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# Negligence: Idaho Cases and Materials

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# NEGLIGENCE:

IDAHO CASES AND MATERIALS

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Dale D. Goble

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# Preface

When I arrived at the University of Idaho College of Law in 1987, I was assigned to teach one of the two sections of first year torts, at that time a two-semester class. The teacher of the other section was Dale Goble, who had been hired five years before me. He offered that I could use his supplement on Idaho torts cases in addition to the national casebook (Franklin & Rabin) we both used. I took his advice and never regretted it. Professor Goble has been my most pedagocially experimental colleague. Professor Goble's book has taken many forms over the years, sometimes published under the copyright "Torts R Us."

Studying Idaho cases at the Idaho College of Law makes sense, of course. Idahoans, and Westerners in general, understand the settings and the controversies. Students recognize the locales and, occasionally the parties. Even very old Idaho cases still resonate, such as Wilson v. Boise City, written in 1899 about water redirected near Cottonwood Creek, which still overflows today. How can a professor refrain from teasing people who grew up in Nampa, where crawling under parked boxcars on F Street was the custom in 1894 (Rumpel v. Ore. Short Line RR)?

Students assigned this book should save their copies. If they eventually practice in Idaho, it will be invaluable. Even if they practice elsewhere, they will be amazed by how well they remember those cases discussed during the indelibly mind-altering experience of the first year of law school.

When Professor Goble retired in late Spring 2017, I publicly promised him that I would keep this book going forward, to serve the students, lawyers and jurists of Idaho. What sounded easy became nightmarish when the book was almost lost in an electronic abyss. Professor Goble's hard drive failed, so his working copy was lost. The book was turned into a pdf, but then returning it to an editable format proved daunting. Third-year law student Patricia Taylor was valiant as she went over and over this edition, correcting many of the formatting glitches and typos created in the transition. For example, the letter "m" was changed to "rn" all the way through! The edition you hold in your hands is still a work in progress. Your professor will inform you how to notify me of potential changes and corrections.

My heartfelt thanks to Patricia Taylor, whose good cheer, patience, and attention to detail were phenomenal. My hat is off to Professor Goble for starting this project and keeping it going over the years. He has read every Idaho torts case from 1889 to 2013. He culled them and organized the most instructive into this teaching supplement. It is my honor to keep this compilation moving forward into the 21st Century, to fascinate and challenge you in your study of tort law.

Monique C. Lillard
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University of Idaho College of Law

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# Chapter I

# ALTERNATIVE THEORIES OF TORT LIABILITY: LOCATING NEGLIGENCE IN A TORT UNIVERSE

There is no clear definition of what a "tort" is. As William Prosser noted, "The word is derived from the Latin 'tortus' or 'twisted.' The metaphor is apparent: a tort is conduct which is twisted or crooked, not straight....'Tort' ...was at onetime in common use in English as a general synonym for 'wrong.'" W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, & DAVID G. OWEN, PROSSER AND KEETON ON THE lAW OF TORTS § 1 (5th ed. 1984).

This section introduces six different categories of torts that are distinguished by the quality of the conduct that falls within each. They form a continuum from intent to no-fault.

## [A] INTENT

### WHITE v. The UNIVERSITY OF IDAHO

Idaho Court of Appeals
115 Idaho 564, 768 P.2d 827 (1989),
affirmed 118 Idaho 400, 797 P.2d 108 (1990)

PER CURIAM: Carol and Kenneth White brought this action on a tort claim against the University of Idaho and Professor Richard Neher, alleging that the professor had caused injuries to Carol White. The district court granted the University's motion for summary judgment holding that, under the Idaho Tort Claims Act, a governmental entity has no liability "for any claim which*** [a]rises out of*** battery" committed by an employee. I.C. § 6-904(3). The Whites' appeal presents a single issue of law: whether Professor Neher's intentional and unpermitted touching of Mrs. White constituted a battery. We agree with the district court that it did, and we affirm.

Summary judgment is an appropriate way to resolve this case. There are no genuine issues of material fact; the case simply calls for the application of law to undisputed facts. [] In such cases we exercise free review.

Professor Neher and Mrs. White had long been acquainted because of their mutual interest in music, specifically, the piano. Professor Neher was a social guest at the Whites' home when the incident here occurred. One morning Mrs. White was seated at a counter writing a resume for inclusion in the University's music department newsletter. Unanticipated by Mrs. White, Professor Neher walked up behind her and touched her back with both of his hands in a movement later described as one a pianist would make in striking and lifting the fingers from a keyboard. The resulting contact generated unexpectedly harmful injuries, according to the Whites. For purposes of summary judgment, we deem these allegations to be true. Mrs. White suffered thoracic outlet syndrome on the right side of her body, requiring the removal of the first rib on the right side. She also experienced scarring of the brachial plexus nerve which necessitated the severing of the scalenus anterior muscles.

Both Professor Neher and Mrs. White gave deposition testimony which is summarized as follows. Professor Neher stated he intentionally touched Mrs. White's back, but his purpose was to demonstrate the sensation of this particular movement by a pianist, not to cause any harm. Professor Neher explained

that he has occasionally used this contact method in teaching his piano students. Mrs. White said Professor Neher's act took her by surprise and was non-consensual. Mrs. White further remarked that she would not have consented to such contact and that she found it offensive. The Whites argue that because Professor Neher did not intend to cause harm, injury or offensive contact, his act constitutes negligence rather than the intentional tort of battery. We disagree.

The tort of battery requires intentional bodily contact which is either harmful or offensive. *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238(1986) (citing RESTATEMENT {SECOND) OF TORTS § 13 (1965)). The intent element of the tort of battery does not require a desire or purpose to bring about a specific result or injury; it is satisfied if the actor's affirmative act causes an intended contact which is unpermitted, and which is harmful or offensive. *See Rajspic v. National Mutual Ins. Co*., 110 Idaho 729,718 P.2d 1167(1986); RESTATEMENT(SECOND) OF TORTS §§ 8A, 16, 18 & 20 (1965). Indeed, the contact and its result may be physically harmless. Thus, a person may commit a battery when intending only a joke, or a compliment- where an unappreciated kiss is bestowed without consent, or a misguided effort is made to render assistance. PROSSER & KEATON, THE LAW OF TORTS §§ 8, 9 (5th ed. 1984).

It is undisputed that Professor Neher intended to touch Mrs. White, though he did not intend to cause harm or injury. His lack of any specific intent to harm or injure Mrs. White is immaterial. Professor Neher's affirmative act caused an intended contact which was unpermitted, offensive and, apparently, harmful. Such voluntary contact constitutes the tort of battery.

Accordingly, the district court's grant of summary judgment is affirmed....

NOTES

**(1) Choosing a theory of recovery**: The central issue is the legal standard which is to be used to evaluate the quality of Professor Neher's conduct. What theory did the plaintiff choose? Plaintiff chose this theory because he was she was suing the University of Idaho. Her claim thus was controlled by the Idaho Tort Claims Act. The ITCA governs the tort liability of "governmental entities," which the Act defines as "the state and political subdivisions as herein defined." I.C § 6-902(3). "State" is defined as "the state of Idaho or any office, department, agency, authority, commission, board, institution, hospital, college, university or other instrumentality thereof." *Id*. § (1). "Political subdivision" means "any county, city, municipal corporation, health district, school district, irrigation district, ...special improvement or taxing district, or any other political subdivision or public corporation." *Id*.§ (2).

Subject to several exceptions, governmental entities are liable for the torts of their employees when private entities would be liable. The exception that is relevant to *White v. University of Idaho* provides:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:
>
> 3. Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. *Id*.§ 6-904(3).

The plaintiff thus chose to sue the University in negligence because her claim against both the University and Neher was barred if Neher's conduct was a battery. See *Umbert v. Twin Falls County*, 955 P.2d 1123, 131 Idaho 344 (1998).

**(2)** The Idaho Supreme Court granted review and affirmed the court of appeal's decision. The court noted,

> [Plaintiffs] assert that the decisions of this court, e.g., *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238(1986), require intentional conduct, i.e., intent to harm or offend, in order

> to constitute a battery. While we stated in Doe that, "A battery, on the other hand, requires intentional bodily contact which is either harmful or offensive," [] that does not mean that the person has to intend that the contact be harmful or offensive.
> *White v. University of Idaho*, 118 Idaho 400, 401, 797P.2d 108, 109(1990).

Does the supreme court's decision clarify what must be intended?

**(3) Intent:** How is intent" defined? What must be intended"? Must the actor intend to harm the other? Note the court of appeals' statement: "The intent element of the tort of battery does not require a desire or purpose to bring about a specific result or injury; it is satisfied if the actor's affirmative act causes an intended contact which is unpermitted, and which is harmful or offensive."

Is the court saying that for there to be a "battery" there must be (1) an act that was (2) intended to contact, i.e., "touch," the plaintiff and that the touch was (3) unpermitted and
(4) either harmful or offensive?

Was there an "act" as we have defined that term in *Hammontree v. Jenner*? Did Neher "intend" to touch the plaintiff? Note that, for there to be an actionable battery the contact must be either offensive or harmful- but the defendant need not have intended the contact to be offensive or harmful.

**(4) Idaho Civil Jury Instructions (IDJI):** A jury is informed of the law applicable to the case before it through instructions that the judge reads. Overtime, pattern jury instructions developed based on statements of law in Idaho Supreme Court decisions. The current jury instructions were written by the Civil Jury Instructions Committee. The Committee was appointed by the Court, which charged the Committee to "conduct [] a detailed review of the pattern jury instructions and [to] mak[e] recommendations to the Court for amendments to the instructions." The Committee delivered its recommendations to the Court in 2003. The Court stated, "Although the Court is not approving any specific instruction and will simply address instructions through appellate review, the Court does hereby accept the recommendation of the Committee and in accord with IRCP 51(a)(2) the instructions shall be disseminated for general use by the trial bench and the bar in Idaho."

The IDJ is are available at www.isc.Idaho.gov uryinst_cov.htm.

**(5) Legal status of Idaho Jury Instructions:** The Idaho Rules of Civil Procedure 51(a)(2) on the use of Idaho Jury Instructions provides:

> Whenever the latest edition of Idaho Jury Instructions (IDJI) contains an instruction applicable to a case and the trial judge determines that the jury should be instructed on the subject, it is recommended that the judge use the IDJI instruction unless the judge finds that a different instruction would more adequately, accurately or clearly state the law. Whenever the latest edition of IDJI does not contain an instruction on a subject upon which the trial judge determines that the jury should be instructed, or when an IDJI instruction cannot be modified to submit the issue property, the instruction given on that subject should be simple, brief, impartial and free from argument. When an instruction requested by a party is a modified IDJI instruction, the party should indicate therein, by use of parentheses or other appropriate means, the respect in which it is modified.

As the Idaho Court of Appeals has noted,

> Pattern jury instructions are not a separate source of substantive law; rather, they seek to embody existing law. They are recommendatory in nature, not mandatory. IRCP 51(a)(2). Thus, the substantive standard by which the jury instruction in this case should be judged is not a subsequently promulgated pattern instruction, but the under1ying case law. As noted above, we find nothing in prior decisions of the Idaho Supreme Court indicating that an instruction such as the one given here should be held fatally defective for incompleteness.

*Packard v. Joint School District No. 171*, 104 Idaho 604, 661 P.2d 770 (Ct. App. 1983).

**(6) IDJI 4.22- Direct battery:** On plaintiffs claim of battery, the plaintiff has the burden of proving each of the following propositions:
1. The defendant intentionally touched the plaintiff;
2. The plaintiff did not permit or consent to the touching;
3. The defendant knew the touching was not permitted; and
4. The touching was unlawful, harmful or offensive.

The intent means only an intent to touch without permission. It is not necessary to prove that the defendant intended the touching to be harmful or offensive. You will be asked the following question on the jury verdict form: "Did the defendant commit a battery upon the plaintiff, as defined in the instructions?" If the plaintiff proves all of the propositions in this instruction, you should answer the question "Yes." If any of these propositions has not been proved, you should answer the question "No."

**COMMENT:** The tort of battery is complete upon the completion of the prohibited act and the plaintiff is entitled to at least nominal damages. *Bonner v. Roman Catholic Diocese of Boise*, 128 Idaho 351,913 P.2d 567 (1996); *Pierson v. Brooks*, 115 Idaho 529,768 P.2d 792 (Ct. App. 1989). Elements of damage should be outlined in a separate instruction.

The intent required is intent to do the act constituting the battery, not intent to do harm to the plaintiff. *Neal v. Neal*, 125 Idaho 617, 873 P.2d 871 (1994); *White v. University of Idaho*, 118 Idaho 400, 797 P.2d 108 (1990); *Rajspic v. Nationwide Mutual Insurance Co.*, 110 Idaho 729, 718 P.2d 1167 (1986).

**(7)** The Restatement (Second) of Torts defined "intent" as meaning "that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to occur." RESTATEMENT (SECOND) OF TORTS § 8A. What are "the consequences" that the actor must be desire? Did Professor Neher "desire the consequences of his act"?

The new Restatement (Third) of Torts defines intent as: "A person acts with the intent to produce a consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result." RESTATEMENT (THIRD) OF TORTS § 1(2010). Does the new Restatements separation of "purpose" and "knowledge" resolve the seeming ambiguity? Comment b states: "In general, the intent required in order to show that the defendant's conduct is an intentional tort is the intent to bring about harm (more precisely, to bring about the type of harm to an interest that the particular tort seeks to protect)."

**(a)** David and Paul were walking their dogs when they met on the street. The two dogs began to fight. David picked up a long branch that was lying at the curb to strike the two in an attempt to stop the fight. When he raised the branch over his head, he struck Paul. Did David intentionally harm Paul? *See Brown v. Kendall*, 6 Cus. (60 Mass.) 292 (1850) [FRANKLIN, RABIN, & GREEN at 35] Did David "act" as that term is defined in *Hammontree v. Jenner*?

(b) The Allen F. Williams Company operates an aluminum smelter, which emits fluoride particles as a by product of the smelting process. Williams knows that the particles will be carried downwind and that they will cause a variety of harms to the land where they come to rest. Williams regrets this result. Has he intentionally caused the harm? *See Martin v. Reynolds Metals Co*., 342 P.2d 790 (Or. 1959) [FRANKLIN, RABIN, & GREEN at 670]; *Bradley v. American Smelting & Refining Co*., 709 P.2d 782 (Wash. 1985).

**(8) The legal status of the Restatements:** The Restatements are multi-volume sets of treatises on different legal subjects such as torts, contracts, and property. They are published by the American Law Institute, an organization of legal academics and practitioners that was founded in 1923. The goal is to "restate" the common law as it develops through the judicial decisions of the state courts as a series of principles or rules - the "black letter law." Although the Restatements are not binding authority, they are persuasive because they generally reflect the consensus of the American legal community of what the areas of the common law.

Each section of a Restatement includes a black letter principle, comments and illustrations, and reporters' notes that provide a detailed discussion of the cases that went into the principle summarized in the black letter statement.

In *White*, plaintiffs argued before the supreme court that certain provisions of the Restatement (Second) of Torts define the intent element of battery as including an intent to harm or offend. Without attempting to unravel which position the Restatement (Second) ultimately embraces -for it could be interpreted as supporting either position - we simply note that we have not previously adopted the Restatement (Second) in Idaho and decline any invitation to do so now. What is the relevance of the court's playground hypothetical? How does a playground differ from the classroom?

The court says that "plaintiff must show either that the intention was unlawful, or that the defendant is in fault." What does the court mean by "unlawful"?

**(10)** ***Rajspic v. Nationwide Mutual Insurance Co*.:** Both courts in White cited an earlier Idaho case, *Rajspic v. Nationwide Mutual Insurance Co*., 110 Idaho 729, 718 P.2d 1167(1986). William Brownson was shot during a scuffle with Grace Rajspic. Rajspic was acquitted on a criminal charge of assault with a deadly weapon when the jury concluded that she suffered from a mental disease or defect sufficient to preclude criminal responsibility. Brownson subsequently brought a civil tort action against Rajspic for battery. Since the Rajspics had an insurance policy with Nationwide Mutual Insurance Company, the Rajspics were defended by an attorney employed by Nationwide as well as by their own attorney. The parties entered into a stipulation that Grace Rajspic was insane at the time of the shooting. The trial court instructed the jury (1) that battery was an intentional tort; (2) that insanity was not a defense; and (3) that to hold Rajspic liable, it needed to find that she intended to do the act complained of and not that she intended to kill or injure Brownson.

The jury returned a verdict in favor of Brownson for $14,000.00. Nationwide then informed the Rajspics that their insurance policy did not cover the judgment because the policy excluded coverage for injuries intentionally caused by the insured.

The Rajspics sued Nationwide alleging the exclusionary provision was improperly invoked. The trial court granted the Rajspic's motion for partial summary judgment on the issue of liability. On appeal, the Idaho Supreme Court reversed. *Rajspic v. Nationwide Mutual Insurance Co*., 104 Idaho 662, 662 P.2d 534 (1983) (Rajspic), holding that an insane person is capable of committing intentional torts and stated that "in the present case insanity under the law would not be dispositive of whether the act committed by Mrs. Rajspic was an intentional act and therefore within the embrace of the intentional act exclusion. On the record when examined in a light most favorable to the opposing party, it presents a question of fact." *Id*. at 664, 662 P.2d at 536.

On remand, the trial court granted Nationwide's motion, holding that, because the jury in Brownson found Grace Rajspic had committed an intentional tort, the insurance policy's exclusion applied as a matter of law. The Supreme Court again reversed:

> An insane person may be liable for an intentional tort yet may still not have intentionally caused an injury within the meaning of the insurance exclusion. In fact, many courts have held that, as a matter of law, an insane person cannot intentionally cause injury as excluded in insurance policies. [] Today, we are not called upon to go so far, but we do recognize that, as a matter of fact, an intentional tort and an intentional injury exclusion clause cannot be treated synonymously. We noted in Rajspic I that it is possible that an otherwise insane person may have sufficient capacity to understand and contemplate the nature and consequences of her actions. *Rajspic I*, at 664, 662 P.2d at 536. It is also possible that the insane person may be completely incapable of understanding the nature and consequences of her actions, depending on the extent of her mental disabilities. Which of these characterizations appropriately applies to Mrs. Rajspic has yet to be determined by a trier of fact?

**(11)** ***Neal v. Neal*****:** Thomas A. Neal filed for divorce after his wife Mary became aware that he was having an extramarital affair. Mary counterclaimed for divorce and also asserted tort claims against Thomas Neal and Jill LaGasse. Among Mary's claims was one for battery:

> ... Her battery claim is founded on her assertion that although she consented to sexual intercourse with her husband during the time of his affair, had she known of his sexual involvement with another woman, she would not have consented, as sexual relations under those circumstances would have been offensive to her. Therefore, she contends that his failure to disclose the fact of the affair rendered her consent ineffective and subjects him to liability for battery.
>
> Civil battery consists of an intentional, unpermitted contact upon the person of not in specific language "adopt" the Restatement (Second) definition of battery in *Doe v. Durtschi*. In the course of discussing the distinction between negligence and battery, the *Doe* opinion paraphrased part of Section 13 and then cited to the section. However, the Court did not expand any further on the definition of battery, nor did it need to in the context of the *Doe* opinion.

*White v. University of Idaho*, 118 Idaho at 403 n.3, 797 P.2d at 111 n.3. Is the court correct that the Restatement "could be interpreted as supporting either position"?

**(9)** ***Vosburg v. Putney*****:** A classic case on the meaning of intent is an 1891 decision by the Wisconsin Supreme Court, *Vosburg v. Putney*, 80Wis. 523, 50 N.W.403 (1891). The Wisconsin Supreme Court gave the following statement of the facts:

> The plaintiff was about fourteen years of age, and the defendant about eleven years of age. On the 20th day of February,1889, they were sitting opposite each other across an aisle in the high school of the village of Waukesha. The defendant reached across the aisle with his foot and hit with his toe the shin of the right leg of the plaintiff. The touch was slight. The plaintiff did not feel it, either on account of its being so slight or of loss of sensation produced by the shock. In a few moments he felt a violent pain in that place, which caused him to cry out loudly. [The plaintiffs condition grew worse and he eventually lost the use of the leg.) The theory of at least one of the medical witnesses was that the limb was in a diseased condition when this touch or kick was given, caused by microbes entering in through the wound above the knee, and which were revivified by the touch, and that the touch was the exciting or remote cause of the destruction of the bone, or of the plaintiff's injury.

The case sought recovery for damages for a battery alleged to have been committed by defendant. A previous trial resulted in a judgment for the plaintiff for $2,800. Defendant appealed, the judgment was reversed, and a new trial ordered. The case was tried again and resulted in a verdict for plaintiff for $2,500. Defendant again appealed, citing the jury's response to a question on the special verdict: "Did the defendant, in touching the plaintiff with his foot, intend to do him any harm? A. No." Defendant argued:

> The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote from GREENLEAF, EVIDENCE §83, the rule that "the intention to do harm is of the essence of an assault." Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act was unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful.

Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold that act of the defendant unlawful, or that he could be held liable in this

action. Some consideration is due to the to the implied license of the play-grounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercise of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful. Hence, we are of the opinion that, under the evidence and verdict, the action may be sustained.

Given the jury's response to interrogatory # 6, how can the defendant's conduct be "intentional"? What were "the consequences" that the defendant desired? Why were these consequences sufficient? If the teacher had not as yet called the school to order, would the result have changed?

> Civil battery consists of an intentional, unpermitted contact upon the person of another which is either unlawful, harmful or offensive. *White v. University of Idaho*, 118 Idaho 400, 797 P.2d 108 (1990). The intent necessary for battery is the intent to commit the act, not the intent to cause harm. *Id*. Further, lack of consent is also an essential element of battery. []. Consent obtained by fraud or misrepresentation vitiates the consent and can render the offending party liable for a battery. [].
>
> The district court concluded that Thomas Neal's failure to disclose the fact of his sexual relationship with LaGasse did not vitiate Mary Neal's consent to engage in sexual relations with him, such consent being measured at the time of the relations. We do not agree with the district court's reasoning. To accept that the consent, or lack thereof, must be measured by only those facts which are known to the parties at the time of the alleged battery would effectively destroy any exception for consent induced by fraud or deceit. Obviously if the fraud or deceit were known at the time of the occurrence, the "consented to" act would never occur.

*Neal v. Neal*, 125 Idaho 617, 873 P.2d 871 (1994).

**(12)** Why should the defendant be liable for highly improbable injuries? Is an instrumentalist explanation of the decisions in *White* and *Rajspic* satisfactory? For liability to affect behavior prospectively, at least three conditions must be satisfied: (1) the liability standard must be understood by the individual whose conduct is to be affected; (2) the addressee must want (perhaps because of the possible sanctions) to conform to the standard; and (3) the addressee must be in a position to comply with the standard. Are these three conditions satisfied in *White*? How likely is it, for example, that Neher knew of his potential liability? How willing would he be to comply? Stated differently: is it likely that imposing liability on Neher will make others act differently? Does the deterrence potential of a decision depend upon the identity of the class of potential defendants? Would a decision imposing liability on a doctor for medical malpractice have more deterrent effect than the decision in *Vosburg* might have on schoolchildren?

Are there possible indirect effects? That is a distinction can be drawn between direct and indirect effects. Standards may affect behavior directly when they proscribe conduct and individuals conform to them; alternatively, standards may affect behavior indirectly when they reinforce existing social norms that discourage socially harmful conduct. Might the decision in *Vosburg* indirectly affect the behavior of schoolchildren to the extent that their parents learn of the decision?

