular act of negligence was not the actual cause. Those who cannot exculpate themselves risk being held jointly liable.

The classic example goes something like this, as adapted from *Summers v. Tice*.

Bruno and Jack are both discharging firearms in a field, and they are the only ones who are so doing. Jill is passing through the field. Both Bruno and Jack negligently shoot in Jill’s direction, but only one bullet hits her, shooting her nose clean off her face. It is impossible to tell which bullet struck Jill’s face, but manifestly it must have been either Bruno's or Jack's bullet.

In a case like this, under the alternative causes rule, some courts would put the onus on Bruno and Jack to absolve themselves—*i.e.*, each must show that his bullet was not the cause of Jill’s injury or both may be held jointly liable.

**Introduction to Proximate Cause**

Now, let's talk about perhaps the most formidable doctrine in negligence: proximate cause. Proximate cause is one of those areas in which there is vast room for disagreement.  Here and in the next video, we are only trying to give very general rules.  The reality is that courts have been known to reach results directly at variance, seemingly, with the rules stated here, but these are rules that are adopted by most lawyers and judges, most of the time.

The Restatement sets forth the basic rule: “An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.” (Restatement (Third) of Torts § 29.) The basic point of proximate cause is that a defendant should not be held liable for necessarily every single harmful event resulting from his tortious conduct. Rather, a defendant should only be held responsible for those harms that arose out of the particular risks that a reasonable person in the defendant's position should have been able to foresee arising from his conduct.

To illustrate the matter differently, recall how we learned some time ago that a duty of care usually arises where the defendant should reasonably perceive that his negligent conduct would create an unreasonable risk of harm to other people. Proximate cause means that we only hold the defendant responsible for injuries emanating from the particular risk that gave rise to a duty of care in the first place.

**I. Foreseeability**

Perhaps the best way to say it is that we do not want to hold a defendant liable for consequences that he could not reasonably have foreseen resulting from his negligence.

By way of example, suppose that Bruno negligently causes Jack to trip and fall.  Unbeknownst to Bruno, Jack has a hand grenade in his pocket.  The impact from Jack’s fall causes the grenade to explode, which destroys the entire building. Was Bruno’s negligence the proximate cause of the destruction of the building?

No, because the destruction of a whole building is not the kind of foreseeable risk that makes a defendant liable for tripping a plaintiff. No one could reasonably foresee that he will decimate a building merely by negligently tripping someone. We don't hold trippers liable because we are afraid they will destroy property, but because we are afraid they will cause cracked hips, and the like.

**II. Type of Harm v. Extent of Harm**

Do not confuse the type of harm with the extent of the harm. Remember, the general rule is that defendant takes his plaintiff as he finds her, with all her preexisting conditions making her more susceptible to injury than a normal person might be. The Third Restatement of Torts states the rule this way: “When an actor's tortious conduct causes harm to a person that, because of a preexisting physical or mental condition or other characteristics of the person, is of a greater magnitude or different type than might reasonably be expected, the actor is nevertheless subject to liability for all such harm to the person.”

Thus, if the plaintiff suffers from some inherent weakness that makes her much more susceptible to harm from the defendant's conduct than a normal person would be, the defendant will be liable for the full extent of the harm caused, so long as the general type of harm was foreseeable.

Let's illustrate this by changing the facts from our previous example. Suppose that Jack did not have a grenade in his pocket, but that, unbeknownst to Bruno, Jack did have a rare genetic disease that causes his bones to be much weaker than those of the average person. Bruno negligently causes Jack to trip and fall. In this situation, a normal person would usually suffer, at most, perhaps minor fractures, but Jack, due to his disease, breaks practically every bone in his body.

In this case, there is proximate cause, and Bruno will be liable for the full extent of Jack's injuries. Unlike the previous example, these kinds of injuries are generally the kind of harm that somebody in Bruno's position should reasonably be able to foresee happening as a result of causing somebody to trip and fall—*e.g.*, skeletal fractures generally.

**III. Type of Harm v. Precise Sequence of Events**

Likewise, it is key not to confuse the type of harm that is reasonably foreseeable with the precise sequence of events that leads to the plaintiff's particular injury. Only the general type of harm need be foreseeable; the precise sequence of events linking the defendant's negligent conduct to the injury, or the precise manner in which the harm occurs, need not be foreseeable.