# [B] RECKLESSNESS

**ATHAY v. STACEY**
**(Athay I)**

Supreme Court of Idaho
142 Idaho 360, 128 P.3d 897 (2005)

EISMANN, J. -This is an appeal from summary judgments dismissing the Plaintiffs' claims arising from a collision involving a driver fleeing a police pursuit. The district court held that none of the individual defendants' conduct reached the level of reckless disregard or was a proximate cause of the collision. We affirm in part and vacate in part.[1]

## I. FACTS AND PROCEDURAL HISTORY

On June 10, 1999, at approximately 10:12 p.m., the sheriffs' dispatcher for Rich County, Utah, broadcast a call that a possible drunken driver in a green Mustang bearing Idaho license plate 3C 1086 was heading north from the town of Randolph in northern Utah. Dale Stacey, the Rich County Sheriff (Sheriff Stacey), heard the radio call and headed to intercept the Mustang. Upon locating the car, Sheriff Stacey followed it for about one-and-one-half miles and observed it cross the centerline twice and the fog line four times. He decided to stop the car at the Sage Creek Junction, near the Utah-Wyoming border, to investigate whether the driver was under the influence of alcohol.

As the Mustang approached the stop sign at the junction, Sheriff Stacey activated the overhead lights on his Chevrolet pickup. The Mustang ran through the stop sign and headed east toward Lincoln County, Wyoming. Sheriff Stacey activated the siren on his pickup and began pursuit. The Mustang accelerated to about 70 mph, and then to over 96 mph. The Sheriff's pickup had a governor that prevented it from traveling faster than 96 mph, and so he was unable to catch the Mustang. The Mustang driver's conduct gave Sheriff Stacey probable cause to believe that the driver was committing the felony offense of eluding.

After entering Wyoming, the Mustang headed north. At Cokeville, Wyoming, it slowed to about 40 mph, and Sheriff Stacey was able to catch up to it. Upon leaving Cokeville, however, the Mustang's driver again sped up, leaving the Sheriff behind.

The highway then curved northwesterly, toward Bear Lake County located in southeast Idaho. Sheriff Stacey radioed for assistance to the Bear Lake County Sheriff's office. In response, Chad Ludwig, a deputy sheriff, (Deputy Ludwig) drove to a point southeast of Montpelier, Idaho, where he attempted to stop the Mustang using spike strips. He only succeeded in deflating its right front tire.

After crossing the spike strip, the Mustang did slow down to about 50 mph, allowing Sheriff Stacey to catch up. Once he did, however, the Mustang immediately accelerated to around 96 mph. It passed deputy sheriff Gregg Athay (Deputy Athay), who had stopped on the highway two miles from where the spike strips had been deployed. Deputy Athay joined in the pursuit after the Mustang and Sheriff Stacey passed his position, and Deputy Ludwig also joined in the pursuit behind Deputy Athay.

[1] An instrumentalist theory views tort liability as a means to an end: liability ought to be imposed because it will serve some other goal. Deterrence is an example of an instrumentalist theory: liability should be imposed because it will deter risky conduct.

The Mustang sped through Montpelier, Idaho, at a speed of 94 mph with the three police vehicles in pursuit. According to witnesses, the Mustang's lights were turned off as it was racing through Montpelier. While passing the Ranch HandTruck Stop, located about two miles north of Montpelier, the Mustang swerved to avoid colliding with an oncoming semi-truck that was turning left into the truck stop. The driver of the semi-truck later stated that he did not even see the Mustang.

About one mile past the truck stop, the Mustang collided with a car driven by the plaintiff-appellant Kyle Athay (Athay). He had stopped to assist two teenage girls whose car had hit a deer. He was just driving away from the scene of that accident when the Mustang slammed into the rear of his car at a speed of approximately 104 mph. Athay was severely injured in the collision. The pursuit had lasted about forty-five minutes through three states. After the collision, the driver of the Mustang was identified as Darrell Ervin (Ervin).

On April 19, 2002, Kyle and Melissa Athay (Athays) filed this lawsuit against Sheriff Stacey, Rich County, Deputy Ludwig, Deputy Athay[2], Brent Bunn (the Sheriff of Bear Lake County), and Bear Lake County. The district court dismissed the complaint after granting the Defendants' motions for summary judgment, and Athays timely appealed.

## III. ANALYSIS

### A. Does Idaho Code §49-623 Establish a Reckless Disregard Standard of Care for Police Pursuits?

Idaho Code §49-623 provides as follows:

> (1) The driver of an authorized emergency or police vehicle, when responding to an emergency call, or when in the pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions stated.
>
> (4) The foregoing provisions shall not relieve the driver of an authorized emergency or police vehicle from the duty to drive with due regard for the safety of all persons, nor shall these provisions protect the driver from the consequences of his reckless disregard for the safety of others.

The focus of the dispute centers upon the words "due regard" and "reckless disregard" in subparagraph (4) of the statute. The Athays argue that it establishes two standards of care: due regard, which they equate with negligence, and reckless disregard. They contend that for policy reasons we should apply the negligence standard and simply disregard the last phrase of the statute referring to reckless disregard.

The interpretation of a statute is a question of law over which we exercise free review. [] When construing a statute, the words used must be given their plain, usual, and ordinary meaning, and the statute must be construed as a whole. [] We must give effect to every word, clause and sentence of a statute, and the construction of a statute should be adopted which does not deprive provisions of the statute of their meaning. []

We are not at liberty to simply disregard a portion of the statute. The last phrase of Idaho Code § 49-623(4) states, "nor shall these provisions protect the driver from the consequences of his reckless disregard for the safety of others." It would be meaningless unless it establishes a reckless disregard standard. It would make no sense to interpret the statute as providing that the driver of an authorized emergency or police vehicle is liable for his or her negligence and will not be protected from his or her

[2] Deputy Athay is Kyle Athay's half brother.

reckless disregard for the safety of others. If the driver is liable for negligence, then whether the driver's conduct also reached the level of reckless disregard would not matter.

The confusion arises as a result of equating the words "due regard" with negligence. The words "due regard" mean "consideration in a degree appropriate to demands of the particular case." BLACK's LAW DICTIONARY 590 (Rev. 4th ed. 1968). They are not words of art synonymous with negligence. In enacting Idaho Code §49-623, the legislature obviously balanced the need for emergency or police vehicles to respond quickly in emergencies or to pursue fleeing law violators with the risks created by such conduct. It decided that in such circumstances, due regard for the safety of others is a reckless disregard standard.

The district court held that Idaho Code §49-623 created a reckless disregard standard for police pursuits when the vehicle being pursued collides with the vehicle of a third party and a negligence standard when the police or emergency vehicle collides with the vehicle of a third party. Such analysis is incorrect. The reckless disregard standard applies in both situations. There is nothing in the wording of subsection (4) that would indicate that the reckless disregard standard applies only when the vehicle being pursued causes a collision. The statute does not even refer to the conduct of the driver of that vehicle. It deals solely with the conduct of the person driving the emergency or police vehicle.

The district court also adopted the definition in Idaho Code § 6-904C for the reckless disregard standard contained in § 49-623. Again, the district court erred. Idaho Code § 6-904C defines the phrase "reckless, willful and wanton conduct" as it is used in the Idaho Tort Claims Act. The statute expressly provides that the definition applies only to Chapter 9 of Title 6, Idaho Code. By its terms, it does not apply to Chapter 6 of Title 49, Idaho Code.

This Court has previously defined the term "reckless disregard." In *Hodge v. Borden*, 91 Idaho 125, 134, 417 P.2d 75, 84 (1966), we adopted the definition announced by the Oregon Supreme Court in *Williamson v. McKenna*, 223 Or. 366, 354 P.2d 56, 67 (1960), which is, "'Reckless disregard of the rights of others' could be regarded as the type of conduct engaged in by the driver when he actually perceives the danger and continues his course of conduct." We distinguished reckless disregard from gross negligence in that the latter would apply where the driver does not know of the high degree of manifest danger but should have known.

**D. Did the District Court Err in Granting Summary Judgment to the Defendants?**

The district court held that as a matter of law the defendants' conduct did not rise to the level of reckless disregard ...and therefore granted their motions for summary judgment. In an appeal from an order of summary judgment, this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment. *Conway v. Sonntag*, 141 Idaho 144, 106 P.3d 470 (2005). All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Id*. Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Id*. If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review. *Id*.

Sheriff Stacey and Rich County. The district court dismissed the case as to Sheriff Stacey ....

Construing the facts in the record liberally in favor of the Athays and giving them all reasonable inferences that can be drawn from the record, there is a jury issue as to whether Sheriff Stacey's conduct rose to the level of reckless disregard and whether it was a proximate cause of the collision.

Sheriff Stacey initially sought to stop Ervin for suspicion of driving while under the influence of alcohol, a misdemeanor. Ervin's conduct in fleeing constituted a felony. Sheriff Stacey did not testify that

he believed Ervin was dangerous except with respect to Ervin's driving conduct while trying to elude the Sheriff.

Sheriff Stacey pursued Ervin for about forty-five minutes through three states over a distance of about sixty-three miles. Ervin sped up to 96 or more mph three times: (1) when Sheriff Stacey activated his pickup's overhead lights in an attempt to stop Ervin at the Sage Creek Junction in Utah; (2) when Sheriff Stacey caught up after Ervin had slowed to about 40 mph while driving through Cokeville, Wyoming; and (3) when Sheriff Stacey caught up after Ervin had slowed down to about 50 miles per hour upon running over the spike strips. After the first mile of the pursuit, Sheriff Stacey knew that he could not overtake the Mustang because its top speed exceeded his pickup's top speed of 96 mph. A reasonable inference is that Sheriff Stacey knew he had no reasonable chance of stopping the Mustang as long as the Mustang's driver was willing to drive in excess of 96 mph.

Sheriff Stacey testified that he considered the hazards of this chase as being high. He acknowledged that the pursuit would stop only if the Mustang crashed into something or someone, or if the Mustang's driver decided to stop, or if the Mustang ceased operating due to a mechanical failure or running out of gas. Considering the length of the pursuit, there appeared to be little likelihood that the driver would voluntarily stop. The only possible mechanical failure mentioned was the loss of a tire due to the spike strips. Although the Mustang initially slowed to 50 mph after running over the spike strips, it had sped back up to 96 mph when it passed Deputy Athay's stopped vehicle two miles later, and it continued at that high rate of speed. There was no testimony offered that the Mustang could not be expected to travel very far running on the right front rim. The collision occurred about eleven miles after the Mustang ran over the spike strips.

Eyewitness testimony and the post-accident examination of the filaments in light bulbs taken from the Mustang showed that Ervin turned off the Mustang's headlights and taillights as he raced through Montpelier, that they were off when he passed the truck stop, and that they were off when he crashed into Kyle Athay's vehicle. About two miles past Montpelier, the Mustang almost collided with an oncoming semi-truck that was turning left into a truck stop. The driver of the semi-truck did not see the Mustang because its lights were off. Sheriff Stacey saw the near-collision. A reasonable inference is that Sheriff Stacey knew that upon leaving Montpelier the Mustang's lights were off, creating a greater hazard that other drivers would not see the Mustang or that the driver of the Mustang would not see other persons or vehicles on the highway in time to avoid a collision.

The record indicates that Sheriff Stacey was not familiar with the highway north of Montpelier. A reasonable inference is that he did not know what intersections or roadside businesses there may be where vehicles could be entering or leaving the highway. He apparently had no reason to believe that the risk to the public posed by the Mustang barreling down the two-lane highway at over 95 mph with its lights off would decrease once they had passed the Ranch Hand Truck Stop.

Sheriff Stacey testified that upon Deputy Athay's command, he slowed down to give the Mustang some room hoping its driver would slow down. It is not clear from the record how much he slowed down or whether he slowed down enough to signal a termination or lessening of the pursuit. He was close enough at the instant of the collision to see the Mustang go off the left side of the road after it collided with Kyle Athay's vehicle.

The above is not intended to be an exclusive list of factors that the jury could consider in deciding whether Sheriff Stacey's conduct rose to the level of reckless disregard and, if so, whether it was a proximate cause of the collision. That weighing process is, in the first instance, for the jury. These factors, taken together, are sufficient to create a jury issue as to Sheriff Stacey's liability. The Sheriff was an agent of Rich County. The County has not argued either below or on appeal that it would not be liable if Sheriff Stacey were found liable. Therefore, there is also a genuine issue of material fact regarding Rich County's liability.

JUSTICE SCHROEDER AND JUSTICES TROUT, BURDICK AND JONES CONCUR.

Following remand, the trial court granted summary judgment for all defendants. Plaintiffs again appealed:

**ATHAY v. STACEY**
**(Athay II)**

Supreme Court of Idaho
146 Idaho 407, 196 P.3d 325 (2008)

**III. ANALYSIS**

**C. Did the District Court Err in Dismissing the Complaint as to Bear Lake County?**

Did the district court err in concluding Deputy Athay's conduct did not rise to the level of reckless disregard? In *Athay I*, we held that under Idaho Code § 49- 623, the driver of an authorized police vehicle engaged in a high-speed chase can be held liable only if the driver's conduct amounts to reckless disregard for the safety of others. The district court held that Deputy Athay's conduct did not rise to that level. After stating that Deputy Athay was not aware of the deer-vehicle collision before Ervin crashed into the Plaintiff's vehicle, the court concluded, "On these facts, Captain Athay had no actual knowledge of any conditions that would have told him to immediately cease or lessen the pursuit any differently than he did." (Emphasis in original) The district court erred in its analysis.

To constitute reckless disregard, the actor's conduct must not only create an unreasonable risk of bodily harm, *Smith v. Sharp*, 85 Idaho 17,27, 375 P.2d 184, 190 (1962), but, as we held in *Athay I*, the actor must actually perceive the high degree of probability that harm will result and continue in his course of conduct. 142 Idaho at 365, 128 P.3d at 902. Actual knowledge of the high degree of probability that harm will result does not require knowledge of the actual person or persons at risk, or the exact manner in which they would be harmed. It only requires knowledge of the high degree of probability of the kind of harm that the injured party suffered. *See Harris v. State*, 123 Idaho 295, 299, 847 P.2d 1156, 1160 (1992).

Plaintiff had pulled out onto the highway after stopping to assist at the scene of the deer-vehicle accident. It does not matter why he had pulled off the highway and stopped. He could have pulled onto the highway for a variety of reasons. What is significant is the foreseeability that there would be vehicles on the highway, such as Plaintiff's; that the Defendant's conduct created an unreasonable risk of bodily harm to the occupants of those vehicles; and that the Defendant perceived there was a high degree of probability that harm would result and continued his course of conduct.

For example, in *Smith v. Sharp*, we held that the following course of conduct by a driver constituted reckless disregard:

> that he deliberately turned off his lights and proceeded in the darkness on the wrong side of the roadway toward the lighted intersection; was driving at a speed which was excessive for town driving; he was warned by one of the passengers that danger lurked ahead; he hit the depressions causing the occupants to be thrown violently forward; he continued on down an unfamiliar street for a distance of 173feet without applying his brakes, although he could have stopped safely within the 173 feet; that he drove down a 45 degree embankment at such speed as to cause the automobile to flip over onto its top into the river just as the brakes were applied, all of which when taken together shows a deliberate course of conduct in reckless disregard of the rights of others and constituted the proximate cause of Marilee Smith's death.

85 Idaho at 33, 375 P.2d at 194.

We did not require that the driver know that his passenger would be killed by his conduct. Likewise, we did not require that he know that his manner of driving could cause his car to flip onto its top into the river, or that he even know the river was there as he drove in darkness at excessive speed down an unfamiliar street with his headlights off. Likewise, in *State v. Papse*, 83 Idaho 358, 363, 362 P.2d 1083, 1086 (1961), we held that a driver acted in reckless disregard by intentionally running a stop sign where obstructions to his view prevented him from seeing whether any vehicles were approaching on the crossing through highway. We did not require proof that he had knowledge of the approaching car, or of the mother and daughter in that car who were killed in the collision.

.... This Court can decide on appeal whether a defendant's conduct is sufficiently egregious to create a jury issue of whether it rises to the level of reckless disregard of the safety of others. *Cafferty v. State, Dept. of Transp., Div. of Motor Vehicle Services*, 144 Idaho 324,332, 160 P.3d 763,771 (2007); *Harris v. State, Dept. of Health & Welfare*, 123 Idaho 295, 299, 847P.2d 1156, 1160(1992). Even though the district court applied the wrong standard for reckless disregard, we affirm the dismissal as to Deputy Athay because the evidence does not create a jury issue as to whether his conduct constituted reckless disregard in this case.

Sheriff Stacey pursued a Mustang automobile being driven by Ervin from Utah, through part of Wyoming, into Idaho. When the Mustang was headed into Idaho, Sheriff Stacey radioed Deputy Athay and asked him to attempt to stop the Mustang with spike strips.

After obtaining the approval of the Bear Lake County Sheriff, Deputy Athay dispatched Deputy Ludwig to attempt to spike the tires of the Mustang. Deputy Athay did not know that the Mustang had Idaho plates, nor did he know that it was registered in Caribou County. He did know that the driver of the Mustang was suspected of being intoxicated.

Deputy Ludwig stopped at milepost442 at 10:50p.m.to prepare to spike the tires. At 10:56 p.m., he radioed that the Mustang had run over the spikes and was still going. Deputy Athay had stopped at milepost 440. When the Mustang passed him, he could smell burning rubber. Sheriff Stacey was approximately one mile behind the Mustang, and Deputy Athay joined in the pursuit after Sheriff Stacey went by. Deputy Athay remained behind Sheriff Stacey the entire time.

The Mustang initially slowed after running over the spike strips, but then sped back upto around 95 mph. Deputy Athay knew that a tire had been spiked because he could smell burning rubber when the Mustang passed his location. He believed that the Mustang would stop because of the flat tire before getting to Montpelier, which was about five miles away. The traffic on the highway that night was very light, the highway was dry, and the weather was clear, and the area from where he was to Montpelier was sparsely populated with few intersecting roads.

At about milepost 439, Deputy Ludwig caught up with Deputy Athay. Deputy Ludwig had a faster vehicle, and he asked Deputy Athay if he could pass him and try to catch the Mustang. Deputy Athay had heard Sheriff Stacey state over the radio that the Mustang had slowed when entering Cokeville, Wyoming, and so he denied Deputy Ludwig's request and told him they would see if the Mustang slowed down when entering Montpelier.

The highway through Montpelier had four traffic lanes and a center turn lane. All of the cross streets intersecting the highway through Montpelier were guarded by stop signs. The highway through town was well lit, and Deputy Athay called ahead to the police and requested their assistance to control any traffic on side streets that intersected the highway.

After the Mustang passed through Montpelier, Deputy Athay saw it fishtail as it was leaving town near the location of the bowling alley at milepost 434. Deputy Athay thought it was speeding up, and so he told everyone to back off and told dispatch to notify Caribou County to request it have an officer in that jurisdiction again spike the vehicle. Deputy Athay slowed down. The Mustang continued on for about three miles, allegedly with its lights off, before colliding with the Plaintiffs vehicle.

From the point he joined in the pursuit until he told the officers to back off about six miles later, Deputy Athay did not engage in conduct that met the standard of reckless disregard. Although its reasoning was flawed, the district court arrived at the correct result in dismissing this action as to Deputy Athay.

JUSTICES BURDICK, J. JONES, W. JONES AND HORTON CONCUR.

NOTES

**(1) Choosing a theory of recovery:** The central issue is the legal standard which is to be used to evaluate the quality of the Deputy Athay's conduct. Plaintiff argued that the emergency vehicle statute was ambiguous because it stated that drivers of such vehicles were not liable unless they had acted (1) without "due regard for the safety of all persons" or (2) with "reckless disregard for the safety of others." I.C. §49-623(4). Given this ambiguity, the plaintiff contended that the court should evaluate Deputy Athay's conduct against the "due regard for the safety of all persons" standard - which he argued was a synonym for negligence. Why did the court reject plaintiffs choice of negligence? [*Athay I*, 1m 11, 13].

On remand, plaintiff thus was forced attempt to prove that the deputy had acted with "reckless disregard for the safety of all persons." The central issue in Athay I and II is what this standard means. Why was Deputy's conduct not reckless? Why was the driver's conduct in *Smith v. Sharp* [ in *Athay I*] reckless?

The court not only addresses "reckless disregard," it also discusses (albeit briefly) "reckless, willful, and wanton," and "gross negligence." Each of these terms figures in the court's decision. Do you feel confident after reading Athay I and II that you can distinguish between them?

**(2) *Athay III*:** Following the Supreme Court's decision in *Athay I*, a jury trial against the only remaining defendant- Rich County- was held. The jury awarded Athay $2,720,126 in economic damages and $ 1,000,000 in non-economic damages. The jury found the fleeing driver (Ervin) 70% and Rich County 30% responsible for Athay's injuries. Rich County appealed, arguing in part that there was insufficient evidence to support the jury's finding thatSheriff Stacey had acted with reckless disregard. The trial denied the motion and the county appealed.

The Supreme Court affirmed, reciting a list of fifteen facts- including the length of the chase, the highs speed involved, the presence of other vehicles on the road, and Stacey's knowledge of the risk--that the jury could have relied upon in concluding that Stacey acted with reckless disregard. The Court also quoted Stacey's testimony that police chases end "either because we step on the brakes and we stop voluntarily; our car breaks down or we get into an accident." *Athay v. Rich County, Utah*, 153 Idaho 815,291 P.3d 1014 (2012).

**(3) Risk:** Moving from intent to recklessness is a crossing into the realm of risk, recklessness and the terms "reckless disregard," "reckless, willful, and wanton," and "gross negligence" occupy an ill-defined borderland between intent ("desires") and negligence ("unreasonable").

For our purposes, it is sufficient to define "risk" as (i) the probability that something bad will occur and (ii) the magnitude of the badness. "Probability" is potentially misleading: a more accurate term is "uncertainty" because the probability (of the bad) is almost always unknown. Conduct is risky if it creates uncertainty that something may happen.

The word "risk" does not appear in *White v. University of Idaho*; it appears five times in *Athay*. Recall that the Restatement defines intent as "desiring," which is not risk. Negligence is unreasonable risk. The various borderland terms fall between the two: less than desire (perhaps) and more than unreasonable.

Are all of the terms effectively synonyms?

**(4) Criminal law and torts:** Intent, recklessness, and negligence also form a borderland between criminal law and torts.

Criminal law is an action by the state against an individual who violated a criminal statute. It is intended to vindicate the society's interest in maintaining the peace. Criminal law focuses on mens rea (the mental state required to commit a crime) and actual reus (the acts necessary to constitute the crime). A person convicted of a crime will be sentenced to jail and/or fined. The criminal may also be required to compensate her victim.

Torts, on the other hand, is intended to vindicate the rights of an injured individual by compensating the individual for her losses- personal injury, property damage, and economic losses.

Criminal law and torts share the terms intent, recklessness, and negligence. The operational definitions are likely to differ. Furthermore, where conduct falls on the border between knowledge and recklessness or recklessness and negligence, the criminal defendant is entitled to application of the law based on the principle that punitive laws ought to be applied so as to provide maximum protection for the accused. This is the "rule of lenity." Tort law has no similar principle to resolve border disputes.

We have already seen one example of this difference in the previous discussion of *Rajspic v. Nationwide Mutual Insurance Co*., 110 Idaho 729, 718 P.2d 1167 (1986). Recall that, although Rajspic was found not guilty on a criminal charge of assault with a deadly weapon because the jury concluded that she suffered from a mental disease or defect sufficient to preclude criminal responsibility. Brownson subsequently brought a civil tort action against Rajspic for battery. The jury returned a verdict in favor of Brownson for $14,000.00. On appeal, the Idaho Supreme Court held that an insane person is capable of committing an intentional tort. *Rajspic v. Nationwide MutuaL Insurance Co*., 104 Idaho 662, 664, 662 P.2d 534, 536 (1983).

**(5) Five evaluative terms:** To begin the classificatory ramble through the borderland between intent and negligence: *Athay I* introduces five different terms (in order of appearance): "due regard," "negligence," "reckless, willful, and wanton," "reckless disregard," and "gross negligence."

(a) Due regard: How does the court define "due regard" []? Does the court define a theory of recovery or a standard for evaluating the actor's conduct? Note that the court treats the term as descriptive: due regard in a negligence case is acting with due care, i.e., without negligence.

(b) Negligence: The court does not define "negligence," simply noting that it is not a synonym for "due regard."

(c) Reckless, willful, and wanton: One approach to "reckless, willful, and wanton" would be to define each of the terms separately. "Willful," for example, seems to be a synonym for "intentional"; "wanton" seems "heartless," perhaps "depraved."

In *Athay I* [], the district court relied on the definition of "reckless, willful, and wanton" in the ITCA:

> "Reckless, willful and wanton conduct" is present only when a person intentionally and knowingly does or fails to do an act creating unreasonable risk of harm to another, and which involves a high degree of probability that such harm will result.

I.C. § 904C (2). The supreme court reversed, since the ITCA specifically states that its definition of "reckless, willful and wanton conduct" is only applicable to the Act itself. The court thus did not define this phrase.

The IDJI include a definition of "willful and wanton":

> The words "willful and wanton" when used in these instructions and when applied to the allegations in this case, mean more than ordinary negligence. The words mean intentional or reckless actions, taken under circumstances where the actor knew or should have known that the actions not only created an unreasonable risk of harm to another, but involved a high degree of probability that such harm would actually result.

IDJI2.25.

(d) Reckless disregard: The Athay court [1'[17] adopts a definition from an earlier decision, *Hodge v. Borden*, 91 Idaho 125, 134,417 P.2d 75, 84 (1966) (adopting, in turn, *Williamson v. McKenna*, 223 Or. 366,354 P.2d 56,67 (1960)): "reckless disregard" is "the type of conduct engaged in by the driver when he actually perceives the danger and continues his course of conduct."

(e) Gross negligence: The court [1'[17] distinguishes "reckless disregard from gross negligence in that the latter would apply where the driver does not know of the high degree of manifest danger but should have known."

The Idaho Torts Claim Act- which was the statute that structured the legal issues in *White v. University of Idaho*- defines "gross negligence" as "the doing or failing to do an act which a reasonable person in a similar situation and of similar responsibility would, with a minimum of contemplation, be inescapably drawn to recognize his or her duty to do or not do such act and that failing that duty shows deliberate indifference to the harmful consequences to others." I.C. § 6-904C (1). This definition also does not apply beyond the ITCA.

(f) Synonyms? Are "recklessness," "reckless disregard," "reckless, willful, and wanton," and "gross negligence" synonyms? The drafters of the IDJI is thought that at least some of the terms were synonymous:

> There appears to be no distinction between "reckless" and "willful and wanton" or "willful or wanton." *Hunter v. Horton*, 80 Idaho 475, 479, 333 P.2d 459 (1958); *Johnson v. Sunshine Mining Co., Inc*., 106 Idaho 866,873, P.2d 268 (1984); *DeGraff v. Wight*, 130 Idaho 577, 944 P.2d 712 (1997).

IDJI2.25, comment.

The IDJI, however, includes a separate definition of "gross negligence":

> Gross negligence is distinguished as a matter of degree from ordinary negligence. Gross negligence involves carelessness that is so great that there was not just an absence of the ordinary care that should have been exercised, but a degree of negligence substantially greater than that which would constitute ordinary negligence.

IDJI 2.24*. See Peterson v. Parry*, 92 Idaho 647,448 P.2d 653 (1968); *Owen v. Taylor*, 62 Idaho 408, 114 P.2d 258 (1940).

(6) When *Athay* was decided, the Restatement (Second) of Torts defined "reckless disregard" as: The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

RESTATEMENT (SECOND) OF TORTS § 500 (1965).

Restatement {Third) has since replaced "reckless disregard" with "recklessness," which is defined as: engaging in conduct if:

(a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and

(b) the precaution that would eliminate or reduce the risk involves burdens that are

> so slight relative to the magnitude of the risk as to render the persons failure to adopt the precaution a demonstration of the person's indifference to the risk.

RESTATEMENT (THIRD) OF TORTS § 2 (2010).

What are the differences between the definitions in the second and third Restatement? Would the new definition change the result in *Athay*?

Does the legislature's definition of the phrase "reckless, willful and wanton conduct" in the emergency vehicle statute differ significantly from the Restatement Third's definition of "reckless"?

Do the definitions address both factors in our conceptual definition of "risk"?

**(7) Knowledge:** What must the actor "know" to be held liable for recklessness? What does the *Athay* court's distinction between "reckless" and "gross negligence" [11 17] tell us about the degree of knowledge needed in recklessness? Recall that the court distinguished "reckless disregard from gross negligence in that the latter would apply where the driver does not know of the high degree of manifest danger but should have known."

Note that in Restatement (Third) requires the plaintiff to prove that the actor either (a) knew the risk or (b) knew of facts that made the risk obvious to another person in the actor's position. The first of these is a "subjective" standard: the actor had to know of the risk. The second is more "objective": the actor had to know facts that to another person would make the risk obvious. Thus, the actor cannot escape liability if she knew the facts (that would make the risk obvious to another) but honestly did not know the risk.

*Restatement (Second)* had only a subjective knowledge requirement: plaintiff needed to prove that the actor either knew or "had reason to know of facts relating to the risk presented by the conduct." Thus, it is the actor's knowledge: to prevail in a reckless disregard claim under the Restatement (Second) standard, plaintiff was required to prove some subjective knowledge by the defendant.

How is the factfinder (either a jury or the court sitting without a jury) to know what the defendant knew at the time of the event?

**(8) Somewhere between?:** Recklessness is commonly understood as involving a greater degree of fault than negligence but a lesser degree of fault than intentional conduct. It is conduct where the actor does not act with the purpose of invading a legally protected interest or knowing that an invasion of such an interest is substantially certain (intent) but which is beyond what a reasonable person would do under the circumstances (negligence).

(a) Intentional and reckless: How does "reckless" differ from "intent" when "reckless" is defined to include "intentional"? The Idaho Court of Appeals discussed this issue in *Galloway v. Walker.* Plaintiff was injured during a softball game when a runner slid into her as she was covering second base. She argued that "the [trial] court's use of the word 'intentional' within the definition of 'reckless' [was] confusing and misled the jury." The court disagreed:

> In the definition of reckless, the term "intentionally" does not modify the entire description of conduct constituting recklessness but modifies only the phrase "fails to do an act." The use of "intentional" therefore does not affect that portion of the instruction defining a reckless act. The instruction's use of "intentional" did not change the standard to reckless and intentional; rather, it excluded an inadvertent or merely negligent omission from the category of recklessness.

*Galloway v. Walker*, 140 Idaho 672, 676, 99 P.3d 625, 629 (Ct. App. 2004). Is the court correct? What does the court's response suggest about how carefully legal documents must be read?

Does defining the phrase as acting "intentionally" mean that it is more or less than intent? That is, is it intent plus other requirements? What are those other requirements? Does this mean that a smaller set of conduct is "reckless" than "intentional"? Or, perhaps, the definition of "reckless" includes a looser or more colloquial definition of "intent" than that in the Restatement?

(b) Reckless and negligent: Negligence involves conduct that is unreasonable in the face of a foreseeable risk of harm. The supreme court recently distinguished negligent and reckless:

> Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency in that reckless misconduct requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent.

*Carrillo v. Boise Tire Co., Inc*., 152 Idaho 741, 751, 274 P.3d 1256, 1266 (2012) (quoting *State v. Papse*, 83 Idaho 358, 362-63, 362 P.2d 1083, 1086 (1961), quoting in turn RESTATEMENT {FIRST) OF TORTS § 500 cmt. g (1934)}.

(9) Are the facts as they are described by the courts in the cases more helpful than the definitions?

(10) Partial statutory immunities: In *Athay I*, the court writes, "If the driver is liable for negligence, then whether the driver's conduct also reached the level of reckless disregard would not matter." Thus, in enacting emergency vehicle statute the legislature created a partial immunity for the drivers of such vehicles: they could only be held liable for injuries to others when their conduct was more than negligence. The emergency vehicle statute is an example of the most common modern source of the "more-than-negligence-and-less-than intent" category-- most commonly, stated as some variation on "recklessness."

(a) Guest Statute: In *Smith v. Sharp*, 85 Idaho 17, 375 P.2d 184 (1962), discussed in *Athay*, the statute was the Guest Statute:

> No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, incase of accident, unless such accident shall have been intentional on the part of said owner or operator or caused by his intoxication or his reckless disregard of the rights of others.

I.C. § 49-1401 (repealed). The Guest Statute has been repealed. Section 49-1401 is now titled "Reckless Driving." The first section of the statute now reads:

> Any person who drives or is in actual physical control of any vehicle upon a highway, or upon public or private property open to public use, carelessly and heedlessly or without due caution and circumspection, and at a speed or in a manner as to endanger or be likely to endanger any person or property, or who passes when there is a line in his lane indicating a sight distance restriction, shall be guilty of reckless driving and upon conviction shall be punished as provided in subsection (2) of this section.

l.C. § 49-1401. Unlike the Guest Statute, the Reckless Driving statute imposes criminal liability and makes no mention of the effect of such driving on civil liability. Should a criminal statute such as the Reckless Driving Statute play a role in tort liability?

(b) Idaho Tort Claims Act: The ITCA applies to state agencies and entities such as counties and municipalities. The statute provides in part:

> A governmental entity and its employees while acting within the course and scope of their employment and without ... reckless, willful and wanton conduct as defined in section 6-904C, Idaho Code, shall not be liable for any claim which:

> 2. Arises out of injury to a person or property by a person under supervision, custody or care of a governmental entity or by or to a person who is on probation, or parole, or who is being supervised as part of a court-imposed drug court program, or any work release program, or by or to a person who is receiving services from a mental health center, hospital or similar facility.

I.C. § 6-904A. The phrase "reckless, willful and wanton" is defined as:

> 2. "Reckless, willful and wanton conduct" is present only when a person intentionally and knowingly does or fails to do an act creating unreasonable risk of harm to another, and which involves a high degree of probability that such harm will result.

l.C. § 6-904C. The supreme court has described these provisions: "The statute protects against ordinary negligence claims which would significantly impair effective governmental process yet allows fair compensation for egregious wrongs." *Harris v. State, Department of Health & Welfare*, 123 Idaho 295, 301, 847 P.2d 1156, 1162 (992). The "supervision" requirement is discussed in *Sherer v. Pocatello School District# 25*, 148 P.3d 1232, 143 Idaho 486 (2006); *Heiv. Holzer*, 139 P.3d 81,85-85,73 P.3d 94,97-98 (2003); *Coonse ex ref. Coonse v. Boise School District*, 132 Idaho 803, 805, 979 P.2d 1161, 1163 (1999); *Brooks v. Logan*, 130 Idaho 547, 944 p.2d 709 (1997); *Mickelson v. School District No. 25*, 127 Idaho 401, 901 P.2d 508 (1995).

(c) **Recreational Use Statute:** A landowner who opens her land to the public without charge for recreational use (as defined in the statute) is exempt from liability. The statute does not explicitly limit the immunity it establishes. In *Jacobsen v. City of Rathdrum*, 766 P.2d 736, 115 Idaho 266 (1988), the supreme court held that the statute "does not preclude liability of an owner for willful or wanton conduct that causes the injury of a person using the land for recreational purposes." *Id*. at 739, 115 Idaho at 269.

**(11)** The only relatively common situation in which willful and wanton is a common law-rather than a statutory- standard of care is when a trespasser is injured. The land occupier has a duty to trespassers to "refrain from willful or wanton acts which might cause injury." *Huyck v. Hecla Mining Co*., 101 Idaho 299, 301, 612 P.2d 142, 144 (1980).

In the IDJI restated the Huyck standard:

> The [owner] [occupant] owes no duty to a trespasser whose presence on the premises is unknown or could not reasonably have been anticipated. But, if the presence of the trespasser becomes known or reasonably could have been anticipated, the [owner] [occupant] has a duty not to injure the trespasser by any intentional or reckless act.

IDJI 3.19. The drafters commented, "'Reckless' appears to be the equivalent of 'willful and wanton,' and is more understandable."

> Is it more understandable?

**(12)** There are at least some grounds for concluding that recklessness as it is currently defined is ill suited to how people actually think and act. See Geoffrey Christopher Rapp, The Wreckage of Recklessness, 68 WASH. U.L. REV. 111, 120 (2008)

## [C] NEGLIGENCE

### STEVENS v. FLEMING

Supreme Court of Idaho
116 Idaho 523, 777 P.2d 1196 (1989)

HUNTLEY, J.:

On August 22, 1984, Walter Roberts, age 78, perished in a fire which destroyed a two-story building in downtown Buhl, Idaho owned by Tom and Gloria Fleming. The Flemings operated a bar, kitchen, restaurant, dance floor and card room downstairs and Roberts resided in an apartment upstairs. Following the fire, Roberts was found dead in a doorway leading from the apartment into the hallway. The autopsy and death certificates note that he died of smoke inhalation while attempting to escape. Fire fighters reached the upstairs but did not know the location of Roberts' apartment. Roberts was the only upstairs tenant. The firefighters had to retreat after searching three to four rooms because the heat became unbearable.

The trial court found that the cause of the fire was unknown. The fire started inside the building on the first floor in a back room and reached the second floor by burning through a plate on the bottom of a vertical shaft located in the service area for the bar and restaurant. The flame was fueled by materials located inside the vertical shaft, by materials located in the bathrooms and storage area located behind the restaurant on the first floor and by air drawn through the open stairway leading from the first to second floors and attic.

There were no fire exits from the second floor. Roberts' apartment was located at the end of the upstairs hallway, requiring him to walk approximately eighty feet to reach a stairway leading to a downstairs exit. There were no doors at the top or bottom of the stairs leading to the second floor. The Flemings purchased the building in 1979. During their five years of ownership prior to the fire, no smoke alarms, fire alarms, warning signs or fire exits were installed anywhere in the building. The subject of the safety of the building for its occupants was never discussed between the Flemings and Mr. Roberts. Prior to the fire, the Flemings undertook extensive remodeling of the downstairs portion of the building without installing fire resistant materials and without removing flammable materials. In the mid-seventies, fire destroyed a business located on the first floor of the building. Although the Flemings were not yet owners at that time, they were aware of this fire.

A wrongful death complaint was filed by Mr. Roberts' daughters, his sole surviving heirs, against the Flemings....

[the district court granted Flemings' motion for summary judgment.]

**II.**

Appellants argue that the trial court erred in granting summary judgment to Flemings on their claim of common law negligence. Motions for summary judgment are only to be granted when, after a review of the pleadings, depositions, admissions and affidavits, there remain no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. [] In determining whether any issues of material fact exist the trial court and this Court, upon review, must liberally construe all of the facts contained in the pleadings, affidavits and admissions in the light most favorable to the nonmoving party. [] ....

.... Analysis of any claim of negligence begins by identification and definition of a duty owed by defendant to plaintiff. A landlord is required to exercise reasonable care to his tenants in light of all the

circumstances. *Stephens v. Stearns,* 106 Idaho 249, 678 P.2d 41 (1984). In adopting the reasonable care standard for landlords in *Stearns*, supra, the Idaho Supreme Court noted by way of footnote that its holding was supported by a statutory version of the implied warranty of habitability, I.C. § 6-320. When applicable, specific statutory provisions such as the Uniform Fire Code may prove useful in delineating minimum standards which are binding upon every owner of a rented premises. Such on-point code provisions provide a ready measure of the base standard of care and failure to meet such standard may be negligence per se if the statutes or ordinances were designed to prevent the type of harm which occurred.

In the present case, the provisions of the Uniform Fire Code were not operative as to the Flemings premises. The construction of their building predated the enactment of the code. The Uniform Fire Code applies to premises constructed before its effective date only under certain enumerated circumstances, such as where a fire marshal inspects a structure and gives notice to the landowner of specific hazards. None of those circumstances was present here. The inapplicability of the Uniform Code was incorrectly imbued with inordinate significance by the trial judge. Upon concluding that the Uniform Fire Code was inapplicable, the trial court should have considered facts and inferences sufficient to give rise to a question of the Flemings' having breached a duty of reasonable care which they owed to Roberts under common law, without regard to specific legislative or municipal pronouncements. Instead, the trial court seems to have made a direct leap from its finding that the Uniform Fire Code did not apply to its conclusion that the Flemings were, as a matter of law, immune from a claim of negligence. This analysis is contrary to established principles of jurisprudence in tort; it also violates the policy underlying building code legislation.

The Uniform Fire Code is designed to improve building safety. Allowing the inapplicability of the Code to equate to an immunity from tort claims would result in the elimination of many sanctions capable of motivating the exercise of due care by landowners in maintenance of their properties. An illustrative scenario was the trial court's decision to stand, would be the preclusion of legal redress against the owner of a tavern who leases upstairs rooms to a boarder and idly watches as flames in the tavern fireplace lick the ceiling before bringing about the death of the upstairs boarder. So long as no "expert" came onto the scene and injected her professional opinion that the flames created a specific danger, the tavern owner would not be liable under the trial court's concept of due care.

The common law has developed a doctrine of reasonable care under individual circumstances which is, in part, designed to avoid such self-serving attempts at avoiding responsibility for one's acts and/or omissions. Juries focus on what the reasonable person of average skill, ability and intelligence would do in the particular situation examined. Individual inexperience is not a legitimate reason for a lower standard of conduct. Status as an expert will heighten expectations regarding the level of care. The burden is lodged squarely on the individual defendant to weigh the burdens associated with undertaking a particular precaution against the probability of loss occasioned by a dangerous condition multiplied by the gravity of that loss. *United States v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947). It is the responsibility of the jury to evaluate the defendant's resolution of this equation in order to determine the presence or absence of negligence.

In contrast to the well-established doctrine of individual responsibility discussed above, the trial court applied a novel approach to the standard of conduct which seems to consist of the notion that a landowner never acts negligently unless she first becomes privy to expert visitation and opinion and then renounces it acting in defiance to the guidance fortuitously rendered. The trial court stated as follows:

> However, Flemings were not required to comply with the fire code, and not being fire experts themselves, could only rely on the recommendations, or lack of recommendations, made by the fire chief or other qualified individuals.

For the reasons recited above, we hold that this is an inaccurate statement of the law of negligence, specifically as to the duty to exercise reasonable care.

Appellants proffered evidence which raises genuine issues as to the material fact of Flemings' failure to exercise due care. The trial court disregarded the affidavit of Don Howard, an expert in fire reconstruction, who investigated this fire on behalf of appellants. The trial court decided that "there is nothing in the affidavit which is relevant to determining whether the Flemings were negligent." This conclusion was premised on the trial court's belief that Howard "presuppose[d] that the building was covered by the Uniform Fire Code, which it was not." This Court does not agree that Howard's affidavit would only be relevant to the negligence claim were the building covered by the Code. As the review of Howard's findings which is provided below will indicate, his statements constitute sufficient evidence in the record to give rise to genuine questions of adequate care which a jury could ultimately resolve by finding the Flemings negligent. Howard concluded that the rapid spread of fire from the first to second floor was caused by:

1. Failure of Flemings to install fire resistant wall and ceiling coverings, fire doors and/or self-closing doors when remodeling the cafe and bar and failure to remove flammable materials contained in the basement and accumulated in the vertical shaft of the building;
2. The failure of Flemings to separate the bar and restaurant, after remodeling, from the upstairs apartment and their failure to install sealed transoms and afire door leading from the first to second floor, all of which would have prevented the escape of heat, gases and flame from the first floor up the stairway and through the upstairs hallway, blocking Mr. Roberts' only avenue of escape;
3. Failure of Flemings to install smoke detectors or a smoke alarm which would probably have allowed Mr. Roberts to awake with sufficient time to escape down the hallway and out of the building notwithstanding the rapid spread of fire;
4. Failure of Flemings to install an upstairs fire escape.

Because we find that a review of the record raises genuine issues of material fact regarding whether the Flemings acted negligently in their capacity as decedent's landlords, we conclude that the trial court erred in granting the Flemings' motion for summary judgment. [] Accordingly, grant of summary judgment on the claim of negligence against the Flemings is reversed and the case is remanded for further appropriate disposition of that cause of action.

JOHNSON, BISTLINE JJ., concur.

BAKES, C.J., concurs in the result.

SHEPARD, J., sat but did not participate due to his untimely death.

NOTES

**(1) Duty:** Note the steps in the court's analysis: it begins with the "identification and definition of a duty owed by defendant to plaintiff." The court then notes that the decision in *Stephens v. Stearns* held that a landlord owes a duty to the tenant that was defined as requiring the landlord "to exercise reasonable care ... in light of all the circumstances." The question then becomes whether the defendant breached the duty by failing to exercise reasonable care.

**(2) Breach of duty:** In negligence, the basic standard of care is "reasonable care ... in light of all the circumstances." In paragraph 10, the court offers three perspectives on how this standard is to be applied.

(a) the "reasonable person": The court notes, "Juries focus on what the reasonable person of average skill, ability and intelligence would do in the particular situation examined." Juries do this because the trial court will in most negligence cases tell them to do so by instructing them,

> When I use the word "negligence" in these instructions, I mean the failure to use ordinary care in the management of one's property or person. The words "ordinary care" mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. Negligence may thus consist of the failure to do something which a reasonably careful person would do, or the doing of something a reasonably careful person would not do, under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

IDJI2.20.

(b) balancing risk and benefits: The court writes, "The burden [to act with reasonable care] is lodged squarely on the individual defendant to weigh the burdens associated with undertaking a particular caution against the probability of loss occasioned by a dangerous condition multiplied by the gravity of that loss. [] It is the responsibility of the jury to evaluate the defendant's resolution of this equation in order to determine the presence or absence of negligence."

(c) a policy rationale: Finally, the court states that the standard "is, in part, designed to avoid ... self-serving attempts to avoid responsibility for one's acts-and/or omissions." It does so by objectifying the standard: how would a reasonable person have acted under these circumstances.

**(3) Proof of breach:** How is the jury to decide what a reasonable person would have done under the circumstances? In many situations, the jury will have sufficient experience with the activity that they will understood how a person should act. When roads are icy, for example, driving the speed limit may not be reasonably careful.

In situations in which the jury lacks sufficient knowledge, the parties must educate its members. This is commonly done through expert testimony. Here, plaintiffs had an expert in fire reconstruction who was prepared to testify that the rapid spread of the fire was caused by a number of the defendant's "failures."

In addition, although the Uniform Fire Code was not applicable to the Fleming's building because it was constructed before the Code was adopted, the Code may nonetheless play a role in assisting the jury in determining what is reasonable conduct.

**(4) Balancing risks and benefits:** The court in Stevens expressly adopts the understanding of negligence as a balancing of risks and benefits of the defendant's conduct. This is a simple idea: conduct is negligent if the risk of the conduct outweighs its benefits.

(a) risks: As noted above, "risk" has two components: likelihood (uncertainty or probability) and badness. In torts, both involve the idea of "foreseeability." The focus is on the foreseeable likelihood that something bad will occur and the foreseeable magnitude of the bad if it does.

(b) benefits: These are the burden of preventing the foreseeable risk that are avoided. Driving more slowly, for example, delays arrival which can be avoided: is the benefit of arriving earlier greater than the foreseeable risk of an accident?

The obvious implication of a balancing is that a small probability of a significant bad will make the actor negligent if the burden of precautions is small. Similarly, the actor can be negligent if there is a substantial probability of a small bad and the burden of precautions is small. Thus, the burden of precaution is an important consideration.