However, this is not an absolute rule, and there may be cases in which the manner in which the injury occurs is so unforeseeable that it nullifies proximate cause with respect to the defendant. This will most often be the case where an unforeseeable, supervening cause contributes to the occurrence of the injury. In this case, proximate cause will be lacking, even when the type of injury was foreseeable

Let's say, for example, that Bruno is driving faster than the speed limit and disregarding stop signs in an urban area. Jill rightfully steps onto a properly designated crosswalk, directly in front of Bruno's oncoming vehicle. Since Bruno is not paying attention as he should be, he does not see Jill until the very last second, at which time he swerves to avoid hitting her. Bruno does avoid hitting Jill, but instead he hits a fire hydrant, which causes a pressurized stream of water to shoot into the air. The pressure of the water kills a pigeon, which is flying overhead, and causes the pigeon to fall onto Jill’s head, causing her to have a concussion.

True, Bruno could not have foreseen this precise chain of events, but it was foreseeable that by driving negligently, he would cause a pedestrian like Jill to suffer an injury like a concussion. There is likely proximate cause in this scenario, in my opinion, although some courts may disagree. This is an area where the courts have been somewhat divided.

**IV. Summary**

That was a lot to take in, so let's try to summarize and synthesize everything before we move on.

Generally, proximate cause means that we do not hold a defendant liable for the kinds, types, or classifications injuries that do not reasonably foreseeably result from his negligent conduct. The magnitude of the injury does not need to be foreseeable, nor does the precise sequence of events between the defendant's negligent conduct and the occurrence of the injury. All that matters is that a reasonable person in the defendant's position can reasonably foresee that his failure to exercise due care under the circumstances will give rise to a risk of the particular kind of injury that the plaintiff ultimately suffered.

My old torts casebook from law school, whose citation appears on your screen (Dan B. Dobbs, Paul T. Hayden, *Torts and Compensation: Personal Accountability and Social Responsibility for Injury*, p. 235 (Thompson West 2005)), stated the basic principle behind proximate cause this way:

“Liability for negligence is liability for the unreasonable risks the defendant created, not for reasonable risks or those that were unforeseeable. We don't think a vasectomy is negligently performed because it might start a fire…”

Thus, proximate cause means that the injury that resulted must have been within the “scope of the [reasonably foreseeable] risk” created by defendant's conduct.

**Proximate Cause: The Role of Intervening Persons or Forces**

Continuing with our discussion of proximate cause, let's talk about the role of intervening persons or forces. This video discusses the effect on proximate cause if some event, which occurred after the defendant’s negligent act but before the plaintiff’s injury, contributed to the occurrence of the injury along with the defendant’s negligence.

The mere fact that an outside force intervened and contributed to the injury will not absolve the defendant of liability. However, intervening forces that are not reasonably foreseeable to the defendant will break the causal chain and therefore defeat proximate cause.

A. Kinds of Intervening Forces

There are two basic kinds of intervening forces:

First, some intervening forces are responses to, or foreseeable results of, the defendant's negligent conduct. These kinds of intervening forces are almost always foreseeable, so that they will not defeat proximate cause.

Second, other intervening forces would have transpired anyway, even if the defendant were not negligent. These intervening forces might defeat proximate cause if they are not reasonably foreseeable. However, if they are foreseeable, and especially if the defendant's conduct foreseeably increased the plaintiff's risk of harm from the intervening force, then proximate cause will not be defeated.

**I. Breaking the Causal Chain**

An intervening force will defeat proximate cause if it breaks the causal chain between the defendant's conduct and the plaintiff's injury. An intervening force will not break the causal chain if it, or the harm it creates, lies within the scope of the foreseeable risk created by the defendant's conduct. Those lying outside the scope of the reasonably foreseeable risk of the defendant's negligence will break the causal chain, and will then become a superseding cause.

A superseding cause is one that did not foreseeably arise from the reasonably foreseeable risks created by the defendant's negligent conduct. Or, as one case put it, a superseding cause is an intervening force that is not a foreseeable result of the defendant's conduct; it operates upon, but does not flow from, the defendant's act of negligence. A superseding cause makes the causal connection between the defendant's negligence and the plaintiff's injury so attenuated that it no longer seems equitable to hold the defendant responsible for the injury.