In a case decided the year after Stevens, the supreme court offered this explanation of the role of foreseeability:

> Foreseeability is a flexible concept which varies with the circumstances of each case. Where the degree of result or harm is great, but preventing it is not difficult, a relatively low degree of foreseeability is required. Conversely, where the threatened injury is minor but the burden of preventing such injury is high, a higher degree of foreseeability may be required. Thus,

> foreseeability is not to be measured by just what is more probable than not, but also includes whatever result is likely enough in the setting of modem life that a reasonable prudent person would take such into account in guiding reasonable conduct.

*Sharp v. WH. Moore Inc*., 118 Idaho 297, 796 P.2d 506 (1990).

**(5) Acts (misfeasance I nonfeasance):** As a general matter, negligence is predicated upon acts. If the defendant did not act, she generally will not be liable. The distinction between acts that lead to liability and non-actions is often more complex than the simple verbal distinction between misfeasance and nonfeasance.

Negligent conduct can be an act - such as making an unsafe tum - or a course of conduct- such as driving at an unreasonable speed. It also is often a failure to take reasonable precautions- failing to stop at a stop sign. This could be described as not applying the brakes, as an omission or nonfeasance. As Restatement (Third) notes, it is preferable to describe the conduct as an unreasonable act of driving because is a risky activity that requires drivers to brake when appropriate. Often, as we saw in *Hammontree*, it depends upon where one begins the analysis.

In *Stevens*, the court noted negligence is about "responsibility for one's acts and/or omissions."Since the Flemings had remodeled the first floor, their conduct might be described as an omission: they did not include fire protection features in the remodeling. Alternatively, it could be described as misfeasance because an older building housing both a bar and a restaurant on the first floor and residential apartments on the second floor involves foreseeable risks.

**(6)** The *Restatement* Third defines "negligence" as

> A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.

RESTATEMENT {THIRD)OF TORTS § 3 (2010).

In the comments to the section, the drafters noted that there are a variety of synonyms for conduct that is an exercise of reasonable care, including conduct that is reasonable, that shows ordinary care or prudence, or that does not create an unreasonable risk of harm. The standard can also be stated in terms of the "reasonable person" or a "reasonably prudent person."

The Idaho Supreme Court spoke of the "reasonable care standard" and noted that "juries focus on what the reasonable person ... would do." [IDJI].

# [D] VICARIOUS LIABILITY

## VanVRANKEN v. FENCE-CRAFT

Supreme Court of Idaho
91 Idaho 742,430 P.2d 488 (1967)

McFADDEN, J.- This action was instituted by Willie E. VanVranken, appellant, for damages for the death of his fifteen-year-old daughter, and for personal injuries and property damage sustained by him as a result of an automobile accident which occurred October 31,1963, on U.S. Highway No. 95, near the easterly city limits of Lewiston, Idaho. The accident occurred when appellants 1950 Ford automobile, driven by him and in which appellant, his ten-year-old son and fifteen-year-old daughter, deceased, were riding, struck the automobile owned and operated by defendant Myrl Bray.

In his amended complaint, appellant alleged that at the time of the accident, Bray was operating his vehicle for and on behalf of respondent Fence-Craft, a California corporation engaged in Idaho in the buying of wood products for the making of fences. The amended complaint in substance alleged that Bray was the agent, servant, and employee of Fence-Craft and was operating his car within the scope of his employment by Fence-Craft at the time of the accident.

The cause was tried to the jury on issues framed by a pre-trial order. At the close of appellant's case, respondent Fence-Craft moved for an involuntary dismissal ...on the grounds:

*** that the evidence taken as a whole and every reasonable inference that could be drawn therefrom by reasonable men does not support*** the allegation of the complaint that defendant Bray was in fact an agent, servant, or employee of the defendant Fence-Craft, nor is there any evidence which can support the finding by reasonable men that defendant Bray was at the time of the accident within the scope of or course of any relationship of agency or master and servant at the time of the collision in question. The trial court granted this motion and dismissed the case as to respondent Fence-Craft. Following dismissal of Fence-Craft, Bray presented his evidence, and the case was submitted to a jury which returned a verdict in favor of appellant in the sum of $10,000; judgment accordingly ˙ was entered against Bray, from which judgment no appeal has been taken. Although Bray has been denominated in the title as a respondent, in fact, he is not involved in any of the issues presented here. This appeal was taken only from the order and judgment of dismissal of the case as to respondent Fence-Craft.

Respondent Fence-Craft contends that the action of the trial court in granting the motion to dismiss as to it was correct on two grounds: first, the record fails to disclose any evidence of agency, master-servant, or employer-employee relationship between Bray and Fence-Craft that would authorize the application of the doctrine of respondeat superior, and further at the time of the accident, even if it be found such relationship did exist, the record affirmatively shows Bray, at the time of the accident, was acting outside the scope of employment; ....

Two essential elements to be proven by a plaintiff in a negligence action for damages allegedly caused by a defendant's alleged servant in the negligent operation of an automobile owned by the servant are: (1) that in fact a master-servant relationship existed and (2) that the agent was acting within the scope of his employment or in furtherance of the defendants' business at the time of damage or injury. *Hayward v. Yost*, 72 Idaho 415, 242 P.2d 971 (1952). In order to adduce evidence bearing of these issues, appellant called Myrl Bray, Fence-Craft's purported agent, for cross examination ....Bray testified extensively to the character of his relation with the respondent Fence-Craft and the purposes of his trip to Lewiston. The following facts appear from his testimony both on cross examination under the rule and on the subsequent redirect examination.

Prior to 1962, Bray had been independently engaged in buying fence posts and selling them at a profit to Penta Post, an Idaho treating plant, and, later, to Fence-Craft, respondent herein. In 1962 or 1963, the nature of Bray's relationship with Fence-Craft changed and, after some negotiation, he became manager of a new picket mill built by Fence-Craft just west of Weippe, Idaho. Bray participated in the construction of the new mill, and during the period of construction, he was paid on an hourly basis. Since then, he and the employees of the mill under his supervision have been paid on a "piece-work" basis, i.e., in terms of the production of the mill. Bray and all of the other employees of the mill, numbering about six, are paid through the Fence-Craft payroll offices in California.

Mr. Bray's duties as mill manager included supervision of the mill's employees, over whom he was given the authority of hiring and firing, buying timber in the field, seeing that it was processed and shipped, and getting "any parts or repairs or anything." The Fence-Craft mill owned no vehicles other than a lift truck and, consequently, Bray used his own auto (the 1950 Buick involved in the accident) "for my own use and for company use." Bray continued to buy posts for Penta Post, and in so doing, was able to secure a supply of material necessary for the Fence-Craft operation, but unusable by Penta Post. He testified affirmatively he did not use this car for the business purposes of anyone other than himself or Fence-Craft; and, in fact, the car was indispensable to his operation of the mill for Fence-Craft.

On behalf of Fence-Craft, he had occasion to use his car "everyday" to drive out to buy timber or "to go to get parts and repairs for anything we needed." He had been authorized by his superiors to get whatever parts were necessary to keep the mill running, at the expense of the company. Bray regularly drove to Lewiston to get parts, "once a week or every two weeks" from the time of the start of the mill operations in the spring of 1963.

Mr. Speers, Bray's immediate superior at Fence-Craft, knew of this use of the car for company business, and knew that Bray had to regularly drive to Lewiston for some of the parts needed. On October 31, 1963, the date of the accident, Bray gave two reasons for his trip to Lewiston. His wife had an appointment with a Lewiston dentist for an extraction of some teeth, and he had to purchase or order "belts and teeth for the saw, edger" for use at the Fence-Craft mill. Bray had a charge account for and on behalf of Fence-Craft at Erb's Hardware in Lewiston, and purchases had previously been made by him and his wife (who was also employed by Fence-Craft) at Jameson's and the Golden Ranch store by Fence-Craft check, the Brays having also been authorized to sign checks for Fence-Craft.

On their arrival in Lewiston about 10:00 o'clock a.m., Bray and his wife "went to Erb's Hardware and Jameson's and then we went up to the doctor's [dentist's] office." Bray waited for his wife at the dentist's office, and following the extraction of her teeth, he drove her to the house of friends- the Roberts - in North Lewiston where, according to their plans, she was to spend the night; he, to return to the mill at Weippe.

Bray testified it was his intention to stop at the Golden Ranch store before returning to Weippe "to get some sprockets" for use at the Fence-Craft mill, and that his wife, who was suffering from the extractions, had the dentist prescribe pain killing medication, which prescription was at the Owl Drug store. Just before 5:00 p. m., Bray drove to downtown Lewiston, parked his car, walked to the Owl Drug store where he picked up his wife's prescription, and then walked over to the Golden Ranch, where he remained just long enough to determine that the "sprockets" he was seeking were not in stock, and then he returned to his vehicle.

Bray then drove out U.S. Highway 95, which was the direct return route to Weippe, until he reached the 3ist Street intersection. He made a left tum into the median of the divided highway, came to a stop, and was crossing the west bound lane on U.S. Highway 95 when his car was struck by the Van Vranken car. Bray testified it was his intention to drop the prescription off for his wife at the Roberts' home, located a few blocks north of the main highway (U.S. 95) on 31st Street, and continue on to Weippe with the "belts" for the saw at the Fence-Craft mill, which he had purchased at Jameson's earlier in the day. These belts were found in the trunk of his car immediately after the accident. Bray testified the "teeth" were ordered also at Jameson's, to be sent to Weippe later. Introduced in evidence ... were two

checks drawn on the Fence-Craft account, payable to "Jameson's" and signed by Mrs. Myrl Bray, which checks were in payment of the belts and teeth.

Respondent relies heavily on the case of *Hayward v. Yost*, 72 Idaho 415, 242 P.2d 971 (1952), in support of his position that, as a matter of law, any purported agency established by the appellant here is of the non-servant or "independent contractor" variety. In that case, a judgment rendered on a jury verdict was reversed in part because the evidence there adduced would not support the existence of a master-servant or employer-employee relationship. The evidence of the character of the agency relation and the scope of authority in *Hayward v. Yost* is not commensurate to the relation testified to by the defendant Bray as existing in the circumstances of the case at bar.

In *Hayward v. Yost* the purported agent, a cattle buyer, did not testify as to the character of any relationship he had with the defendant Livestock Commission. Extraneous evidence revealed only that some of his buyer's checks cleared through the Commission's account, which process was explained, by the manager of the Commission as indicative of a debtor-creditor relation with buyers who sold through the Commission's cattle ring, with each buyer guaranteeing his own account. No competent evidence at all appeared to the effect that the buyer ("agent') was acting for or on behalf of the Commission at the time of the accident there in question.

In the ultimate determination of whether one, alleged to have been operating within the scope of his employment when and where he committed a tort, was then and there functioning as a servant and not as an "independent contractor," an important guidepost is this the right to control reserved by the employer over the functions and duties of the agent. []

Since the principal concern is with the "right to control" the activities of the agent reserved by the employer and not with the extent of control actually exercised, except insofar as actual control may evidence the right, *Burlingham v. Gray*, 137 P.2d 9 (Cal. 1943), the fact that the agent may be imbued with some discretion in the performance of his duties is not determinative of his status for purposes of the imposition of liability for his negligence against his principal. Unless the evidence bearing on the question is susceptible of only one inference, the question is peculiarly one for the jury. []

In a jury case, a motion for involuntary dismissal made at the close of the proponent's case is indistinguishable in operation and effect from a motion for a directed verdict. [] .... For the purpose of a motion for directed verdict (motion for dismissal) the movant admits the truth of the adversary's evidence and every reasonable inference of fact which may be legitimately drawn therefrom, [], or as is sometimes stated, on a motion for directed verdict the evidence and all reasonable inferences to be drawn therefrom must be considered in the light most favorable to the opponent. []

When viewed in the light most favorable to appellant, the testimony of the agent Myrl Bray to the effect that he was continuously employed as the manager of the Fence-Craft mill, his enumeration of his regular duties incident to his functioning as a manager, which duties specifically included an obligation to procure all necessary parts, and his further testimony and the evidence reflecting that the use of his own vehicle was necessary to the discharge of his duties, that he was regularly required to drive to the city of Lewiston to get parts, and that his Fence-Craft superior knew of these Lewiston trips and their necessity, provides an ample foundation from which reasonable men might infer that he was in fact a servant of Fence-Craft authorized to operate his vehicle on behalf of his employer in the area where the accident occurred. []

Respondent next argues that liability should not be asserted against a master where some business purpose of the master is to be accomplished merely as an incidental to the primary personal purpose of the venture or mission, []. While we are cognizant of this general principle, we are also aware that an act may be within the scope of employment although done in part to serve the personal purposes of the servant. []

In *Baldwin v. Singer Sewing Machine Co.*, 49 Idaho 231, 287 P. 944 (1930), this Court reversed a judgment entered on a jury verdict against the master. There, the employee, a salesman, had gone to

Nampa on business, as he testified, "for the company and himself." However, unlike the instant case, the salesman terminated his dual-purpose venture when he returned to Boise, parked his car, spent some time at the company's office, and has his supper. The accident occurred thereafter when he returned to his car and had started on the way to his residence. Of those circumstances, this Court reasoned: After reaching Boise, had he continued homeward, it might be said that he was concluding a trip made in his employer's business, but he terminated his trip at his own option when he went to the company's office. *Id*. at 238, 287 P. at 946.

In the instant case, the agent Bray testified to a joint purpose for his trip to Lewiston and, similarly, to a joint immediate purpose for his return to downtown Lewiston after leaving his wife at the Roberts' home. In view of apparent mutual advantage, whether he was acting principally in furtherance of his employer's business at the time and place of his collision with appellant's car was, on this point, for the determination of the trier of fact, the jury.

Lastly, respondent contends that the trial court could nevertheless property determine as a matter of law that, in turning left onto 3ist Street for the sole immediate purpose of dropping off the prescription for his wife at the Roberts' home, Bray thereby deviated from the direct return route to the Fence-Craft mill at Weippe and, hence, from any purpose to benefit his employer. However, the better reasoned authorities dealing with deviations by an employee from the geodesic route have generally recognized that a proportionately slight or expectable deviation will not relieve an employer of vicarious liability, and except where the deviation is gross, the jury should determine the scope of employment question as one of fact. []

Upon the foregoing, we are of the opinion that the evidence was sufficient to establish a prima facie case for appellant on the issues presented; and thus, the order and judgment of dismissal must be reversed, and the cause remanded for new trial.

SMITH AND McQuADE, JJ., CONCUR.

SPEAR, J. AND DONALDSON, D.J., dissent.

NOTES

**(1)** What is the basis for liability? How does the quality of the Fence-Craft's conduct differ from that of the defendants in *White* and *Stevens*? Is this strict, i.e., faultless, liability? Was Fence-Craft negligent in employing or supervising *Bray*? Is the liability of the employer based upon negligence -albeit not its own negligence? Does the law simply increase the number of individuals who are held legally responsible for the negligence of an individual?

**(2)** **Agency:** "Vicarious liability" is the general term applied to those situations in which one entity or individual is legally liable for injuries resulting from the tortious conduct of another person. The principle case is an example of the most common situation, the doctrine of respondeat superior- "let the master answer." As the case demonstrates, the doctrine is applicable to employment relationships; under it, the employer is responsible for most torts committed by most but not all employees. As a general rule, an employer is not legally responsible for the torts of independent contractors. These terms are defined in Restatement (Second) of Agency (1958):

**§2. Master; Servant; Independent Contractor**

(1) A master is a principal who employs an agent to perform service in his affairs and who conduct of the other in the performance of the service.
(2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.
(3) An independent contractor is a person who contracts with another to do something

for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking.

**Comment:**

A. Servants and Non-servant Agents. A master is a species of principal, and a servant is a species of agent. The words "master" and "servant" are herein used to indicate the relation from which arises both the liability of an employer for the physical harm caused to third persons by the tort of an employee and the special duties and immunities of an employer to the employee. Although for brevity the definitions in this Section refer only to the control or right to control the physical conduct of the servant, there are many factors which are considered by the courts in defining the relation. These factors are stated in Section 220....

**§219 When Master is Liable for Torts of His Servants**

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or
(b) the master was negligent or reckless, or
(c) the conduct violated a non-delegable duty of the master, or
(d) the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

**§ 220 Definition of Servant**

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part or the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

(3) Independent contractors: Generally, respondeat superior is not applicable when the employee is an independent contractor rather than a servant. What are the justifications for this no-liability rule? Why should one group of employees be treated differently?

The general, no-liability rule for the torts of an independent contractor has a number of exceptions. A significant exception is the "non-delegable duty." The Restatement (Second) of Agency rather unhelpfully defines "non-delegable duty" in § 214: "[a] master ...who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by failure of such agent to perform the duty." Restatement (Second) of Torts§§ 416-429 provides additional analysis. Non-delegable duties frequently arise in the context of land occupier/land entrant relationships, statutory obligations, and ultrahazardous or inherently dangerous activities.

(4) Why should a master be held vicariously liable for the torts of her servant? Does such liability create an incentive for masters to exercise care in selecting and supervising employees? Does the fact that the employer allowed/required the employee to use a dangerous instrumentality in the context of the employment relationship provide a rationale? If both the victim and the employer are innocent, why should the law impose liability on the one rather than leaving the loss where it lies (to the extent that the employee is judgment proof)? Is such liability predicated upon the general fact that masters have more money than servants and an injured person thus is more likely to recover for his losses if the master is held vicariously liable? Is this compensatory goal a sufficient basis for assigning liability? Is vicarious liability simply a means of allocating to businesses the costs of the accidents caused by those businesses? Which of these rationales are sufficient to justify the imposition of liability on an innocent party? Consider the following statement by the United States Supreme Court:

> To this day, there is disagreement about the basis for imposing liability on an employer for the torts of an employee when the sole nexus between employer and the tort is the fact of the employer-employee relationship. [] Nevertheless, two justifications tend to stand out. First is the common-sense notion that no matter how blameless an employer appears to be in an individual case, accidents might nonetheless be reduced if employers had to bear the costs of accidents. [] Second is the argument that the cost of accidents should be spread to the community as a whole on an insurance theory.

*Monnell v. Department of Social Services*, 436 U.S.658 (1978).

**(5)** ***Eldridge v. Black Canyon Irrigation District*****:** Does the doctrine apply to tortious conduct other than negligence? For example, should a master be held liable for the intentional torts of its servant?

In *Eldridge*, the court was presented with the whether the employer was liable for the conduct of its employee. Jordan was the district's superintendent and it was his responsibility to keep its canal operational. Plaintiff was an employee of an irrigated farm that bordered the canal. Because of the geology of the location, there was a tendency for the canal to become blocked by landslides from the farm. While checking the canal, Jordan called plaintiff to the canal bank to ask him to correct a potential problem. As the court noted, "during the conference, and as a result of it, Jordan "assaulted, struck and beat" plaintiff.

> The court upheld the jury verdict against the irrigation district, noting:
> [I]t is in general sufficient to make the master responsible that he gave to the servant an authority, or made it his duty to act in respect to the business in which he was engaged, when the wrong was committed, and that the act complained of was done in the course of his employment. The master, in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business, or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another.

The court concluded that it "was a question for the jury to decide whether he acted within the scope of his employment in committing the assault, or stepped aside from his line of duty and committed it pursuant to some purpose of his own and independent of his employment." *Eldridge v. Black Canyon Irrigation District,* 55 Idaho 443,43 P.2d 1052 (1935).

(6) Respondeat superior is only the most common form of vicarious liability.

## [E] STRICT LIABILITY

At your request I accompany you when you are about your own affairs; my enemies fall upon and kill me, you must pay for my death.

Leges Henrici 88, § 9 (c. 1155)

You take me to see a wild beast show or that interesting spectacle, a mad man; beast or mad man kills me; you must pay. You hang up your sword; someone else knocks it down so that it cuts me; you must pay. In none of these cases can you honestly swear that you did nothing that helped to bring about death or wound.

LegesHenrici 90, § 11 (c.1155)

**Kunz v. Utah Power & Light Co.**

Supreme Court of Idaho
117 Idaho 901, 792 P.2d 926 (1990)

BAKES, C.J.- [The court was presented with three certified questions from the Ninth Circuit Court of Appeals:

[(1) Under Idaho law, may one be held liable without proof of fault for damages caused by the intentional discharge of water?
[(2) Under Idaho law, may one be held liable pursuant to a direct trespass theory for damages caused by the intentional discharge of water?
[(3) Under Idaho law, may one be held liable pursuant to a private nuisance theory for damages caused by the intentional, but non-negligent, discharge of water?

In its order certifying the questions, the Ninth Circuit provided a factual summary:]

Bear Lake lies on the border between Idaho and Utah. Bear River begins high in the Uinta Mountains of Utah, meanders back and forth between Utah and Wyoming, flows north some distance into Idaho, and finally tums back south into Utah, where it terminates in the great Salt Lake. Bear River does not naturally enter Bear Lake; instead it flows past it a few miles to the north. In about 1917, however, the predecessor of Utah Power constructed Stewart Damon the river, diverting the river's flow southward via canals into Mud Lake, which connects with Bear Lake. Bear Lake is thereby utilized as a reservoir. After the water reaches Bear Lake, it flows northward out of the lake, by gravity or through pumping, via an outlet canal to rejoin the old natural bed of Bear River some distance north of Stewart Dam. Between certain maximum and minimum limits (the height of the release gates and the depth of the pumping intake facilities), Utah Power can control the flow out of Bear Lake, and it can close the lake so that the flow continues directly down the river. The use of Bear Lake for water storage is the central feature of the whole system. The dam, canals, and control facilities are located within Idaho.

Utah Power operates the system under the authority of various federal statutes, a court decree, and the Bear River Commission (established by the Bear River Compact, a joint effort of Idaho, Utah, and Wyoming). The explicit purposes for which Utah Power is commissioned to operate the system are (1) to store water for irrigation throughout the valley in Idaho and Utah below the Bear Lake facilities and (2) to generate hydroelectric power. In addition, as *Kunz I [Kunz v. Utah Power & Light Co*., 526 F.2d 500 (9th Cir. 1975), reprinted at Supplement] conclusively established, Utah Power is required to use the facilities for flood control, particularly as to the spring runoffs of the watershed. Flood control is not one of the specified purposes imposed by the authorizations but is imposed by common-law negligence principles. *See generally Kunz*, 526 F.2d at 502-04. Additionally, the Bear River Compact establishes a minimum irrigation reserve level requirement. Under the dictates of the compact, Bear Lake must be maintained at an elevation of 5914.61 [ft.].

Utah Power regulates the storage capacity of Bear Lake by adjusting the lake's elevation. The key period is spring because during that period the runoffs cause a substantial rise in the lake's elevation. The full capacity level of the lake is 5923.65 [ft.]. In regulating the lake elevation Utah Power balances the competing factors, including, irrigation, flood control, fish and wildlife, recreation, and power generation.

Landowners are numerous farmers who own or lease riparian lands, and a private irrigation company, located along the Bear River below Bear lake. Prior to 1917 much of these lands were devoted to orchard grasses and wild hays, which were dependent upon flooding from natural spring runoffs to maintain their growth. The installation of the water storage system in 1917harnessed the spring runoffs and stopped the flooding, so the ranchers converted their operations to alfalfa and cereal crops, which will not tolerate floods.

During the period between 1983-1986, the spring runoffs were unusually heavy. During this period, landowners' lands were flooded by stored and naturally flowing waters which were respectively discharged and "bypassed" by Utah Power from Bear lake into the natural channel of Bear River in amounts exceeding the carrying capacity of the natural channel.