In order to understand the kinds of intervening forces that come underneath the ambit of superseding causes, it might first benefit us to get a handle on what things are not superseding causes.

**II. Types of Intervening Forces**

A. Negligence of Others

First, let's talk about the negligence of others as an intervening force. The negligence of other people is often foreseeable, so that the first defendant will not necessarily be relieved just because the plaintiff’s injury is attributable, to some degree, to the intervening negligence of a second defendant. If one defendant’s negligence causes a second defendant to be negligent in response, causing a plaintiff’s injury, a jury can find the first defendant liable for the injury. This general rule has several specific permutations:

(1) If the defendant causes physical injury, any exacerbation of that injury caused by medical malpractice is usually deemed foreseeable.

(2) Similarly, remember the rule that danger invites rescue. If the defendant negligently injures the plaintiff and exposes the plaintiff to further harm, it is foreseeable that someone will come along, try to rescue the plaintiff and, through negligence, exacerbate the plaintiff's condition.

(3) The first defendant’s negligence may make the plaintiff more vulnerable to a second defendant’s negligence, or put the plaintiff in a position to be hurt by a second defendant’s negligence. For example, the first defendant, by driving negligently, may cause the plaintiff to have to dive out of the way in order to avoid getting hit—and directly into the path of an oncoming bus, whose driver is also negligent.

B. Foreseeable Responses of Others

More generally, the defendant is liable to the plaintiff for injuries caused by the actions of third parties, if the actions of the third parties are a foreseeable response or reaction to the defendant’s negligence. It is generally foreseeable that people will take action to protect themselves and others, and will react to things that frighten them, and thereby injure themselves and others through negligence or otherwise.

The Second Restatement of Torts (§ 444) states the rule, which can be summarized this way: Any act by somebody that is a normal response to fear or similar disturbance, which disturbance is a foreseeable result of the defendant’s conduct, is not a superseding cause of the harm caused by such act.

C. Increased Risk of Harm

The defendant’s action may not injure the plaintiff immediately, but may leave the plaintiff more exposed to risk from a separate intervening force, whether foreseeable or not, such as an extraordinary force of nature.

Suppose that, because of the defendant's negligence, the plaintiff is injured on the side of the road, unable to move. It is foreseeable that a motorist might negligently hit the plaintiff, injuring the plaintiff further. The intervention of another motorist's negligence will not be a superseding cause.

D. Unforeseeable Force of Nature

An unforeseeable force of nature, which accelerates or increases the harm that was a reasonably foreseeable risk of the defendant's conduct, will not be a superseding cause.

Suppose that the defendant is hired to clean gunk off of the inside of an oil tanker. The defendant is told that the reason he is hired to do this is because something might ignite the flammable gunk and burn up the tanker. The defendant negligently does his job, leaving lots of gunk inside the tanker. Suddenly, and quite unforeseeably, lightning strikes the tanker, setting the gunk on fire.

E. Crimes and Intentional Torts of Others

The crimes and intentional torts of others are usually not foreseeable, and will usually constitute superseding causes. However, there are circumstances where the law recognizes a duty on the part of the defendant to protect the plaintiff from the acts of third person. This usually happens if: first, the defendant's conduct reasonably foreseeably puts the plaintiff at an unreasonable risk of criminal aggression, under unusual circumstances where the defendant should realize that his or her conduct creates an opportunity, temptation, and inducement to such conduct, or second, the special relationship between the plaintiff and the defendant gives rise on the part of the defendant to use reasonable care to protect the plaintiff from the crimes and intentional torts of third persons.

1. Plaintiff Put at Risk

The classic illustration of the first scenario is if the defendant's negligence reasonably foreseeably leaves the plaintiff stuck in an area populated by unusually vicious people, or a known high-crime area.

2. Special Relationship

Probably the most obvious illustration of the second scenario is if the defendant is a prison guard, teacher, or some similar type of custodian, and the plaintiff is the prisoner or student or other person in custody. The custodial relationship often gives rise to the duty.

**II. Superseding Causes**

Remember, a superseding cause is one that did not foreseeably arise from the reasonably foreseeable risks created by the defendant's negligent conduct.