[The Ninth Circuit certified the questions after it concluded that there were two distinct lines of Idaho cases that applied different liability standards in cases involving flood damage. The federal court described one line of cases as] requiring a showing of negligence to hold a party liable for damages resulting from the escape, seepage, or percolation of water carried in an artificial channel, such as an irrigation canal or ditch." [In these cases, non-negligence based theories of liability, such as strict liability, trespass, or private nuisance, are not recognized. *See e.g., Stephenson v. Pioneer Irrigation District*, 49 Idaho 189,288 P.421 (1930); *Burt v. Farmer's Co-operative Irrigation Company, Ud*., 30 Idaho 752, 168 P. 1078 (1917). The court of appeals described the other line of cases that involve situations where] a natural channel is altered or obstructed through the placement of barriers which diminish the ability of the channel to carry its natural volume thereby causing flood damage to another riparian landowner. Under these factual circumstances, the injured riparian landowner may not be limited to a 'negligence only' cause of action. [*See e.g., Campion v. Simpson*, 104 Idaho 413, 659 P.2d 766 (1983); *Milbert v. Carl Carbon, Inc.,* 89 Idaho 471,406 P.2d 113 (1965); *Boise Development Company, Ud. v. Boise City*, 30 Idaho 675, 167 P. 1032 (1917); *Fischer v. Davis*, 19 9 Idaho 493, 116 P. 412 (1911).]

[The Idaho Supreme Court decided that its] task essentially is to determine which line of cases more closely applies to the factual circumstances presented here, which involve an artificial water diversion and storage system (Bear lake) which is subsequently discharged into a natural channel (Bear River) and thereafter causes flooding. [The court concluded that] "the Stephenson and Burt line of cases applies to the facts of this case, and that negligence is the only basis for imposing liability on Utah Power. [The court offered the following explanation:]

The starting point in our analysis of which line of cases applies to the present case is to explain why a distinction exists between them. For instance, why does Idaho case law limit the theories of liability which can be brought against an irrigation system operator whose canal floods over its banks when other cases arguably place no such limitations on the theories of liability which can be brought against

someone who erects a breakwater into the natural channel that causes damage to the property owner on the opposite bank of the stream? The answer to this legal question is based almost entirely on the unique circumstances of Idaho's geography and economy. "The water of this arid state is an important resource. Not only farmers, but industry and residential users depend upon it." *Miles v. Idaho Power Company*, 116 Idaho 635, 645-646, 778 P.2d 757, 767-768 (1989). Because Idaho receives little annual precipitation, Idahoans must make the most efficient use of this limited resource. "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources. *Stickney v. Hanrahan*, 7 Idaho 424, 63 P. 189 [(1900)]; *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752 [(1907)]; *Farmers' Co-operative Ditch Co. v. Riverside lrr. Dist*., 16 Idaho 525, 102 P. 481 [(1909)]; *Coulson v. Aberdeen-Springfield Canal Co*., 39 Idaho 320, 227 P.29 [(1924)]; *Reynolds Irrigation Dist. v. Sproat,* 69 Idaho 315,206 P.2d 774 [(1949)]; *Ramseyer v. Jamerson*, 78 Idaho 504, 305 P.2d 1088 [(1957)]; *Mountain Home Irrigation District v. Duffy*, 79 Idaho 435, 319 P.2d 965 [(1957)]; I.C. §§ 42-101 and 42-104." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960). *See also Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976).

Idaho's extensive agricultural economy would not exist but for the vast systems of irrigation canals and ditches which artificially deliver stored or naturally flowing water from Idaho's rivers and streams into abundant fields of growing crops. Many of these irrigation systems depend on dams which divert naturally flowing water, storing it in reservoirs and later releasing it for use on gated lands through canals and ditches. These artificial water storage systems serve an additional need for flood control, power generation, recreation, and provide beneficial environments for fish and wildlife.[3]

This Court is cognizant of the crucial role which artificial water systems serve this state. As a result, limited liability rules have been applied to operators of these artificial water systems. Early on, in *Burt v. Fanners' Co-operative Irrigation Co*., 30 Idaho 752, 767, 168 P. 1078, 1082 (1917), we wrote:

> Under the common law one who diverted water from its natural course did so at his peril and was held practically to be an insurer against damage which might result from such action. [Citing cases] The common law has been modified and relaxed in this and other arid states, so that the owner of an irrigation ditch is only liable for damages occurring to others as a result of his negligence or unskillfulness in constructing, maintaining or operating of the ditch. [Citing cases].

In *Stephenson v. Pioneer Irrigation District*, 49 Idaho 189, 194,288 P.421,422 (1930), this Court wrote further that:

> [The owner of an irrigation ditch] is not an insurer against all damages arising from his ditches, but is liable when negligent in the construction, maintenance, and operation thereof. This, in other words, required to exercise reasonable or ordinary care only in the construction, maintenance, and operation of his ditches.

*See also Aibrethson v. Carey Valley Reservoir Co*., 67 Idaho 529, 186 P.2d 853 (1947); *Munn v. Twin Falls Canal Co.,* 43 Idaho 198,252 P. 865 (1926); *Nampa & Meridian Irrigation District v. Petrie*, 37 Idaho 45, 223 P. 531 (1923); *Stuart v. Noble Ditch Co*., 9 Idaho 765, 76 P. 255 (1904).The same policies which compelled this Court to limit the liability of operators of irrigation canals from suit for all but an action in

[3] The operation of an artificial water diversion and storage system may at times diminish the carrying capacity of the natural stream into which it empties due to a lack of natural "scouring" which occurs during spring runoff. Such "scouring" clears the streambed of silt deposits thereby maximizing the stream's carrying capacity. We are not aware of any diminished carrying ca _>acity in the Bear River due to the operation of the Bear Lake water storage system. The certification order only indicates that "naturally flowing waters ...were respectively discharged and 'bypassed' by Utah Power into the natural channel of Bear River in amounts exceeding the carrying capacity of the natural channel." (Emphasis added.) We understand this to indicate that the amounts released into the natural channel of the Bear River would have caused flooding to the landowners regardless of whether the carrying capacity of the Bear River was diminished by the operation of the water storage system. Even so, we do not liken the possible diminution in the carrying capacity of a natural steam channel caused by the operation of a public reservoir to that diminution caused when a private party obstructs or diverts a natural stream channel for private gain. This position follows logically from the initial factual premise -the law of Idaho has developed to encourage the non-negligent management of Idaho's limited water resources in order to advance the economy and livelihood of Idaho's citizenry.

negligence also extends to those entities which operate the artificial water diversion and storage systems, i.e., dams and reservoirs which supply the water to the irrigation canals.

This holding does not conflict with the other line of Idaho cases, identified by the Court of Appeals, dealing with the alteration or obstruction of natural streams. *See Campion v. Simpson*, 104 Idaho 413, 659 P.2d 766 (1983); *Milbert v. Carl Carbon, Inc*., 89 Idaho 471, 406 P. 2d 113 (1965); Boise *Development Co. v. Boise City*, 30 Idaho 675, 167 P. 1032 (1917); *Fischer v. Davis*, 19 Idaho 493, 116 P. 412 (1911). These alteration or obstruction of natural stream cases present facts distinct from those contained in the case before us. Generally, these alteration cases involve situations where one riparian landowner takes measures to improve or protect its land from the natural stream flow thereby causing an alteration in the natural stream flow which injures another riparian landowner, usually the one on the opposite bank of the stream.

In *Campion*, the two parties involved owned land on the opposite banks of the Wood River at a point where the river naturally flowed through three channels. The defendant filled in two channels to protect his property from flood waters thereby reducing the river's overall channel capacity. When the spring flood waters carne the carrying capacity of the remaining channel was exceeded and Campion's property was damaged.

In *Milbert*, the parties owned land on opposite sides of the Palouse River. Milbert co complained that Carl Carbon's blasting operations reduced the carrying capacity of the Palouse River during a high spring runoff thereby causing flooding to his land.

In *Boise Development Company*, the city was sued for flood damage to riparian landowners along the Boise River which occurred after the city constructed embankments, dams and riprapping along the opposite bank of the river in order to protect riverside parkland from erosion.

In *Fische*r, dams, cribs and obstructions were erected by Davis in order to protect his property from the Boise River. These measures, however, reduced the carrying capacity of the river thereby causing flood damage to Fischer, the landowner on the opposite bank.

The legal standard applicable to these "alteration or obstruction" cases is described in Boise Development Company in which we stated that "liability in such cases {does not] rest solely upon the narrow ground of negligence, but rather upon the broad legal principle that no one is permitted to so use his own property as to invade the property of another." []

> A riparian owner of land abutting upon a stream, whether navigable or non-navigable, has the right to place such barriers as will prevent his land from being overflowed or damaged by the stream, and for the purpose of keeping the same within its natural channel. A riparian owner, however, has no right to place obstruction into the stream for the purpose of changing the natural channel of the stream, or for any other purpose, that would do damage to the riparian owner on the opposite side or to owners of land abutting upon the stream either above or below.

[*Campion*]

These obstructions of the natural channel cases do not apply to the factual scenario set forth in the Ninth Circuit's certification order. Utah Power, by diverting and storing, and later releasing the flood waters of the Bear River back into the natural channel, is carrying out its duty to "balance the competing factors, including irrigation, flood control, fish and wildlife, recreation and power generation."[] Balancing these competing and often conflicting interests as it must, Utah Power is only held to a standard of reasonableness, i.e., negligence. As the owner and operator of the diversion and storage system, Utah Power "is not an insurer against all damages arising from its storage system], but is liable when negligent in the construction, maintenance and operation thereof." *Stephenson v. Pioneer Irrigation District*, 49 Idaho 189, 194,288 P.421,422 (1930). *See also Albrethson v. Carey Valley Reservoir Co*., 67 Idaho 529, 186 P.2d 853 (1947); *Munn v. Twin Falls Canal Co*., 43 Idaho 198, 252 P. 865 (1926); *Nampa & Meridian Irrigation District v. Petrie*, 37 Idaho 45, 223 P. 531 (1923); *Burt v. Farmers Co-operative Irrigation Co*., 30 Idaho 752, 168 P. 1078 (1917); *Stuart v. Noble Ditch Co*., 9 Idaho 765, 76.P. 255 (1904).

Accordingly, the landowners' claim against Utah Power, whether denominated strict liability, an action in trespass, or private nuisance, is not maintainable against Utah Power on the facts of this case in the absence of proof of negligence....

JOHNSON & McDEVITT, JJ., & SCHROEDER, J. PROTEM., concur.

BISTLINE, J., dissented.

**BOSWELL V. STEELE**

Court of Appeals of Idaho
2017 Ida. App. LEXIS 65

GUTIERREZ, J- Stephen and Karena Boswell appeal from the district court's judgment entered in favor of Amber Dawn Steele and the Estate of Mary Steele. The Boswells argue the district court erred in reducing their claims to negligence causes of action by not instructing the jury on common law and statutory strict liability, by instructing the jury on negligence, and by providing the negligence special verdict form. For the reasons explained below, we vacate the district court's judgment and remand for further proceedings.

**I.**
**FACTUAL AND PROCEDURAL BACKGROUND**

After Amber's dog bit Stephen, the Boswells filed a complaint alleging various causes of action. Both parties moved for summary judgment. The district court granted summary judgment in favor of the Steeles. The Boswells filed a motion to reconsider, which was denied. The district court entered a judgment in favor of the Steeles, dismissing the Boswells' claims.

The Boswells appealed from the district court's summary judgment. This Court vacated and remanded after determining the Boswells pled a cause of action for liability for domestic animals, simple negligence, premises liability, negligence per se, and injury from a dangerous animal as defined by the Pocatello Municipal Code; and the Boswells sufficiently supported these claims with evidence to survive summary judgment. *Boswell v. Steele*, 158 Idaho 554, 348 P.3d 497 (Ct. App. 2015).

On remand, the Boswells filed motions for partial summary judgment, arguing they were entitled to summary judgment on their strict liability and Pocatello Municipal Code claims, and that the Steeles' defenses of comparative negligence should be stricken. The district court denied the motions, reasoning the Boswells' claims all sound in negligence and therefore subject to the defense of comparative negligence. Before trial, the Boswells voluntarily dismissed their negligence claims. The district court instructed the jury on negligence and gave the jury a negligence special verdict form. The jury returned a verdict in favor of the Steeles, finding that they were not negligent. The Boswells appeal from the district court's judgment entered against them.

**II.**
**ANALYSIS**

The Boswells argue the district court erred in reducing the Boswells' claims to negligence by not instructing the jury on common law and statutory strict liability, by instructing the jury on negligence, and by providing the special verdict form about negligence. Whether the jury has been properly instructed is a question of law over which we exercise free review. *Needs v. Hebener*, 118 Idaho 438, 441, 797 P.2d 146, 149 (Ct. App. 1990). When reviewing jury instructions, we ask whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law. *Powell v. Sellers*, 130 Idaho 122, 126, 937 P.2d 434, 438 (Ct. App. 1997). A requested jury instruction need not be given if it is either an erroneous statement of the law, adequately covered by other instructions, or not supported by the facts of

the case. *Craig Johnson Constr., L.L.C. v. Floyd Town Architects*, P.A., 142 Idaho 797, 800, 134 P.3d 648, 651 (2006).

**A. Common Law and Statutory Strict Liability**

The core and dispositive issue on appeal is whether Idaho, at the time Stephen was bitten, had adopted strict liability in dog-bite cases. As we explained in Boswell, the Idaho Supreme Court "adopted a rule that an owner of a domesticated animal will be liable for injuries it causes if the owner had prior knowledge, or should have known, of the animal's dangerous propensity. It is the elements of the cause of action that are significant, not a label of strict liability or negligence." Boswell, 158 Idaho at 561, 348 P.3d at 504 (discussing *McClain v. Lewiston Interstate Fair & Racing Ass'n*, 17 Idaho 63, 104 P. 1015 (1909)).

The Idaho Supreme Court recently confirmed the elements of liability for domestic animals set forth in Boswell:

> In the context of liability for domestic animals, duty is governed by "a rule of law lacking the ordinary care scienter requirement of negligence when owners of domestic animals know of vicious tendencies. In cases where a domestic animal is not trespassing, the owner of the animal is liable for injuries caused if the owner knew or should have known of the animal's vicious or dangerous tendencies."

*Bright v. Maznik*, 162 Idaho 311, 315, 396 P.3d 1193, 1197 (2017) (quoting Boswell, 158 Idaho at 560, 348 P.3d at 503) (emphasis added). While the Supreme Court has been reluctant to classify this type of liability as "strict liability," the Restatement makes clear that what Idaho has referred to as "liability for domestic animals" is strict liability. The elements of liability for domestic animals set forth in Boswell mirror the elements of strict liability for abnormally dangerous animals set forth in Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 23 (2010). The Restatement provides: "An owner or possessor of an animal that the owner or possessor knows or has reason to know has dangerous tendencies abnormal for the animal's category is subject to strict liability for physical harm caused by the animal if the harm ensues from that dangerous tendency."

The Boswells' proposed jury instruction 6 sets forth the exact language we provided in Boswell and the Supreme Court reiterated in Bright. The instruction reads: "[T]he owner of a dog is liable for injuries caused by the dog if the owner knew or should have known of the dog's dangerous tendencies. Similarly, the custodian of a dog is liable for injuries caused if such custodian knew or should have known of the dog's dangerous propensities." The proposed jury instruction further clarified: "There is no requirement under this claim for the Plaintiffs to prove that the owner or the custodian of the dog failed to exercise ordinary care." The district court, however, disregarded the Boswells' proposed instruction and instead conflated negligence with strict liability. The district court instructed the jury that "the owner of a dog is negligent if the owner knew or should have known of the dog's dangerous tendencies. Similarly, the custodian of a dog is also negligent for injuries caused if such custodian knew or should have known of the dog's dangerous tendencies." These are not accurate statements of the law. Had the district court replaced "negligent" with "liable," the instruction would have been an accurate statement of the law.

Instead, the instruction misled the jury to consider negligence in a strict liability analysis. Moreover, the special verdict form only included negligence causes of action. Accordingly, the district court erred in instructing the jury by effectively reducing the Boswells' claims to negligence causes of action. While the Court in Boswell was justifiably hesitant to use the description "strict liability," as liability for domestic animals' claims had never before been classified as such in Idaho, for purposes of clarification the district court is instructed that the elements of liability for domestic animals set forth in Boswell amount to strict liability.

Turning to statutory strict liability, the Boswells argue Pocatello Municipal Code §§ 6.04.010 and 6.04.050 create a private cause of action that imposes statutory strict liability on the owner of a vicious animal behind an unprovoked attack. Pocatello Municipal Code § 6.04.050(E) provides: "An adult owner/custodian of a dangerous animal shall be liable for all injuries and property damage sustained by

any person or by animal caused by an unprovoked attack by any dangerous animal . . .."The district court instructed the jury on this code section, but further instructed that "a violation of the ordinance is negligence." This is not an accurate statement of the law because PMC § 6.04.050(E) does not set forth a negligence cause of action. The city code does not include any language pertaining to duty, breach of care, or the care of a reasonable person. Rather, it sets forth a statutory strict liability cause of action. The instruction was therefore improper. Moreover, the special verdict form only included questions pertaining to negligence. The district court erred by reducing the strict liability established in the city code to negligence in both the jury instruction and the special verdict form.

…

**III.**
**CONCLUSION**

The district court erred in instructing the jury on negligence causes of action and only including negligence on the special verdict form because the Boswells were permitted to pursue both common law strict liability and statutory strict liability causes of action.

…

Judge Pro Tem WALTERS, SPECIALLY CONCURRING

I concur in the result because the district court erred in giving to the jury instructions relating to causes of action predicated on theories of negligence when the plaintiffs had withdrawn their claims asserting liability based on alleged negligence. However, I am not convinced that causes of action for damage resulting from a domestic dog bite under the circumstances of this case needs to be characterized as a form of strict liability or that provocation by the plaintiff should be measured as a form of comparative fault. Consistent with the recently adopted legislative directive in Idaho Code § 25 2810(10) and the City of Pocatello Municipal Code § 6.04.050(E), provocation by the plaintiff, if found by the jury to exist as a matter of fact, should be an absolute bar to recovery by the plaintiffs.

NOTES

(1) In *Kunz*, what is the basis for liability? How is it similar to the form of liability in Boswell? How does the evaluation of the quality of the defendant's conduct in those cases differ from that in *White*, *Athay*, *Stevens*, and *Van Vranken*? Does either line of cases involves strict liability?

Why should a defendant who has acted with care be held liable for the unintended consequences of her actions? There are various rationales for tort liability -- retribution, compensation, risk-spreading, deterrence, or administrative concerns. Which of the of these offer(s) the most support for the imposition of strict liability?

(2) In *Kunz*, what type of risk-imposing conduct is involved? Does the risk involved differ from that involved in a negligence case? If so, how would you characterize each type of risk? Consider *Restatement (Second) of Torts*:

> § 520. Abnormally Dangerous Activities
>
> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
>
> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

How does the Restatement characterize the risk? Note that factors (a) and (b) relate to the magnitude of the risk and factor (c) suggests that greater care is not a factor in prevention of the accident. Factors (d)-(f) are less easily characterized. For example, the combination of factors (a}{c) with factors (d)and (e)suggest a reciprocity criterion: liability is appropriate when the actor imposes a nonreciprocal risk. Alternatively, factors (d}{f) can be viewed as concerned with the cost of reducing the risk. Under this - an economic deterrence perspective- the coupling of an expected large loss and the inability to prevented that loss through the exercise of greater care suggest that a reduction in activity levels is appropriate, i.e., the activity ought to be deterred. Finally, factors (a) and (b) when coupled with factors (d} {f) suggest that, because of the unusual nature of the risk, it seems appropriate to spread the risk to those who benefit from risk imposed by the service or product.

*Restatement (Third)* has modified the strict liability provisions:

> § 20. Abnormally Dangerous Activities
>
> (a) An actor who carries on abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.
>
> (b) An activity is abnormally dangerous if:
>
> (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and
>
> (2) the activity is not one of common usage.

Would a single, non-recurring act be subject to liability under the terms of § 20?

**(3)** ***Rylands v. Fletcher in Idaho*****:** In *Burt v. Fanners 'Cooperative Irrigation Co*., 30 Idaho 752, 186 P. 1078 (1917), the court noted:

> Under the common Jaw one who diverted water from its natural course did so at his peril and was held practically to be an insurer against damage which might result from such action. *Fletcher v. Rylands*, L.R. 1Exch. 265, atrd, L.R. 3 H.L. 330; []. The common law has been modified and relaxed in this and other arid states, so that the owner of an irrigation ditch is only liable for damages occurring to others as a result of his negligence or unskillfulness in constructing, maintaining or operating the ditch. *McCarty v. Boise City Canal Co*., 2 Idaho 225,245, 10 P. 623 {1886); *Stuart v. Noble Ditch Co*., 9 Idaho 765, 76 P. 255 (1904); []. It would be quite within the power of the legislature to restore the rule of the common law and render the owner liable for any damages resulting from the escapement of water which he brings upon his land by artificial means.

The plaintiff in *Brizendine v. Nampa Meridian Irrigation District*, 97 Idaho 580, 548 P.2d 80 {1976), argued that the irrigation district should be held strictly liable under the principles of *Rylands v. Fletcher* when water escaped from its canal and damaged plaintiffs land. The trial court rejected the argument and refused to so charge the jury. The Idaho Supreme Court affirmed a verdict for the plaintiff on other grounds.

Should *Rylands v. Fletcher* apply to such situations in Idaho? Would it under the standards set out in Restatement (Second)? in Restatement (Third)?

**(4) Strict liability and blasting:** A traditional area of strict liability applies to blasting. No case has adopted strict liability explicitly but consider the following cases: if the standard of care is high enough, the difference between negligence and strict liability can be vanishingly small.

(a) *Miller v. Gooding Highway District* Plaintiff-- who was nine years old -was injured when he crawled through a window in defendants' storage shed, where he and a friend found a tin can containing dynamite caps. Plaintiff was seriously injured when one of the caps exploded as he was playing with it. At the end of plaintiff's case, the trial court granted defendant's motion for a nonsuit. The supreme court reversed, holding that the evidence was sufficient to preclude dismissal:

> Liability may be incurred for injuries to a child of tender years by having or leaving dangerous instrumentalities, such as high explosives, upon premises or elsewhere where they are accessible to children [], although there might be no liability with reference to an adult or a child of years of discretion, under like circumstances. [) A child without discretion, although a trespasser, occupies a legal attitude similar to that of an adult who is not a trespasser. [] In such circumstances, care and caution must be exercised by the owner or person in charge of such high explosives to prevent children of tender years obtaining possession of such dangerous instrumentality. It by no means follows that a property owner is an insurer of the safety of children who come upon his premises. The degree of care required of persons having the possession and control of dangerous explosives, such as dynamite caps, must be commensurate with the dangerous character of the article and is greater and more exacting as respects young children. As to such, the care required to be exercised is measured by the maturity and capacity of the child. What would constitute reasonable care with respect to adults might be gross negligence as applied to young children. [] Whether, under all of the facts and circumstances as are disclosed by appellants' testimony, respondent was negligent in its duty to take such precautions as a reasonably prudent person would have taken under like circumstances is a question of fact for the jury....

*Miller v. Gooding Highway District*, 55 Idaho 258,41 P.2d 625 (1935).

Given the flexibility of the negligence standard, what purpose is served by having a separate theory of recovery in strict liability?

(b) *Lundahl v. City of Idaho Falls*: The city entered into contract with Coleman Plumbing & Heating Company to construct a sewer line through an alley behind plaintiff's parcel. Plaintiff brought an action alleging that defendants "negligently, recklessly and carelessly, exploded large quantities of explosives .... approximately eight feet from ... [plaintiff's] garage" which "produced great and violent concussions and vibrations of the earth and air which ... caused great injury to the lava substrata ... and building by cracking and breaking same and causing great injury to the foundation of said building and whole superstructure, including its walls, windows, ceilings and chimneys, and rendered the same unsafe and uninhabitable." Plaintiff appealed dismissal of his claim.