Suppose that, because of the defendant’s negligence, the plaintiff falls into a hole. The plaintiff is uninjured, and the defendant immediately goes for help, since the hole is such that the defendant cannot possibly get the plaintiff out of the hole and the plaintiff cannot climb out. Sometime later, a panther comes out of the woods and eats the plaintiff. No one has seen a panther or similar predatory animal in that geographical area for years. However, since the plaintiff landed without harm, and since the defendant had no reason to suspect any imminent danger, the reasonably foreseeable risk from the defendant’s conduct has abated. Thus, the panther was an unforeseeable superseding cause.

##### Assumption of the Risk

Now, let's talk about an affirmative defense, which might let the defendant off the hook even if the plaintiff makes a prima facie case for negligence: assumption of the risk. The essence of assumption of the risk is that the plaintiff actually perceived the risk created by the defendant's negligent conduct, yet knowingly proceeded in the face of that risk.

**I. Elements of Assumption of the Risk**

The elements of assumption of the risk are as follows:

(1) First, the plaintiff actually, subjectively knew of the risk created by the defendant's negligent conduct and appreciated its unreasonableness, its nature, and its magnitude. If the plaintiff should have known of the risk, but did not, then the plaintiff was negligent, and the matter theoretically would fall underneath contributory negligence or comparative fault, and not assumption of the risk. We’ll discuss contributory negligence and comparative fault in future videos.

(2) The second element is that the plaintiff voluntarily proceeded in the face of the risk, whether reasonably or not. As the Restatement puts it, courts consider a plaintiff's acceptance of the risk to be voluntary even if the plaintiff acted under the pressure of the circumstances, not caused by the defendant’s tortious conduct, which has left the plaintiff with no other choice but to take the risk.

Notwithstanding, the plaintiff cannot be said to have “voluntarily” proceeded in the face of the risk if the defendant's tortious conduct serves to leave the plaintiff no other reasonable option in order to avert some kind of harm to himself, herself, or another person.

A. Not a Defense to Intentional Torts

Assumption of the risk is not a defense to intentional torts, but is a defense to negligence or even recklessness on the part of the defendant. But conduct amounting to a valid consent is a defense to intentional torts.

**II. Types of Assumption of the Risk**

Now, we should point out that there are two kinds of assumption of the risk: (1) express and (2) implied.

A. Express Assumption of the Risk

A valid, express assumption of the risk by the plaintiff is an absolute bar to the plaintiff’s recovery.

Express assumption of the risk usually takes the form of a contractual release by one party of the other from liability related to the other’s negligent conduct in connection with some activity the plaintiff desires to engage in. These are called exculpatory clauses. Usually, courts will strictly construe exculpatory clauses against the party seeking to use them as a defense, so be careful if you draft them in your practice.

In order for an agreement to assume the risk to be valid, it must be the case that (1) the plaintiff has assented to the terms and (2) the parties intended the release to apply to the particular conduct by the defendant that has caused the harm.

However, express assumption of the risk can be found without a written agreement if the plaintiff's consent to assume the risks of the defendant's negligent conduct can be inferred from all the circumstances. The plaintiff could verbally state something to the tune of "I, the plaintiff, hereby acknowledge and accept the risk of harm created by the defendant's negligent conduct." The plaintiff can, though, assume the risk of general negligence on the defendant’s part, if the plaintiff wants.

B. Implied Assumption of the Risk

Implied assumption of the risk is not as straightforward. The plaintiff does not expressly say “I, the plaintiff, hereby assume the risk of harm created by the defendant’s conduct,” but the plaintiff’s conduct creates the impression, to a reasonable observer, that the plaintiff knew the risks created by the defendant’s conduct, yet voluntarily proceeded in the face of such risk.

In order for there to be implied assumption of the risk, it must usually be the case that the plaintiff subjectively understood the existence, nature, unreasonableness, and magnitude of risk posed by the defendant's conduct, but nevertheless took action exposing himself or herself to that risk under circumstances which manifest that the plaintiff was willing to accept the risk.

1. Other Manifestations

Implied assumption of the risk has been formally abolished in many jurisdictions. However, even if it has been abolished, it still exists and manifests itself in various ways. Perhaps the most obvious mutations or permutations of implied assumption of the risk are bound up in two elements of the prima facie case for negligence: duty and proximate cause.