In the supreme court, the city argued that it could not be held liable because the company engaged in the blasting was an independent contractor. The court disagreed:

> Blasting in a populated area and in the vicinity of buildings is dangerous and hazardous and if not done with adequate and proper precautions and by proper means
> and methods, becomes a nuisance. [] The allegations in the amended complaint are that the blasting was being done in such a negligent manner as to create a nuisance and that the respondent, through its proper officers, was notified of such condition and refused to remedy the same. Under such conditions, the city cannot escape liability because the work was being done by an independent contractor.

*Lundahl v. City of Idaho Falls*, 78 Idaho 338, 303 P.2d 667 (1956).

What standard was used to evaluate the city's actions? Recklessness? Negligence? Strict liability? Part of the difficulty in answering results from the fact that neither the plaintiff nor the court is clear. Plaintiff alleged recklessness and negligence. The court arguably went further, stating that blasting "in a populated area" is "dangerous and hazardous" and is a "nuisance." Nuisance is a term that describes a result- it can be either an invasion of the interest in the use and enjoyment of real property or it can describe quasi-criminal activities that are contrary to the public health, safety or morals. For our purpose, a nuisance can be a result of careful actions, i.e., it can be strict liability.

**(5) Strict liability and animals:** Another traditional area of strict liability applies to animals. Thus, the owner of an animal with known propensity for harm is strictly liable for that harm. Propensity for harm is generally assumed when the animal is wild, e.g., a lion.

The propensity-for-harm requirement is the source of the common misconception that every dog is entitled to one free bite. While it is true that the owner of a dog that has bitten someone is on notice of the dog's propensity to cause harm, the converse is not necessarily true. For example, the owner of a dog whose breed is known to be dangerous, e.g., a pit bull, has similar notice. For an interesting- and somewhat confused- case involving injuries to a jockey when a greyhound dog decided to join a horse race, see *McClain v. Lewiston Interstate Fair & Racing Ass'n* 17 Idaho 63, 104 P. 1015 (1909).

Domestic animals such as cattle have a well-recognized tendency to wander and the owner of cattle will generally be strictly liable for damages they cause. Liability for wandering cattle is now generally covered by statute. I.C. §§ 2 2118, -2119, -2408. *See Griffith v. Schmidt*, 110 Idaho 235, 715 P.2d 905 (1985); *Whitt v. Jarnagin*, 91 Idaho 181,418 P.2d 278 (1966).

(6) Less than strict but more than negligence? Plaintiffs decedent was killed when the helicopter he was piloting crashed. His employer had been hired by the state to transport state fish and game biologists to census game animals in wilderness areas. The crash -which was caused by equipment failure- occurred in a steep mountainous canyon. Plaintiffs argued that the state had a duty to decedent given the risk to which he was exposed. Chief Judge Walters dissented from the majority's decision that the state did not owe any obligation to the employee of an independent contractor,

> I dissent as to the portion of the opinion concerning whether a peculiar risk of physical harm should have been recognized by the state. I believe this is a factual question which should be resolved by a jury. Since a factual question remains to be decided, I would vacate the summary judgment and remand the case for trial.

*RESTATEMENT [(SECOND)]* § 413 comment b explains the concept of peculiar risk as follows:

> This Section is concerned with special risks, peculiar to the work to be done, and arising out of its character, or out of the place where it is to be done, against which a reasonable man would recognize the necessity of taking special precautions. The situation is one in which a risk is created which is not a normal, routine matter of customary human activity, such as driving an automobile, but is rather a special danger to those in the vicinity, arising out of the particular situation created, and calling for special precautions. "Peculiar" does not mean that the risk must be one which is abnormal to the type of work to be done, or that it must be an abnormally great risk. It has reference only to a special, recognizable danger arising out of the work itself. [Emphasis added.]

My reading of the *RESTATEMENT* leads me to believe that "peculiar" risks are risks which fit somewhere in a continuum between "normal" risks (e.g., driving an automobile) and "abnormal" risks (e.g., blasting explosives in a city, dropping an object from an aircraft). The RESTATEMENT takes the position that some risks are so common that they are normal as a matter of law. The RESTATEMENT also takes the position that the question of whether an activity presents abnormally dangerous risks is a legal question. RESTATEMENT §520, comment 1. While the RESTATEMENT§ 520A lists risks to persons or property on the ground from falling aircraft as being abnormally dangerous, the Restatement specifically says that the risks to the crew of an aircraft from the aircraft's falling are not abnormally dangerous. RESTATEMENT § 520A, comment e.

The RESTATEMENT does not take a position on the question of whether peculiar risk determinations are legal or factual. There is a split of authority on this issue....

.... The risks to a helicopter pilot associated with flying over flat, sparsely populated land in good weather might be "normal." On the other hand, the risks to a helicopter pilot associated with flying over mountainous, forested, and uninhabited land are markedly greater and might be "peculiar." By changing the facts slightly, by focusing on the risks to persons on the ground instead of the pilot, the risks become "abnormally dangerous." RESTATEMENT § 520A, comment e. While the facts of this case make it clear that the pilot did not face abnormally dangerous risks, I cannot say whether the risks he faced were on the side of the line demarcating normal from peculiar risks. I believe this is a determination better suited to a jury than to a court on summary judgment. *Fagundes v. State*, 116 Idaho 173, 774 P.2d 343 (Ct. App. 1989).

"Abnormally dangerous" risks subject the actor to strict liability. What is the effect of finding that the risk is "peculiar"?

(7) In connection with the problem of "animals or wagons," consider Benjamin Cardozo's analysis of the process of judging:

> Let me assume a case where authority is silent. You, gentlemen, or as many of you as may be lucky enough to receive a retainer, are the lawyers. I am the distracted judge. You have ransacked the digests, the cyclopedias, the treatises, the law reviews. The decision on all fours which counsel love to produce with a latent note of triumph, cowing with authority the skeptic on the bench, this buried treasure of the law books, refuses to come forth. The vigils and the quest yield at most a few remote analogies, which can be turned as easily to the service of one side as to the service of the other. What are you going to do to persuade? What am I going to do to decide? Perhaps we shall, neither of us, be fully conscious of the implications of the process. Much that goes on in the mind is subconscious or nearly so. But if, when the task is finished, we ask ourselves what we have done, we shall find, if we are frank in the answer, that with such equipment as we have, we have been playing the philosopher.
>
> We had in my court a year ago a case that points my meaning. [*Hynes v. N.Y. Central* R.R.,231 N.Y.229.] A boy was bathing in a river. He climbed upon a spring board which projected from a bank. As he stood there, at the end of the board, poised for his dive into the stream, electric wires fell upon him, and swept him to his death below. In the suit for damages that followed, competitive analogies were invoked by counsel for the administratrix and counsel for the railroad company, the owner of the upland. The administratrix found the analogy that suited her in the position of travelers on a highway. The boy was a bather in navigable waters; his rights were not lessened because his feet were on the board. The owner found the analogy to its liking in the position of a trespasser on land. The springboard, though it projected into the water, was, none the less, a fixture, and as a fixture it was annexed. The boy was thus a trespasser upon land in private ownership; the only duty of the owner was to refrain from wanton and malicious injury; if these elements were lacking, the death must go without requital. Now, the truth is that, as a mere bit of dialectics, these analogies would bring a judge to an impasse. No process of mere logical deduction could determine the choice between them. Neither analogy is precise, though each is apposite. There had arisen a new situation which could not force itself without mutilation into any of the existing molds. When we find a situation of this kind, the choice that will approve itself to this judge or to that, will be determined largely by his conception of the end of the law, the function of legal liability; and this question of ends and functions is a question of philosophy.
>
> In the case that I have instanced, a majority of the court believe that liability should be adjudged. The deductions that might have been made from published definitions were subordinated and adapted to the fundamental principles that determine, or ought to determine, liability for conduct in a system of law wherein liability is adjusted to the ends which law should serve. *Hynes v. The New York Central Rail Road Co*., was decided in May, 1921. Dean Pound's Introduction to the Philosophy of Law had not yet been published. It appeared in 1922. In these lectures, he advances a theory of liability which it may be interesting to compare with the theory of liability reflected in our decision. "The law," he says, "enforces the reasonable expectations arising out of conduct, relations and situations." I shall leave it to others to say whether the cause of the boy diving from the springboard would be helped or hindered by resort to such a test. This much I cannot doubt. Some theory of liability, some philosophy of the end to be served by tightening or enlarging the circle of rights and remedies, is at the root of any decision in novel situations when analogies are equivocal, and precedents are silent. As it stands today, the judge is often left to improvise such a theory, such a philosophy, when confronted overnight by the exigencies of the case before him. Often, he fumbles about feeling in a vague way that some such problem is involved, but missing the universal element which would have quickened his decision with the inspiration of a principle. If he lacks an adequate philosophy, he either goes

> astray altogether, or at best does not rise above the empiricism that pronounces judgment upon particulars....

BENJAMIN CARDOZO, THE GROWTH OF THE LAW98-103 (1924).

# [F] PRODUCTS LIABILITY

## MASSEY V. CONAGRA FOODS, INC.

Supreme Court of Idaho
156 Idaho 476, (2014)

J. JONES, J.- This appeal arises out of a products liability case. In early June of 2007, Karrin Massey consumed at least one, but perhaps several, poultry pot pies that were manufactured by ConAgra Food, Inc. and sold under the Banquet brand name. Soon after, Karrin, who was six months pregnant at the time, developed salmonellosis. After an outbreak of salmonella was linked to Banquet pot pies, it was discovered that Karrin's strain of salmonella matched the strain of salmonella found in the contaminated pot pies. Karrin, her husband, Mark Massey, and their daughter Emma filed suit against ConAgra, alleging claims of product liability, negligence, and breach of warranty. The district court eventually granted ConAgra's motion for summary judgment on the grounds that the Masseys had failed to establish the pot pies in question were defective. The Masseys filed a motion for reconsideration, which was denied. The Masseys then appealed to this Court.

### I.
### FACTUAL AND PROCEDURAL BACKGROUND

In early May of 2007, the Centers for Disease Control ("CDC") identified a salmonella outbreak in several states, including Idaho. After an extensive investigation, the most likely source of the outbreak was identified as pot pie filling that was manufactured by ConAgra and marketed as part of the Banquet brand.

Appellant Karrin Massey had long enjoyed pot pies as part of her diet. In the first part of June 2007, Ms. Massey consumed one or more Banquet pot pies. Ms. Massey does not remember if she cooked the pot pies in the oven or in the microwave. She testified that she usually—but not always—cooked them in the oven, and that she "always followed [cooking] time instructions." During the first week of June, Ms. Massey began to experience diarrheal symptoms and was hospitalized twice due to dehydration. On June 10, 2007, a stool sample was cultured for salmonella. The sample tested positive, and Ms. Massey was hospitalized on June 13 for treatment. On June 14, the Idaho Department of Health and Welfare ("IDHW") interviewed her in hopes of determining a possible source of her infection. At this time, Ms. Massey was approximately six months pregnant with her daughter, Emma. Because she was pregnant, Ms. Massey declined to take certain medications that may have been more effective in treating salmonellosis but could have harmed her unborn child. Emma Grace Massey was born on October 3, 2007. On appeal, the Masseys do not delve into how Emma was injured, although ConAgra notes that Emma's birth itself was without complications.

Ms. Massey was treated for salmonellosis until approximately September 4, 2007, at which time three consecutive stool samples tested negative for the presence of salmonella. Ms. Massey's particular strain of bacteria was later identified as salmonella enterica, serovar 4,5,12: i:-monophasic.

According to the Masseys, near the end of 2007, CDC investigators collected samples of pot pie crust and filling at ConAgra's plant, which were found to contain salmonella enterica, serovar 4,5,12: i:-, the same strain present in Ms. Massey's stool sample. ConAgra disputes this, stating that in fact, "no salmonella was ever found within ConAgra's pot pie facility." In any event, salmonella enterica, serovar 4,5,12:i:-, the same strain present in Ms. Massey's stool sample, was later found in Banquet pot pies sampled from a Boise store.

Ms. Massey and her husband Mark filed a complaint on April 2, 2010, individually and on behalf of their daughter Emma. Therein, they alleged claims based on product liability, breach of warranty, and negligence. On March 21, 2012, ConAgra moved for summary judgment, alleging that the Masseys'

claims were barred because of the statute of limitations and that the Masseys could not establish that the pot pies in question were defective. The district court, upon request, granted the Masseys a continuance so that they could depose Dr. Leslie Tengelsen, an Idaho State Deputy Epidemiologist. Shortly after Dr. Tengelsen's deposition was taken, ConAgra filed a renewed motion for summary judgment. The district court held a hearing on ConAgra's renewed motion on June 4, 2012. In its resulting July 3, 2012 order ("Summary Judgment Order"), the district court found in ConAgra's favor, holding that the Masseys had failed to establish a genuine issue of material fact with regard to whether a product defect existed. The Masseys filed a timely motion for reconsideration, arguing that the district court misunderstood the main issue of the case and misconstrued certain facts. The district court entered an order denying the Masseys' motion on September 28, 2012 ("Order Re: Motion for Reconsideration"). The Masseys filed a timely appeal.

## II.
## ISSUES ON APPEAL

I. Whether the district court erred in determining that the Masseys failed to establish a genuine issue of material fact that the pot pies were defective?

II. Whether the district court erred in finding that there was no genuine issue of material fact as to the Masseys' negligence claim?

III. Whether the Masseys waived their right to challenge the district court's denial of their motion to reconsider?

IV. Whether the district court erred in sua sponte concluding that the Masseys' failure to warn claim was not adequately pleaded?

## III.
## DISCUSSION

### A. Standard of review.

The applicable standard of review is well-settled:

> "Appellate review of a district court's ruling on a motion for summary judgment is the same as that required of the district judge when ruling on the motion." *Steele v. Spokesman Review*, 138 Idaho 249, 251, 61 P.3d 606, 608 (2002). Under I.R.C.P. 56(c), summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). This Court must "liberally construe . . . the record in favor of the party opposing the motion and draw . . . all reasonable inferences and conclusions in that party's favor." Steele, 138 Idaho at 251, 61 P.3d at 608. Summary judgment is not appropriate "[i]f the evidence is conflicting on material issues, or if reasonable minds could reach different conclusions." *Peterson v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266, 1269 (1998).

*Liberty Northwest Ins. Co. v. Spudnik Equip. Co*., LLC, 155 Idaho 730, 732-33, 316 P.3d 646, 648-49 (2013).

Additionally, this Court has recently clarified the standard of review utilized in reviewing a district court's denial of a motion to reconsider. "[W]hen the district court grants summary judgment and then denies a motion for reconsideration, 'this Court must determine whether the evidence presented a genuine issue of material fact to defeat summary judgment.' This means the Court reviews the district court's denial of a motion for reconsideration de novo." *Bremer, LLC v. E. Greenacres Irrigation Dist*., 155 Idaho 736, 744, 316 P.3d 652, 660 (2013) (quoting *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012)).

**B. The district court erred in determining that the Masseys failed to establish a genuine issue of material fact that the pot pies were defective.**

In their complaint, the Masseys put forth three claims: products liability, negligence, and breach of warranty. In order "[t]o establish a prima facie case in a products liability action, the plaintiff has the burden of proving that 1) he was injured by the product; 2) the injury was the result of a defective or unsafe product; and 3) the defect existed when the product left the control of the manufacturer.'" *Liberty*, 155 Idaho at 733, 316 P.3d at 649 (quoting *Farmer v. Int'l Harvester Co*., 97 Idaho 742, 746-47, 553 P.2d 1306, 1310-11 (1976)). The district court granted summary judgment on the grounds that the Masseys did not show that a genuine issue of material fact existed with regard to whether the pot pies were defective. In its Summary Judgment Order, the district court determined that "[a] pot pie contaminated with salmonella is not defective because salmonella in an uncooked or under cooked product is not considered an adulterant." The district court explained that "[e]ven assuming that a pot pie eaten by Massey was contaminated by salmonella, the deposition testimony of Dr. Tengelsen clearly fails to establish that a pot pie contaminated with salmonella is defective." The district court also concluded that a Food Safety and Inspection Service (FSIS) investigation and its "conclusions drawn therefrom does not determine that any of the pot pies were adulterated, and therefore, defective."

The Masseys argue that Karrin's affidavit established a defect under Idaho law, that Dr. Tengelsen's testimony did the same, and that the district court erred in its analysis of certain nonbinding case law. ConAgra disputes all of these assertions and adds that the district court did not err in failing to find evidence of a defect based on USDA guidelines.

"[T]he term 'defect' is not susceptible of a general definition but must be considered on a case by case basis." Farmer, 97 Idaho at 747, 553 P.2d at 1311. In defining what constitutes a defect, this Court has favorably quoted the Restatement (Second) of Torts, § 402A (comment g 1965) as follows: "Defective condition. The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." *Id*. Comment i to § 402A defines "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id*. This Court has also quoted Prosser on Torts for the proposition that '"the prevailing interpretation of "defective" is that the product does not meet the reasonable expectations of the ordinary consumer as to its safety.'" *Id*. (citing Prosser, Torts, § 99, p. 659 (4th ed. 1971)). A defect can be shown either by direct evidence, or by circumstantial evidence. *Id*. "A circumstantial evidence showing under the Farmer case [requires] proof of: (1) the malfunction of the product; (2) the lack of evidence of abnormal use; and (3) proof excluding the possibility of other 'reasonable causes.'" *Doty v. Bishara,* 123 Idaho 329, 332, 848 P.2d 387, 390 (1992).

When circumstantial evidence is presented, it is the trier of fact who "is invited to infer the existence of a defect." *Edwards v. Conchemco, Inc*., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986). Furthermore, the defect may be established solely based upon the "[t]estimony of the user [or] operator of the product as to the circumstances of the event." *Farmer*, 97 Idaho at 748, 553 P.2d at 1312. This Court has explicitly refused to require a plaintiff to proffer expert testimony as part of its prima facie products liability case, stating: "[t]hough it is no doubt true that a plaintiff may bolster his or her case considerably through the use of expert testimony, we nevertheless decline to require such expert testimony for the establishment of a plaintiff's prima facie case." *Fouche v. Chrysler Motors Corp*., 107 Idaho 701, 704, 692 P.2d 345, 348 (1984).

The district court erred in its analysis of what constitutes a product defect under Idaho law. Specifically, it was error to equate "defective" with "adulterated." The origin and rationale behind using these terms interchangeably is unclear, although it was the Masseys who first made mention of the term in their complaint. "Adulterated" is a defined term under Chapter 10 of 21 U.S.C. § 453, a federal statute. 21 U.S.C. § 453. Generally, Chapter 10 discusses "Poultry and Poultry Products Inspection." *Id*. No link exists between a defined term in a federal statute and what constitutes a product defect under Idaho law; thus, the district court's erroneous assumption to the contrary was in error.

Instead of determining that a pot pie must be "adulterated" to be defective, the district court should have looked to existing case law to determine what constitutes a product defect in Idaho. Under Farmer, a defect can be established solely based on the testimony of the user. Here, Karrin testified that (1) she ate at least one and possibly several Banquet brand pot pies during the last part of May and the first part of June; (2) despite not remembering whether she cooked those pot pies in the microwave or oven, she "always followed time instructions" on the box; (3) she was diagnosed with salmonellosis on June 13, 2007; and (4) her particular strain of salmonella was later found in Banquet brand pot pies. As for whether there was proof of the lack of evidence of abnormal use and the lack of other reasonable causes—which again is required under Farmer when making a showing of circumstantial evidence—those are questions best answered by a jury, since it is the trier of fact who "is invited to infer the existence of a defect." In this case, the Masseys requested a jury trial. Based on Karrin's testimony alone, a jury could reasonably conclude that a pot pie cooked according to the instructions that nonetheless retains salmonella bacteria is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer," "does not meet the reasonable expectations of the ordinary consumer as to its safety," and is therefore defective.

Because the district court erred in its analysis of what constitutes a product defect under Idaho law, and because a jury could reasonably conclude that Karrin's testimony sufficiently demonstrated product defect, we vacate the district court's grant of summary judgment.

**C. The district court erred in granting summary judgment on the issue of negligence.**

The district court also granted summary judgment on the Masseys' negligence claim, again because of a failure to show product defect. On appeal, the Masseys seem to be arguing that because the Idaho pattern jury instruction for negligence does not make mention of the term "defect," a negligence claim does not require that element.

Regardless of whether a products liability case "is based on warranty, negligence or strict products liability, plaintiff has the burden of alleging and proving that 1) he was injured by the product; 2) the injury was the result of a defective or unsafe product; and 3) the defect existed when the product left the control of the manufacturer." Farmer, 97 Idaho at 746-47, 553 P.2d at 1310-11. Thus, product defect is a necessary element in a products liability case that is based on negligence.

Because we hold that the district court erred in its product defect analysis, the Masseys' negligence claim survives. We thus vacate the district court's decision as to the Masseys' negligence claim.

**V.**
**CONCLUSION**

We vacate the judgment and award costs to the Masseys

**MAJOR V. SEC. EQUIP. CORP.**

Supreme Court of Idaho
155 Idaho 199, 307 P.3d 1225 (2013)

BURDICK, C.J.,- This appeal arises from the Ada County district court's decisions regarding a products liability claim between Billie Jo Major and Security Equipment Corporation (SEC). Major brought an action against SEC alleging that the company failed to provide adequate warning to her employer, the Idaho Department of Corrections (IDOC), on the risks of its oleoresin capsicum (OC) pepper spray. Major alleged that the use of the spray in a training exercise worsened existing bronchial difficulties and caused her permanent injury. On July 19, 2011, the district court granted partial summary judgment to SEC on the grounds that Major failed to create a material issue of fact on whether her injuries were a known or foreseeable risk prior to March 2008, the date of sale to IDOC. In a motion to reconsider, Major submitted a second affidavit from her expert, Dr. Yost, which was declared a sham affidavit by the district court in its denial of the motion. The district court later granted summary judgment to SEC on the sole remaining

issue, the viability of Major's claim under the Federal Hazardous Substances Act (FHSA). We vacate the judgment of the district court and remand for proceedings consistent with this opinion.

## I.
## FACTUAL AND PROCEDURAL BACKGROUND

Billie Jo Major was employed by IDOC beginning in July 2004. Major was assigned to the Idaho Maximum Security Institution from July 2004 to July 2006 and from August 2007 to March 2008. She worked at the South Boise Women's Correctional Facility in the interim. According to Major, she suffered periodic bouts of respiratory illness before and during her employment at IDOC. While employed at IDOC, Major participated in several training exercises that involved exposure to pepper spray.

Pertinent to this action is the training that occurred on March 3, 2008, where Major was exposed to spray from SEC's MK-9 Fogger pepper spray. The MK-9 Fogger produces a widely dispersed aerosol designed to irritate and inflame the respiratory tract. During the training, bursts of pepper spray were sprayed into a jail cell before trainees would enter to experience the effects of the aerosol. The training lasted approximately two and a half hours. Major alleges that when the training took place she was on light duty and suffering from bronchitis. After the training, Major states that her respiratory problems worsened, and she developed a chronic cough. According to Major, her health issues prevented her from working, caring for herself, or engaging in other activities.

Major filed a complaint against SEC on February 24, 2010, that contained three causes of action. Major alleged that: (1) the MK-9 Fogger spray was unreasonably dangerous, the proximate cause of her injuries, and SEC was subject to strict product liability; (2) that the spray's labeling did not provide adequate warnings or instructions for safe use and; (3) SEC breached express warranties to the consumer.

On April 22, 2011, SEC filed a motion for summary judgment on the grounds that Major would be unable to present evidence that SEC knew or should have known of the pepper spray's dangers. Major filed a cross motion for partial summary judgment on June 10, 2011. Major's cross motion contained an affidavit from Dr. Garold Yost, a professor of pharmacology and toxicology. Dr. Yost's affidavit stated that SEC's pepper spray caused Major "to suffer acute adverse health responses and greatly exacerbated her underlying respiratory diseases." SEC filed a motion to strike portions of Dr. Yost's affidavit, which was heard with the cross motions for summary judgment in a hearing on July 14, 2011.

After hearing argument on the motions, the district court issued its Order Re: Pending Motions for Summary Judgment and to Strike Affidavit of Garold Yost. In it, the district court granted SEC's motion for summary judgment on the grounds that Major failed to show a genuine issue of fact regarding chronic injury that resulted from exposure to the pepper spray. The district court also denied Major's cross motion for summary judgment and SEC's motion to strike Dr. Yost's affidavit. The district court did not decide the issue of whether Major has any viable claim under the FHSA.

SEC filed its second motion for summary judgment for the FHSA issue on July 22, 2011. On July 26, 2011, Major filed a motion and memorandum for reconsideration of the district court's summary judgment order. The motion was supported by a second affidavit of Dr. Yost. In response, SEC filed a motion to strike portions of Dr. Yost's second affidavit on the grounds that it directly contradicts the doctor's deposition testimony without explanation. A hearing on these three motions was heard on September 15, 2011. After hearing argument from the parties, the district court granted SEC's second motion for summary judgment and its motion to strike Dr. Yost's second affidavit and denied Major's motion for reconsideration. The district court struck Dr. Yost's second affidavit on the grounds that the second affidavit contradicted the expert's deposition testimony without explanation and denied the motion for reconsideration because it was based on this affidavit.

SEC filed a motion for clarification on September 20, 2011, to determine whether any of Major's issues survived the two grants of summary judgment. Specifically, SEC sought clarity on whether a claim

for Major's acute injuries had survived. The district court treated this as a motion for summary judgment. On October 4, 2011, Major filed a second motion for reconsideration on the issue of whether a material issue of fact exists as to the foreseeability of acute injury. Argument on these motions was heard on October 17, 2011. The district court concluded that the undisputed facts in the record led to only one conclusion, that the pepper spray's warning label provided an adequate notice to Major regarding the acute effects of the spray. On these grounds, the district court granted summary judgment to SEC and denied Major's second motion for reconsideration. A final judgment pursuant to these orders was issued on October 20, 2011. Major filed a third motion for reconsideration accompanied by a third affidavit from Dr. Yost, which was denied by the district court. Major timely filed a notice of appeal with this Court on November 23, 2011.

## II.
## ISSUES ON APPEAL

1. Whether the district court erred by granting summary judgment to SEC.

2. Whether the district court erred by striking Dr. Yost's second affidavit as a sham affidavit.

3. Whether either party is entitled to attorney fees and costs on appeal.

## III.
## STANDARD OF REVIEW

> When reviewing an order for summary judgment, the standard of review for this Court is the same standard as that used by the district court in ruling on the motion. Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party.

*Fuller v. Callister*, 150 Idaho 848, 851, 252 P.3d 1266, 1269 (2011) (quoting *Castorena v. Gen. Elec*., 149 Idaho 609, 613, 238 P.3d 209, 213 (2010)). "However, the nonmoving party cannot rely on mere speculation, and a scintilla of evidence is insufficient to create a genuine issue of material fact." *Bollinger v. Fall River Rural Elec. Coop., Inc.,* 152 Idaho 632, 637, 272 P.3d 1263, 1268 (2012).

## IV.
## ANALYSIS

### A. The district court erred by granting summary judgment to SEC.

On appeal, Major argues that the district court erred when it granted SEC's first motion for summary judgment on her failure to warn claim. Specifically, Major argues that the affidavits from Dr. Yost presented a genuine issue of material fact as to whether SEC knew or should have known that the MK-9 Fogger pepper spray posed a danger of causing the kind of respiratory injury alleged by Major. SEC argues that Dr. Yost's first affidavit did not create a genuine issue of material fact because it "focused more on causation of injury, rather than foreseeability of risk, and on an acute injury which Major did not have, instead of the chronic injury that is the basis for her claim for damages."

> Failure to warn can be a basis for recovery in a products liability action, whether alleged under a theory of strict liability in tort or negligence. A product is defective if the defendant has reason to anticipate that danger may result from a particular use of his product and fails to give adequate warnings of such danger.

*Puckett v. Oakfabco, Inc*., 132 Idaho 816, 823, 979 P.2d 1174, 1181 (1999) (internal quotations omitted). "As is well established, a [**1229] [*203] supplier has no duty to warn where the use made of a product was not known or reasonably foreseeable to the manufacturer or seller. The factual question of foreseeability is for the jury to determine." *Sliman v. Aluminum Co. of Am*., 112 Idaho 277, 283, 731 P.2d

1267, 1273 (1986) (internal citations omitted). "While sellers need not be clairvoyant, they are held to the knowledge and experience of experts in their fields. Knowledge of the product's risks based on reliable and obtainable information is imputed to the seller." *Toner v. Lederle Lab*., 112 Idaho 328, 338, 732 P.2d 297, 307 (1987) (internal citations omitted).

In its decision, the district court found that Major failed to present evidence that her alleged injuries were foreseeable:

Mr. Yost in response to the questions in the deposition . . . clearly indicates that he cannot point to any existing studies that would have put Security Equipment Corporation on notice that . . . it was a foreseeable danger to people using this product.

SEC argues on appeal that Dr. Yost's conclusions are unsupported by the state of scientific knowledge in 2008. Based in part on the lack of supporting evidence, the district court concluded that Major failed to meet her burden:

In other words, . . . this affidavit does not clearly tee up the issue of — does not create a material dispute of fact because there is not a direct dispute between Dr. Reilly other than for him to say I don't agree with him. But he doesn't come back and say that it's undisputed or that there are these studies or something that says there is this risk of chronic disease as a result to the exposure.

On appeal, the pertinent analysis is whether Dr. Yost's affidavits and deposition create a genuine issue of material fact regarding the foreseeability of chronic injury.

**1. Dr. Yost's first affidavit and deposition testimony.**

In his first affidavit, Dr. Yost concluded that in his expert opinion, within a reasonable degree of scientific certainty, SEC's pepper spray caused Major "to suffer acute adverse health responses and greatly exacerbated her underlying respiratory diseases."

This opinion was based in part on the following excerpts from the affidavit:

> 4. According to the records and other documents I reviewed, after the Plaintiff completed the March 2008 OC Spray training session, she was not able to return to work due to a severe chronic cough and other respiratory related disease. The records also indicated the Plaintiff suffered a much milder form of chronic cough prior to the March 2008 training, and it was only after the exposure in that training that her condition worsened to the point that she was no longer able to work, whether at IDOC or in other similar employment settings.
>
> 5. I have expressed my expert opinions as to the cause of the Plaintiff's acute adverse health responses to the OC Spray, and how it greatly exacerbated her underlying respiratory diseases. Attached hereto as Exhibit B is a true and correct copy of those opinions.
>
> . . .
>
> 6. Based on my review of the above cited articles and my education, training, research and knowledge of the scientific literature in the relevant area, it is my opinion that the risks to the respiratory tract posed by exposure to SEC's SABRE Red law enforcement 10% OC Spray (MK-9 Fogger) were known and foreseeable risks at the time SEC sold its product to IDOC.
>
> 7. It is known now and it was known prior to 2008 that people with asthma and chronic cough are more sensitive to pepper spray then [sic] other people with normal respiratory function. People with greater sensitivity to capsaicin would be expected to have increased TRPV1 receptor populations. Other important TRP channels exist, and several of them, particularly TRPA1, are activated by irritants, such as those that exist in cigarette smoke, and other environmental sources. Thus, it is reasonable to expect the multiple TRP channels act in concert with each other to result in higher acute respiratory responses to a multitude of respiratory irritants, particularly in people with increased sensitivity to pepper sprays.

Dr. Yost's first affidavit also contained a list of studies from which his conclusions were drawn. SEC argues that although Dr. Yost listed several studies, his affidavit did not cite from or supply copies of those studies.

Additionally, SEC argues that Dr. Yost's comments only address acute injury, not the chronic injury alleged by Major. Dr. Yost's initial report, which was attached as an exhibit to his affidavit, more clearly stated the possibilities of chronic toxicity from OC exposure:

> [T]he biological responses to OC products are caused predominately by binding capsaicinoids to Transient Receptor Potential (TRP) calcium channels. The population of TRP channels in tissues is regulated by multiple exposures, and the number and activities of TRP channels usually determine the responses to chronic exposures that lead to sensitization or desensitization from multiple exposures in multiple organ systems. One highly characterized toxicity of capsaicinoids is the exacerbation of chronic cough, and people with this respiratory disease are up to 30-times more sensitive to capsaicin-induced cough.

Given the standard of review of making all reasonable inferences in favor of Major, Dr. Yost's first affidavit addresses chronic injury that results from OC exposure. Major's complaint alleged that the exposure increased the severity of her pre-existing, chronic respiratory illness. It is thus reasonable to infer that Dr. Yost's conclusion that SEC's pepper spray caused Major "to suffer acute adverse health responses and greatly exacerbated her underlying respiratory diseases," refers to both an acute and a chronic response to the pepper spray. In addition to his first affidavit and deposition, Dr. Yost offered two more affidavits into evidence.

**2. Dr. Yost's third affidavit.**

Although the district court struck Dr. Yost's second affidavit from the record and did not consider it below, it took his third affidavit into consideration. The third affidavit was provided in support of Major's motion for reconsideration of the district court's order to strike the second affidavit. A significant portion of the third affidavit is used to explain any real or perceived inconsistencies between Dr. Yost's prior affidavits and his deposition testimony. But the third affidavit also provides more detailed explanations for Dr. Yost's opinion on the pertinent issues:

As I explained in my deposition and in my affidavits, the weight of evidence is that long-term chronic adverse health effects can occur from exposure to OC for a certain population under certain circumstances. As I have repeatedly said, there is an entire body of research relating to the physiological, biological, toxicological, and pharmaceutical effects of capsaicinoids on human tissues. The weight of that evidence strongly suggests that exposure to capsaicinoids can cause long-term adverse health effects in persons who are already sensitized to capsaicinoids, whether it be because of pre-existing respiratory injury or because of prior exposures that up-regulated the TRPV1 receptor.

The affidavit also discusses the state of scientific knowledge in 2008:

> The fact that there was [sic] not any definitive studies showing long-term adverse health effects does not detract from the reality that, prior to 2008, enough was understood about the toxicology of capsaicinoids that it was understood that capsaicinoids are irritants that are toxic to sensory neurons under certain circumstances. . . . [I]t was understood that biological changes occurring within human and animal tissues can be of short duration, long duration, or even permanent.

These statements are supplemented through citations to studies and are used to support Dr. Yost's ultimate conclusion that:

> the scientific literature and studies in existence prior to 2008 [were] such that when viewed as a body of literature and human and animal studies, it was known that a product such

as SEC's MK-9 Fogger posed a risk of both acute and chronic respiratory injury such as that described in Ms. Major's medical records.

When all reasonable inferences that can be drawn from the record are construed in favor of Major, Dr. Yost's first affidavit, deposition, and third affidavit create a genuine issue of material fact. The third affidavit in particular identifies the injuries alleged by Major and the possibility that SEC's pepper spray could have caused them. The third affidavit is also supported by—and cites directly from—scientific research that was available when SEC sold the MK-9 Fogger to the IDOC. Therefore, Major has demonstrated a genuine issue of material fact to survive SEC's first motion for summary judgment. We hold that the district court improperly granted summary judgment to SEC on whether the company had a duty to warn Major of possible chronic injury.

**B. The district court erred by striking Dr. Yost's second affidavit as a sham affidavit.**

Major also appeals the district court's decision to grant SEC's motion to strike Dr. Yost's second affidavit in the September 15, 2011 hearing. The district court based its decision on the finding that Dr. Yost's testimony changed, and that the second affidavit still did not create a dispute of material fact. Major argues that the district court misinterpreted the second affidavit and that the deposition only clarifies earlier testimony.

**1. Standard of Review.**

"The admissibility of evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold matter to be addressed before applying the liberal construction and reasonable inferences rule to determine whether the evidence creates a genuine issue of material fact for trial." *Fragnella v. Petrovich*, 153 Idaho 266, 271, 281 P.3d 103, 108 (2012). "This Court applies an abuse of discretion standard when determining whether testimony offered in connection with a motion for summary judgment is admissible." *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 15, 175 P.3d 172, 177 (2007). "A trial court does not abuse its discretion if it (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason." *O'Connor v. Harger Constr., Inc*., 145 Idaho 904, 909, 188 P.3d 846, 851 (2008).

**2. Whether the district court erred by striking Dr. Yost's second affidavit as a sham affidavit.**

This Court has never adopted the sham affidavit doctrine. *See Arregui v. Gallegos-Main*, 153 Idaho 801, 805, 291 P.3d 1000, 1004 (2012). However, the Court of Appeals has previously stated that an affidavit which directly contradicts prior testimony may be disregarded as a sham affidavit on a summary judgment motion. See In re Estate of Keeven, 126 Idaho 290, 298, 882 P.2d 457, 465 (Ct. App. 1994). "[A]ll tribunals inferior to the Court of Appeals are obligated to abide by decisions issued by the Court of Appeals." *State v. Guzman*, 122 Idaho 981, 986, 842 P.2d 660, 665 (1992). Therefore, to the extent that the district court was following precedent from the Court of Appeals, the district court did not err in striking the affidavit.

In *Keeven*, the statement of the sham affidavit doctrine is dicta—rather than an adoption of the doctrine—since the affidavit in that case was not a sham and the rule did not apply. 126 Idaho at 298, 882 P.2d at 465. We have previously held that "[t]he issues of credibility should not be resolved at summary judgment unless the record is clear that credence cannot be given to the expert's affidavit." *Mains v. Cach*, 143 Idaho 221, 225, 141 P.3d 1090, 1094 (2006). The circumstances in this case are similar to those in *Mains*. In *Mains*, the plaintiff brought a medical malpractice claim against a neurosurgeon, Dr. Cach. *Id*. at 222, 141 P.3d at 1091. Mains alleged that she experienced severe pain following a surgery performed by Dr. Cach and offered expert testimony from Dr. Farzad Massoudi in support of her claim. *Id*., at 223, 141 P.3d at 1092. The district court declined to admit Dr. Massoudi's testimony into evidence,

having found that his affidavit contradicted testimony he gave in an earlier deposition. *Id*., at 224, 141 P.3d at 1093. The district court then granted summary judgment to Dr. Cach. *Id*.

This Court summed up the main issue on appeal:

> The problem with this case is simple. The testimony Massoudi gave in his deposition appears to contradict his subsequent affidavit. The testimony appears to say that he did not inquire as to the standard of care at the relevant time. The affidavit says that he did. Standing by itself, the affidavit would be sufficient to defeat summary judgment. The question is whether the affidavit should be disregarded because of Massoudi's prior deposition testimony.

*Id*. at 225, 141 P.3d at 1094. This Court then reversed the district court's grant of summary judgment on the grounds that a reasonable inference could be made showing that Dr. Massoudi's affidavit and deposition were consistent:

> Certainly, a contrary determination could be made by a trier of fact, but that type of weighing of the evidence is not appropriate for summary judgment. It is not clear that Massoudi failed to establish the relevant time frame for his opinion. Consequently, summary judgment should not have been granted.

*Id*. at 226, 141 P.3d at 1095.

Here, the district court struck the affidavit, in part, because several answers provided by Dr. Yost in his deposition contradicted the more direct language in the second affidavit. Specifically, the district court found that the affidavit unequivocally stated that SEC's pepper spray posed a known risk of both acute and chronic respiratory injury, and that Dr. Yost's deposition contained a contradictory statement regarding acute injury. When asked whether exposure to OC is generally deemed to cause temporary effects, Dr. Yost's deposition states that this is a fair statement.

In this instance and others discussed by SEC, it would appear that the district court conflated the term "generally" with the words "always" or "only." Dr. Yost's affirmation that OC generally causes a temporary effect does not conflict with the affidavit's statement that the substance has a known risk for acute and chronic injury. Similar to Mains, it can be reasonably inferred that Dr. Yost was making very fine distinctions that do not contradict as much as they refine and clarify. Though this caused some confusion, other examples seem to demonstrate the fine lines involved. SEC points to an exchange where Dr. Yost is asked whether any literature has explored the effect of chronic exposure to OC. SEC offers this as proof that Dr. Yost's second affidavit contradicts this testimony. However, SEC clearly asked about chronic exposure, not chronic injury caused by exposure.

This Court has never adopted the sham affidavit doctrine. We roundly criticized the doctrine in Mains because a sham affidavit finding necessarily turns on a credibility finding as well as a finding of bad faith. That is beyond the power of the trial courts at the summary judgment phase.

Although the trial court followed Court of Appeals precedent, it is however an abuse of discretion to misinterpret an affidavit or deposition. That is what has happened here. The deposition, first affidavit, and third affidavit of Dr. Yost create material issues of fact. The issues of bad faith or unreasonableness of litigation can be addressed through I.R.C.P. 56(g) or other attorney fee provisions.

**C. Neither party is entitled to attorney fees and costs on appeal.**

Major and SEC both argue that they are entitled to attorney fees on appeal pursuant to I.C. § 12-121. Under this section a judge may award reasonable attorney's fees to the prevailing party in a civil action. I.C. § 12-121. Because we will only award attorney fees on appeal "when the court is left with the abiding belief that the appeal was brought, pursued, defended frivolously, unreasonably or without foundation," we award neither party attorney fees in this appeal. *Conley v. Whittlesey*, 133 Idaho 265, 274, 985 P.2d 1127, 1136 (1999).

**V.**

**CONCLUSION**

We hold that the district court erred in granting SEC's first motion for summary judgment. Further, we hold that the district court erred in striking Dr. Yost's second affidavit. We vacate the judgment of the district court and remand for proceedings consistent with this opinion. We award neither party attorney fees on appeal. Costs to Major on appeal.

## [G] NO-FAULT

### LOUIE v. BAMBOO GARDENS

Supreme Court of Idaho
67 Idaho 469, 185 P.2d 712 (1947)

MILLER, J.-This case was submitted to the Industrial Accident Board on a stipulation of the facts as agreed to between the parties, and from which, among other things, it is made to appear.

That Tom Louie, claimant and appellant, about 45 years of age, on the 18th day of October 1946, and for more than three months prior thereto, was in the employ of the Bamboo Gardens, a restaurant in Boise, Idaho, as a dishwasher therein; that he was casually acquainted with one Fook Lee Hong, another Chinaman, but that said Hong was not a patron of the Bamboo Gardens, nor a customer thereof in that he had never taken his meals thereat and was in nowise interested therein. September 21, 1946, Fook Lee Hong and three other Chinese were arrested on a narcotic charge by officials of the United States; that during the latter part of September 1946, Hong was fined $50 by the U.S. District Judge, at Boise, Idaho, on account of his plea to said charge and thereupon discharged from further custody. Hong was a discharged veteran of World War II. After his discharge for the violation of the Narcotic Act, [], he seems to have labored under the delusion that it was thought that he had turned "State's evidence," and that someone was going to kill him. After his said discharge and prior to October 18, 1946, he stated to an Assistant United States District Attorney that members of a tong society to which Tom Louie belonged, and to which Hong did not belong were going to import "hatchet men" from Walla Walla, Washington to Boise, Idaho to kill him because members of such tong thought he had turned State's evidence against his former companions on the narcotic charge; that for several days before October 18, 1946, he was more or less in hiding at the American Legion Building in Boise, Idaho, asserting that someone was going to kill him. The Prosecuting Attorney of Ada County, Idaho, made an investigation and found there were no reasonable grounds for his suspicions that someone was going to kill him, but in his own mind he suffered the delusion that an attempt would be made upon his life.

October 18, 1946, at about 5:45 P.M., Tom Louie, claimant and appellant, received an injury, during his regular hours, and in the course of his employment, and while he was on duty performing the tasks for which he was employed at his employer's place of business, at 107 South 7th Street, Boise, Idaho, in that while taking water glasses from the kitchen to the serving table in the dining room, Fook Lee Hong entered the restaurant by the front door on 7th Street, carrying a loaded38 caliber revolver, which he brandished in a threatening manner, and then shot the same within the restaurant three times, one of which shots struck Tom Louie, claimant and appellant, in the upper back region, piercing his chest cavity and his lungs.

The employer was notified of such accident and injury sustained by said claimant and appellant, during the evening of October 18, 1946, and that a claim inwriting, stating the name, and address of the employer, the time, place, nature and cause of the injury, signed by claimant and appellant, was filed with the Industrial Accident Board on October 30, 1946; that as the result of the injury sustained, claimant and appellant was hospitalized at St. Luke's Hospital at Boise, Idaho, for a period commencing the evening of October 18, 1946, and until and including November 9, 1946, and that the hospital and medical charges in the sum of $475.55were paid by claimant and appellant; that cla1mant and appellant was under medical care at the time of filing the stipulation of facts with the Industrial Accident Board and that at the

time he was totally disabled for work and would continue to be so totally disabled for a period of time subsequently to be determined; that he was not then surg1cally healed and whether or not he will sustain a permanent injury is yet to be determined as well as the degree thereof, if permanent injury results therefrom.

On or about October 21, 1946, a criminal complaint was filed against Fook Lee Hong by the Prosecuting Attorney of Boise, Idaho, and on October 31, 1946, Hong was held by the Committing Magistrate to answer to the District Court for the crime of assaulting Tom Louie with a deadly weapon with intent to commit murder. An information was filed in said District Court, November 1, 1946, charging Hong with an assault to commit murder. A plea was interposed under I.C.A. Sec. 19-3202, that Fook Lee Hong was insane. The issue was tried to a jury, which returned a verdict of insanity and which was duly filed and entered in said District Court on November 18, 1946. November 20, 1946, the said District Court made and entered its commitment, committing Hong to the State Hospital South at Blackfoot, Idaho, by virtue of his having been found insane as aforesaid.

The Industrial Accident Board considered the stipulated facts and on January 6, 1947, made and entered its findings of fact, rules of law and order dismissing appellant's claim. The findings of fact follow very closely the stipulation. Finding No. 7, among other things, recites as follows: "The sole issue presented is one of law. It is conceded that the accidental injury to claimant Tom Louie arose in the course of his employment by the Bamboo Gardens. The precise issue is whether said accidental injury arose out of such employment." There is no dispute as to the facts.

We fail to find any evidence that would indicate that Fook Lee Hong, at the time he entered the restaurant at which Tom Louie was employed, or at the time he fired the shot resulting in the accidental injury of said Tom Louie, was looking for the appellant and had a real or imaginary grievance against him. There is no evidence to the effect that at the time Hong entered the restaurant that he knew that Tom Louie was employed there or that he would find him therein. In the conversation he had with various officials, no mention was ever made of Tom Louie and the only manner in which Tom Louie seems to have been connected with his delusion, is that Louie was a member of a tong that Hong asserted was going to bring in hatchet men from Walla Walla to kill him.

It may, however, be of no significance as to whether or not said Hong was looking for Tom Louie at the time he shot him and had either a real or imaginary grievance against him. The fact remains that it was an accidental injury and under the Workmen's Compensation Law, claimant and appellant is entitled to receive compensation as a result of said injury.

The Industrial Accident Board was manifestly of the opinion, which opinion is concurred in and now urged by respondents, that it was incumbent upon appellant to establish by a preponderance of the evidence that the accident arose out of his employment. It is admitted it occurred during the course of the employment. …

.... The modern tendency of the decisions, in keeping with the spirit of the law, is to award compensation in all cases where a liberal construction of the statute would justify it. Even in view of this liberal construction, it is not enough for the applicant to say that the accident would not have happened if he had not been engaged in the particular employment or if he had not been at the particular place. He must go further and say that the accident arose because of something he was doing in the course of his employment and because he was exposed by the nature of his employment to some particular danger. []

It would seem that the evidence in this case is such as justifies the conclusion that the injury was the result of a risk to which appellant was subjected in the course of his employment, and to which he would not have been subjected had he not been so employed. Appellant was injured not merely because he was a dishwasher in the Bamboo Gardens' restaurant, but because he was an employee within the Bamboo Gardens restaurant and engaged in the performance of duties which his employment imposed upon him. It was his employment that placed him in the position and environment wherein he was assaulted and sustained the accidental injury. Appellant did not in any manner provoke the assault and

attending accidental injury. At the precise time of the injury he was placed and engaged in the business of his employer. There is nothing to show that the brandishing of the pistol and the firing thereof was a deliberate intention to injure appellant. The intention of the assailant from the record may have been limited to "shooting up the place," and that it was a random shot that struck appellant.