Remember how, earlier, we learned that the majority view is the Cardozo view that the defendant owes no duty of care if the defendant’s negligent conduct did not create a foreseeable and unreasonable risk of harm to someone in the plaintiff’s position. Some courts, using basically the same principles bound up in implied assumption of the risk, will state that it was not reasonably foreseeable that someone in the plaintiff's position would knowingly disregard the risk created by the defendant's negligent conduct, so that the plaintiff is not a foreseeable plaintiff to whom the defendant owed a duty.

Relatedly, recall how we learned that proximate cause will usually be met if a reasonable person in the defendant's position should have foreseen that the defendant’s negligent conduct posed an unreasonable risk of causing the plaintiff's general type of injury. Also recall how unforeseeable intervening forces that contribute causally to the occurrence of the plaintiff's injury will often function as superseding causes that break the causal chain, defeat proximate cause, and essentially absolve the defendant of liability. Marrying proximate cause with implied assumption of the risk, a court might hold that the plaintiff knowingly proceeding in the face of the risk created by the defendant's conduct is so unforeseeable as to constitute a superseding cause.

**III. Public Policy**

On public policy grounds, some risks cannot be assumed.

Common carriers and public utilities usually cannot pass the risk off to the customer through contracts and disclaimers, unless perhaps they are providing services gratuitously (since they are usually under no duty to provide services for free).

If a statute is designed to protect a class of plaintiffs, like workplace regulations, the protected class will not be treated as assuming the risk if, for example, they report to a risky job.

Courts will tend to disregard contractual provisions limiting the liability of one party for the party’s own negligence if that party has a decisive and unfair advantage in bargaining strength, such that the assumption of the risk cannot rightly be said to be the product of the plaintiff's free choice. This usually includes medical malpractice, given the sometimes life-and-death nature of medical services, but may include situations much less grave. The bottom line is that the plaintiff will not usually be held to the assumption of the risk if the disparity in bargaining power is so unfair that it left the plaintiff with no reasonable choice but to accept the risk.

If fraud, coercive force, or an external emergency prompt the plaintiff to act in the face of a risk, risk will not be deemed assumed.

**IV. Modern Treatment**

Now, let's discuss the modern of assumption of the risk in jurisdictions that have abolished it formally.

A. Primary Assumption of the Risk

What we have referred to as express assumption of the risk is often called primary assumption of the risk, although primary assumption of the risk also encompasses situations where the plaintiff's disregard of a patently clear risk is so unforeseeable that it defeats duty and/or proximate cause. If primary assumption of the risk is proven, recovery is absolutely barred, as we already discussed.

For example: The plaintiff, a grown adult of average intelligence, trespasses onto the defendant’s property and knowingly dives from off of the lifeguard chair and into the shallow end of the pool, sustaining injuries.

This is an example of primary assumption of the risk. Assuming that the defendant owed a duty to the plaintiff as a trespasser, it could be said that the danger here was so plainly obvious to a reasonable person in the plaintiff's position that it was unforeseeable that the plaintiff would actually dive into the shallow end of the pool. As we discussed above, this could defeat both duty and proximate cause.

B. Secondary Assumption of the Risk

What we have called implied assumption of the risk is often referred to as secondary assumption of the risk. Falling underneath secondary assumption of the risk are those situations where the plaintiff is unreasonable in disregarding a risk arising from the defendant's negligence that a reasonable person in the plaintiff's position should have perceived.

If this sounds a lot like negligence, it should: Many jurisdictions will analyze secondary assumption of the risk under principles of contributory negligence or comparative fault, which we will discuss in a later video. Indeed, the great majority of assumption of the risk cases will often also qualify for contributory negligence or comparative fault, but not all, as there is a great deal of overlap between the doctrines.

For example: The defendant digs a hole and covers it up, and fails to post any kind of warning, block off the hole, or otherwise protect foreseeable plaintiffs from falling in. The plaintiff is walking along and manages to perceive the hole, which is directly in the plaintiff’s path. The plaintiff perceives that there is a reasonably accessible path around the hole, but instead tries to jump over the hole. The plaintiff fails and falls into the hole, injuring himself.

This is secondary assumption of the risk. Though what the plaintiff did was unreasonable, it wasn’t overwhelmingly so. Thus, it will likely be dealt with under contributory negligence or comparative fault.

Assumption of the risk is a defense both to negligence and to recklessness. It might even operate as a defense to intentional torts, assuming the plaintiff's conduct might be construed as a valid consent.

**Contributory Negligence and Comparative Fault**

Now, let's talk about contributory negligence and comparative fault. Both of these doctrines provide a way for the defendant to eliminate or reduce the amount of damages the defendant has to pay, owing to the fact that the plaintiff’s own negligence contributed causally to the occurrence of the plaintiff’s injury.

**I. Contributory Negligence**

We'll start with contributory negligence. As we will soon see, contributory negligence is a very harsh doctrine, so much so that most jurisdictions have done away with it entirely. Only a few jurisdictions still retain it.

Contributory negligence is an all-or-nothing doctrine. If the defendant makes out a case for contributory negligence, the plaintiff is completely barred from recovering anything, even if the plaintiff’s own negligence was very slight compared to the defendant’s. Contributory negligence stems from the notion that each of us has a duty to use reasonable care to avoid situations if we reasonably foreseeably place ourselves at unreasonable risk of harm.

Thus, contributory negligence results if:

(1) The plaintiff’s conduct falls below the standard of care that the hypothetical reasonable person would exercise in looking out for himself or herself, and (2) that lack of care is an actual and proximate contributing cause of the plaintiff’s injuries, along with the defendant’s negligence.

The same rules and theories about the reasonable person, unreasonable conduct, actual cause, proximate cause, harm, etc., apply in contributory negligence, more or less as they do in regular negligence, except that what constitutes unreasonable conduct might differ if we're looking out for ourselves than if we're looking out for someone else, especially if we disregard our own safety in an effort to help someone else.

At this point, it bears repeating that contributory negligence is an all-or-nothing doctrine: Either the plaintiff was 0 percent at fault in causing the plaintiff’s own injuries and can therefore recover 100 percent of the damages, or the plaintiff was more than 0 percent at fault and can therefore recover nothing. However, if the plaintiff can establish a defense to contributory negligence once the defendant makes out a prima facie case for contributory negligence, the proverbial ball is back on the defendant’s court, and the plaintiff may recover. You'll therefore see that the contributory negligence cases often feel like a tennis match: the plaintiff establishes a prima facie case for negligence; the defendant establishes contributory negligence; the plaintiff establishes a defense to contributory negligence; etc.

A. Defenses to Contributory Negligence

That said, let's talk about some defenses that the plaintiff might try to establish in order to recover, despite the plaintiff’s own negligence.

1. Defendant Acted Recklessly or Intentionally

One way that the plaintiff can defend against a charge of contributory negligence is to show that the defendant’s conduct amounts to reckless or intentional conduct, since contributory negligence is not a defense to such actions.

2. Rescuer’s Negligence

If the defendant’s negligence puts the plaintiff in trouble, and a rescuer is injured (through the rescuer’s own negligence) in trying to rescue the plaintiff, and the rescuer sues the defendant, the rescuer cannot be subject to a contributory negligence defense unless the rescuer acted recklessly. It may be hard to find that the rescuer’s taking of a risk was unreasonable, since the rescuer was trying to help someone, and we want to encourage that.

3. Last Clear Chance

Now, let's talk about the last clear chance rule. This rule lets the plaintiff recover despite being negligent if the defendant was the person with the “last clear chance” to prevent the accident from occurring. Another way to state this rule might be that, in a contributory negligence jurisdiction, the last person who was negligent is the loser.

Last clear chance situations usually go something like this:

First, the plaintiff gets into some sort of predicament through the plaintiff’s own negligence, that the plaintiff either cannot escape from, or that the plaintiff could but for the plaintiff’s lack of proper attentiveness or reasonable care. The effect of this is to leave the plaintiff exposed to a risk of harm from the defendant’s negligent conduct.

Second, the defendant comes along and either is aware or should be aware of: (1) the fact that the plaintiff is in the predicament and (2) that the defendant, through reasonable care, can avoid injuring the plaintiff. The effect of this is to make it so that the defendant is the last person with a realistic chance of avoiding harm to the plaintiff, in light of the fact that the plaintiff has gotten himself or herself into such a mess, if only the defendant will use reasonable care under the circumstances.

Third, the defendant for some reason fails to exercise reasonable care and thus injures the plaintiff, despite having had the last clear chance not to do so. Under these particular circumstances, the defendant was the one with the last clear chance to prevent the plaintiff’s injury from occurring. Thus, contributory negligence is not a bar to recovery, and the defendant is liable.

a. Plaintiff’s Predicament

Whether the last clear chance defense will work depends on what kind of predicament the plaintiff gets into. If the defendant’s negligence put the plaintiff in helpless peril—that is, the plaintiff had no reasonable means of escape—then the rule differs among the states. Some states apply the last chance doctrine if the defendant knew or reasonably should have known of the peril. Others apply the doctrine only if the defendant actually knew of the peril.

On the other hand, if the defendant’s negligence put the plaintiff in peril, but the plaintiff had a reasonable means of escape, then the prevailing rule is, the last chance doctrine applies only if the defendant actually, subjectively knew of the peril.

**II. Comparative Fault**

Now, let's talk about contributory negligence's better reasoned and more evolved offspring: comparative fault. Most jurisdictions have abandoned the harsh contributory negligence rules in favor of one of two basic comparative fault regimes, which we'll discuss in more depth in a bit after we discuss some general rules that apply in any comparative fault regime.

The basic objective of comparative fault schemes is that, if the plaintiff and the defendant are both at fault for creating the plaintiff’s injury, each party’s responsibility should not be an all-or-nothing proposition. In comparative fault, the defendant proves the plaintiff’s negligence just as the defendant would in a contributory negligence jurisdiction. However, such proof will not bar recovery altogether. To that end, the last clear chance doctrine and assumption of the risk will not apply.

Rather, each party will bear the cost for that portion of the damages that his or her negligence actually caused under the rules established by the particular comparative fault scheme, which operates in the relevant jurisdiction. The actual apportionment may be based on a percentage of damages actually caused; if this cannot be discerned, the court might apportion responsibility based on which party's conduct was more or less negligent than the other's.

Courts are divided over what extent rescuers are subject to a reduction of recovery under comparative fault. In some jurisdictions, the rescue doctrine applies so that, if a third-party rescuer is trying to save somebody who is in a predicament because of another's negligence, and is hurt through the rescuer’s own negligence, the rescuer’s recovery cannot be diminished under comparative fault unless the rescuer’s conduct was reckless. In other jurisdictions, the rescuer's recovery is still reduced under comparative fault rules even if the rescuer was not reckless.

Now, let's discuss the two basic comparative fault regimes you're likely to encounter: pure and modified (or partial) comparative fault.

A. Pure Comparative Fault

We'll start with pure comparative fault. In a pure comparative fault jurisdiction, the plaintiff recovers for the plaintiff’s injuries, regardless of the plaintiff’s own percentage allocation of fault, but the plaintiff’s recovery is reduced by the plaintiff’s own percentage allocation of fault. Thus, if the plaintiff is 51 percent at fault, and the defendant is 49 percent at fault, the plaintiff only recovers 49 percent of the damages.

B. Modified Comparative Fault

Contrast that with a modified comparative fault jurisdiction. A modified comparative fault jurisdiction retains some of the harshness of contributory negligence. Here, if the plaintiff’s own percentage fault is equal to (or, in some jurisdictions, greater than) the combined percentage fault of all the defendants in the case, then the plaintiff’s recovery is completely barred. If the plaintiff’s fault is less than this, then the plaintiff still recovers, but the plaintiff’s recovery is still diminished in proportion to the plaintiff’s own fault. Thus, in the previous example where the plaintiff was 51 percent at fault, recovery would be completely barred in a modified comparative fault jurisdiction.

1. Medical Malpractice and Similar Negligence

One last point is worth noting. If (1) the plaintiff’s negligence serves only as the occasion for medical and similar services and (2) if such services are performed negligently, then the plaintiff’s negligence may not be considered in determining the proper apportionment of fault. Thus, for example, if the plaintiff is negligent and gets himself or herself hurt in a car accident, which causes the plaintiff to require medical attention, and if medical staff make the plaintiff’s injuries worse through negligence, the plaintiff’s negligence will be seen as merely furnishing the occasion for the later rendition of medical services and thus will not be considered in determining the proper apportionment of fault.