There are no provisions under the Workmen's Compensation Laws that prohibit a recovery, except Sec. 43-1002, in that compensation shall not be allowed for an injury caused, "By the employee's willful intention to injure himself or to injure another; or, 2. By his intoxication." The Workmen's Compensation Law, Sec. 43-902, states:

> The common law system governing the remedy of workmen against employers for injuries received in industrial and public work is inconsistent with modem industrial conditions.*** The state of Idaho, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy *** and to that end all civil actions and civil causes of action for such personal injuries, and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided.

The legislature having declared that the common law system is inconsistent with modem industrial conditions, and all civil actions and causes for personal injuries, and all jurisdiction of the courts over such causes are abolished is the impelling reason for the liberalization of the rules governing the common law system.

The order of the board denying compensation constitutes a clear error of Jaw. The order is, therefore, vacated and set aside, with directions to conduct such proceedings as may be necessary in a further consideration of appellant's claim and to make such findings and award as the evidence and law require consistent with the views herein expressed.

## NOTES

(1) What is the basis for liability? How does the evaluation of the quality of the defendant's conduct differ from that in *White*, *Athay*, *Stevens*, *Van Vranken*, and *Kunz*?

What is the difference between strict liability and no-fault? If an employer kept a lion that got lose as a result of lightning or the act of a third person, would the employer be liable to an individual in strict liability? Would the employer be liable to an employee?

(2) The central trade-off in workers compensation schemes is the preclusion of potential tort liability in exchange for modest but guaranteed benefits. The test for liability is not whether there was fault involved in the injury but whether it was work-related; it is a matter or marking boundaries, not one of assessing blame. The underlying philosophy thus is a belief that is it good or proper to provide efficiently for the major financial and medical costs associated with employment-related injuries. The insurance premium payments are simply a cost of doing business and, as such, can be planned for and passed along to consumers of the products through higher prices.

(3) Although workers compensation statutes vary from state to state, it is possible to set out typical features:

(a) the basic principle is that an employee is entitled to certain benefits whenever the employee suffers an injury occurring in the course of employment;
(b) fault is irrelevant: the employee's fault does not bar or reduce recovery and the employer's lack of fault does not lessen liability;
(c) coverage is limited to certain enumerated classes of employed individuals;

(d) employee benefits include cash-wage benefits, hospital and medical expenses, and death and survivor benefits; the amount of benefits is set uniformly by legislative or administrative action rather than on a case-by-case basis;

(e) the employee, spouse, and dependents are prohibited from suing the employer for any injury covered by the act;

(f) the right to sue third parties whose conduct may have contributed to the injury is not abrogated, but the employee compensation fund generally is entitled to recoup any benefits it has paid;

(g) the system is operated by an administrative agency with appeal generally to an appellate court;

(h) the employer is required to pay for the system either through privately purchased insurance or a state-fund insurance.

**(4) Idaho workers' compensation statutes:** As with all other states, Idaho has adopted a statutory scheme to replace the potential tort liability of employers. The following are the major provisions as they appeared in 1947:

**43-901. Employments covered.** This act shall apply to all public employment as defined in section 43-903 and to all private employment not expressly excepted by the provisions of section 43-904.

**43-902. Declaration of police power.** The common law system governing the remedy of workmen against employers for injuries received in industrial and public work is inconsistent with modem industrial conditions. The administration of the common law system in such cases has produced the result that little of the cost to the employer has reached the injured workman, and that little at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such employments formerly occasional have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wageworkers. The state of Idaho, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as is otherwise provided in this act, and to that end all civil actions and civil causes of action for such personal injuries, and all jurisdiction of the courts of the stat over such causes are hereby abolished as is in this act provided.

**43-903. Public employment.** This act shall apply to employees and officials of the state and of all counties, cities, cities under special charter or commission form of government, villages, school districts, irrigation districts, drainage districts, highway districts, road districts and other public and municipal corporations within the state: but not to include, judges of election, clerks of election or jurors ....

**43-904. Employments not covered- Election of coverage.** None of the provisions of this act shall apply to:

1. Agricultural pursuits ...; or,
2. Household domestic service ...; or,
3. Casual employment ...; or,
4. Employment by charitable organizations; or,
5. Employment of outworkers; or of,
6. Members of the employer's family dwelling in his house; or,
7. Employment of airmen or individuals, ...engaged in the navigation of aircraft while under way; or
8. Employment which is not carried on by the employer for the sake of pecuniary gain:

Unless prior to the accident for which the claim is made, the employer had elected in writing filed with the board, that the provisions of the act shall apply.

**43-1001**. **Right to compensation for injury.** If a workman receives personal injury by accident arising out of and in the course of any employment covered by this act his employer or the surety shall pay compensation in the amounts and to the person or persons hereinafter specified.

**43-1002. Injuries not covered.** No compensation shall be allowed for an injury caused:

1. By the employee's willful intention to injure himself or to injure another; or,
2. By his intoxication.
   If the employer claims an exemption or forfeiture under this section the burden of proof shall be upon him.

**43-1003. Right to compensation exclusive**. The rights and remedies herein granted to an employee on account of a personal injury for which he is entitled to compensation under this act shall exclude all other rights and remedies of such employee, his personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury.

**43-1004. Liability of third persons.** When an injury for which compensation is payable under this act shall have been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee may, at his option, either claim compensation under this act or obtain damages from or proceed at law against such other person to recover damages ....

Note how the statute is structured: it creates categories and then specifies legal results that flow from being place in the categories. How many categories of employee-employers does the statute create? What results flow from being placed in the different categories? Does Louie have any other potential remedies that the worker compensation system?

**(5) Workers' comp as a model for torts**: The most comprehensive no-fault system is the New Zealand Accident Compensation Act. The Act, which abolished most tort actions for accidental injuries, became effective in 1974. Initially, it provided for compensation to accident victims from three different sources:

(a) the earners scheme: an extension of the previously existing workers compensation system, the earners scheme provides coverage for all workers against accidental injury both on and off the job 24 hours a day, seven days a week. When the accident occurs on the job, the employer pays 100% of the lost salary for the first week; there after, the Accident Compensation Corporation (ACC) pays 80% per week. The ACC also pays all medical expenses. Lifetime periodic payments are provided for permanent losses in earning capacity.

**(b)** the motor vehicle accident scheme: only non-earners are covered since workers are covered under the earners scheme. They are entitled to compensation for full medical expenses and lost earning capacity, but do not receive weekly payment for lost earnings.

(c) the supplementary scheme: again, only non-earners are covered by this scheme. It covers are accidental injuries other than motor vehicles.

In 1982, the New Zealand Parliament amended the statute to remove all references to the three separate funding schemes. The New Zealand system has prompted a significant amount of discussion in law reviews. For example, Professor James Henderson has argued that the New Zealand social insurance system was unwise on several grounds. He argued that the system did not address the "utility and fairness" goals of tort law but instead focused on compensation. On the fairness issue he wrote:

> A New Zealand-type system can be criticized on several fairness grounds. First, citizens would no longer have some of the traditional methods of vindicating individual rights in our legal system. A person intentionally struck by another, for example, would no longer be entitled to a legal judgment that his right to personal integrity had been violated. Second, the anomalies created by the Act are open to attack. For example, distinctions drawn between illness and accidental injury under the system cause persons similarly disadvantaged to be treated differently. Third, the measures of recovery include a number of arbitrary limits that cause persons dissimilarly disadvantaged to receive essentially the same benefits. Finally, the procedures under the

> compensation system reflect a willingness to sacrifice the interests of the individual to the greater good.

James A Henderson, Jr., *The New Zealand Accident Compensation Reform*, 48 U.CHI. L. REV. 781 (1981). As to Professor Henderson's first argument: is there a satisfactory solution to the dignitary claim short of reinstituting the tort system? How important is this claim? Should such "revenge" be encouraged? Is it unavoidable? On his second point: why is the New Zealand system more anomalous than the tort system since tort actions are not available for diseases? On the third issue is the tort system any less arbitrary? Isn't this the inevitable result of reducing injuries to monetary compensation? Finally: is this true? Why?

Henderson also argued that the New Zealand system fails to create adequate incentives for safety because it does not focus on allocative efficiency. A detailed study of motor vehicle accidents that compared accident statistics from before and after the adoption of the system does not, however, support this contention:

> New Zealand abolished the system of tort actions for personal injury damages in 1974. The new system created some obvious externalities, at least in regard to the costs of automobile accidents. The traditional view of the tort model [e.g., Henderson's view] suggests that the new system would produce: (1) an increase in motoring; and (2) an increase in the number and, in all probability, the severity of accidents. The available statistics, however, suggest exactly the opposite: (1) no significant increase in motoring activity (as represented by the number of vehicles registered and total kilometers driven) occurred; and (2) no noticeable increase in accident rates. In fact, the predominantly downward trend in the number of accidents, deaths, and injuries that had started prior to 1974 continued and even accelerated after New Zealand adopted the Accident Compensation Act. Similarly, the number of accidents (as compared to total vehicle usage) continued a steady decline.
>
> On the other hand, the total number of convictions for offenses involving potentially dangerous conduct continued an upward climb. When one takes into consideration the more effective measures adopted for dealing with alcohol-related offenses, however, even conviction rates have remained reasonably constant.
>
> In conclusion, the removal of tort liability for personal in New Zealand has apparently had no adverse effect on driving habits. In fact, statistics show a decline in accident and fatality rates. Of course, the decrease in accident and fatality rates is probably attributable to deterrent measures, such as compulsory seat belt and safety helmet laws and stricter drunk-driving laws and enforcement measures. Although it will remain impossible to determine whether the reduction in accident rates would have been even greater if full tort rights had been retained to act as a silent "partner" to changes in the traffic laws, clearly removal of tort rights for personal injury cases did not produce the increase in accident-producing behavior predicted by the traditional theory of tort deterrence.

Craig Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience,* 73 CAL. L. REV. 976 (1985). Do Brown's conclusions suggest that economic incentives may be less important than other factors such as the possibility of personal injury or death?

For an overview of the scheme, see William C. Hodge, No-Fault in New Zealand: It Works, 50 INS. COUNSEL. J. 222 (1983).

# Chapter II

# NEGLIGENCE: THE PRIMA FACIE CASE

> Negligence law is fundamentally a creature of technology; really, it is the common law's response to technology....The best introduction to [these issues] might be the Walt Disney version. In scene one, Goofy is an American colonial walking down a country road. Even when he is quite inadvertent (maybe he is smelling a flower with a bumblebee inside), he causes little negligent harm. Next, our hero is a teamster in Old New York. With the same inadvertence as before (is that a piano wagon connected to the horses?), Goofy causes more negligent harm. In the last scene, Goofy is driving an 18-wheel rig down an interstate highway. With advanced technology, slight amounts of inadvertence can produce disastrously large quantities of negligent harm. Luckily, inadvertence does not always lead to negligent harm, but it is much more likely to do so if people are using technology.
>
> - Mark F. Grady, Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion, 82 Nw. U. L. REV. 293 (1988)

As the excerpt suggests, negligence is concerned with risks. That is, with the probability (or more technically, the uncertainty) of some untoward event. Negligence is one attempt by society to reduce risk by imposing liability for injuries caused by risky behavior. "Negligence" thus is the general term for a group of decisions that lead to the conclusion that one person is obligated to compensate another person for injuries caused by unreasonably risky conduct.

To make the liability decision more manageable and consistent, courts have developed a prima facie case - those combination of facts and legal conclusions (the "elements" of the prima facie case) that are sufficient, if established by the plaintiff, to have the plaintiff's claim presented to the jury.

The elements of a prima facie case for negligence can be stated in a number of slightly different ways. The Idaho Supreme Court, for example, has declared:

> The elements of a cause of action based upon negligence can be summarized as (1) a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage.

*Brizendine v. Nampa Meridian Inigation District*, 97 Idaho 590, 593, 548 P.2d80, 83 (1976). See also *Alegria v. Payonk*, 101 Idaho 617, 619, 619 P.2d 135, 137 (1980).

*The Restatement (Second) Torts* § 281 provides a similar list in a section entitled "The Elements of a Cause of Action for Negligence":

> The actor is liable for an invasion of an interest of another, if:
>
> (a) the interest invaded is protected against unintentional invasion, and
>
> (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and
>
> (c) the actor's conduct is a legal cause of the invasion, and
>
> (d) the other has not so conducted himself as to disable himself from

> bringing an action for such invasion.

*See also* WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971).
Leon Green provided a short statement highlighting the process aspects of the prima facie case:

> How can law that never comes to rest be successfully studied, practiced, and administered from day to day? That is the problem we now consider. The prescription is not difficult to state. The chief virtue of negligence law is that it does not bind the judgment of advocate, judge, juror, appellate court, teacher, or student. Instead, it frees their judgment. It is only a process for making the law of any case brought within the boundaries of a negligence action. It does not forecast certainty. It only insures that a case will receive intelligent consideration.
>
> The prescription is based on procedures for the allocation of the functions performed by trial judge and jury in the determination of the basic affirmation issues and affirmative defenses of a negligence case. Its requisites ... are as follows:
>
> (1) In the trial of a negligence case, there must be evidentiary data sufficient to establish causal connection between the conduct of the defendant and the injury of the victim;
> (2) In any negligence case the plaintiff must rely on the duty of the defendant to avoid the injury suffered by the victim as a result of the defendant's conduct;
> (3) There must be evidentiary data sufficient to support a finding that the conduct of the defendant violated his duty to avoid the injury suffered by the victim;
> (4) There must be evidentiary data sufficient to support a finding that the plaintiff suffered damages as a result of the defendant's conduct; and,
> (5) The defendant may show any defense that disproves anyone of theof these requisites.
>
> It is generally said that the issues of fact are for the jury and the issues of law are for the court. It will be noted, however, that all issues require the participation of both judge and jury. Only if an issue is uncontested will the judge alone so rule.

Leon Green, *The Negligence Action*, 1974 ARIZ. ST. L. J. 369.

For analytical purposes, it is helpful to separate the causation element into two distinct components, cause in fact and scope of liability. In practice, courts and commentators generally make this distinction. Thus, these materials are structured by a prima facie case of negligence that has five elements, each of which must be proved by the plaintiff to prevail. Think of the elements of the prima facie case are a road map to the tort.

a. DUTY: duty is a legal issue to be determined by the judge. It is a question of whether the government through the operation of the legal system imposes an obligation on a person (the defendant) to exercise reasonable care (or some more exacting standard) towards another person (the plaintiff) under the circumstances. Duties are based upon policies which may be drawn from a wide range of sources.

b. BREACH OF DUTY: breach is the basic carelessness issue which characterizes the action for negligence; it is often loosely referred to as the negligence element because it poses the central question of negligence law: 'Was it reasonable for the defendant, under all of the circumstances, to engage in the conduct which caused the injury?" This has two aspects: (1) was a risk foreseeable? and (2) if so, was the defendant's conduct reasonable in the face of the foreseeable risk? The breach elementemploys the mythical "reasonable person." Green has called this element "an intellectual gyroscope" because the conduct which it requires "adjusts automatically commensurate with the danger." This element is the central law applying function of the tribunal.

c. CAUSE IN FACT: causation is a factual question for the trier of fact (classically a jury) to determine. It is a question of whether there actually is in fact a causal relation between the defendant's conduct and the plaintiff's injury. It is not necessary that the defendant's conduct be the sole cause of the harm - since this is impossible.

d. SCOPE OF LIABILITY: aka, "proximate cause." This element centers on the limitation of liability for harms actually caused by the defendant's conduct. The law has concluded that an individual should not be liable for all harms which causally follow from her conduct; this element is the primary limiting factor. The issues considered under this heading are closely related to those considered under duty. Courts tend to become metaphysical in the presence of the questions surrounding this element; it is the least coherent.

e. DAMAGES: the plaintiff must suffer actual harm --that is, harm which is legally recognized as worthy of compensation. Because of the historical relationship between negligence and action in case, plaintiffs cannot recover nominal damages in a negligence action.

For a recent, short introduction to the prima facie case and its utility in evaluating negligence see David G. Owen, The Five Elements of Negligence, 35 HOFSTRA L REV. 1671 (2007).

# Chapter III

# DUTY

## INTRODUCTION

"Duty" is the first element of the plaintiff's prima facie case. As noted in the brief description of the elements of the prima facie case, duty is a question of whether the government through the operation of the legal system imposes an obligation on a person (the defendant) to exercise reasonable care (or some more exacting standard) towards another person (the plaintiff) under the circumstances. Duty both serves prospectively to channel human behavior in ways deemed socially appropriate and retrospectively as the basis for determining the propriety of behavior.

The Idaho Court of Appeals defined "duty" as "a requirement that one conduct himself in a particular manner with respect to a risk of harm.... The scope of the duty [i.e., how one is required to act] is defined by the nature of the risk and by the persons endangered by it. A risk may arise from a number of sources, including the actor's own conduct, the conduct of others, or a condition on the actor's property." *Keller v. Holiday Inns, Inc*., 105 Idaho 649, 671 P.2d 1112 (1983). "Duty" thus is the legal shorthand for the conclusion that one person is obligated to act with some degree of care to avoid risking an invasion of another person's interest. This obligation is a "duty"; the interest protected by the obligation is a "right." "Duty" and "right" thus are flip sides of one another.

From a defendant's perspective, the imposition of a duty involves a restriction of freedom of action: "duty," after all, means that the duty-bound individual must refrain from acting in ways that invades the protected interest ("right") of the right-possessor. This is the reason that libertarians (such as Richard Epstein) are fundamentally hostile to tort: tort law is a major societal limitation on the freedom of action. Libertarians seek to replace torts with contracts which (in theory, at least) allows individuals to determine their own limits. A primary insight that libertarianism offers is that tort law is a form of governmental control of individual conduct - judges are paid by the government and have available the full powers of the state to enforce their decisions. Epstein's solution is to replace negligence with strict liability. Under this approach, the actor would presumptively be liable even if she neither intended to harm the plaintiff nor failed to take reasonable steps to avoid the harm. See Richard Epstein, A Theory of Strict Liability, 2 J. LEG. STUD. 151 (1973).

From the plaintiff's perspective, on the other hand, the problem is protection of an interest against invasive conduct. Why should one individual be able to act in a way that causes another a loss and not be required to make good that loss? Are there interests so worthless that they deserve no protection?

Given its role and the nearly overwhelming hodgepodge of conduct, it is hardly surprising that "duty" is a complex concept. The rest of this chapter examines the recurrent situations in which the Idaho courts impose a duty. These can be broadly grouped into two categories: (1) misfeasance (the general rule) and its limitations and (2) nonfeasance and its exceptions.

(1) RESTATEMENT {THIRD) OF TORTS § 7: The Restatement (Third) defines "duty":

> §7. Duty
>
> (a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.
>
> (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

RESTATEMENT {THIRD)OF TORTS § 7 (2010).

(2) The Idaho caselaw is (perhaps) a bit more complex than a simplistic reading of § (a) might indicate. The law draws a basic distinction between misfeasance and nonfeasance and recognizes exceptions to both:

**(a) misfeasance**: the general rule is that everyone has a duty to avoid invading another's right. In *Whitt v. Jarnagin*, the Idaho Supreme Court wrote,

> Every person has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him, and to do his work, render services or use his property as to avoid such injury. The degree of care to be exercised must commensurate with the danger or hazard connected with the activity.

*Whitt v. Jarnagin*, 91 Idaho 181, 188,418 P.2d278,285(1966). The court has frequently iterated this conclusion. E.g., *Sharp v. W.H. Moore, Inc*., 118 Idaho 297, 300,796 P.2d 506,509 (1990) ("the general rule is that each person has a duty of care t9 prevent unreasonable, foreseeable risks of harm to others. *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980); *Harper v. Hoffman*, 95 Idaho 933, 523 P.2d 526 (1974)").

Limitations on this general rule reflect situations in which the harm suffered is nonphysical. Emotional harm is the paradigm. The courts fear that the potential liability is out of proportion to the culpability: the amount of emotional distress that might result from any bit of careless conduct is unknowably large. Misrepresentation and economic loss presents similar problems.

**(b) nonfeasance**: there generally is no duty to prevent harm not of the actor's making. Stated slightly differently: there is no obligation to act to prevent a foreseeable risk of harm; there is no duty to rescue. This reflects a general presumption in the common law: although conduct may be prohibited, the common law has been reticent to require affirmative conduct.

**Exceptions to the nonfeasance "no-duty" rule** reflect the fact that the no-duty position can produce harsh and unjust results. The Idaho courts have, therefore, created several exceptions by imposing duties to act in certain situations.

**(3) Synonyms:** As you read through the materials, it is helpful to remember that there are a number of synonyms for the duty issue. For example, the duty question may be stated as whether

**(a)** the plaintiff has "stated a cause of action" since, absent a duty, the defendant is under no obligation to avoid infringing the plaintiffs interest and plaintiff has no cause of action for the invasion of that interest.

**(b)** the interest asserted by the plaintiff is justiciable, i.e., it will be protected by the court if the person asserting the interest can establish that the interest has been invaded.

**(c)** there has been a cognizable injury. This inquiry is closely to the question of whether there is a justiciable interest.

## [A] MISFEASANCE AND ITS LIMITS

## 1. THE GENERAL RULE: DUTIES ARISING FROM THE CREATION OF RISK OF PHYSICAL HARM

### WILSON v. BOISE CITY

Supreme Court of Idaho
391,55 P. 887 (1899)

[Plaintiffs brought an action to recover damages to their land caused by flooding from defendant's canal. The canal had been constructed to redirect the water of Cottonwood Creek, a natural stream which arose in the hills northeast of Boise and flowed through the city. During periods of high water, the stream's bed was insufficient to carry the entire flow and lands adjacent to the stream were flooded. To prevent this flooding, the city redirected the creek outside the city limits and constructed an artificial channel of cement and rock. The canal was approximately five feet high and varied from three feet wide at the bottom to eight feet wide at the tip. As redirected, Cottonwood Creek ran along plaintiffs' land. In 1892 and 1894, Cottonwood Creek overflowed its cement banks. Following a third flood in 1897, plaintiffs brought this action. Defendant appeals a jury verdict for plaintiff.]

QUARLES, J.: .... The power to provide for the health and cleanliness of the city grants power to the mayor and common council to cause sewers to be constructed to carry the waste from the outside of the city and authorizes the mayor and common council to cause such sewers to be constructed to such points outside of the city as may be necessary in order to rid the city entirely of said waste. In order to protect the streets of said city, to protect the property and the health of its citizens, it appears from the record in this case that it was necessary to construct the artificial channel in question. A grant of power carries with it authority to do those things necessary to the exercise of the power granted. The mayor and common council, in constructing said channel, were exercising a power conferred upon them by said city charter. Now, having acted within the scope of the powers granted by the city charter, the defendant must take care of said artificial channel, and of the waters which naturally flow in Cottonwood creek, whether during the summer and fall seasons, when such waters are at a low stage, or during the spring thaws, when the said stream is naturally swollen from melting snows in the mountains. As a part of the common history of the country, we know that more snow falls some seasons than falls others, and that there is more water in said creek during the spring thaws in some years than there is in other years. The record before us shows that during the freshets, or spring thaws, during some of the years since its construction, said artificial channel, on account of its not being large enough, did not and could not carry all of the waters of said stream, causing the flooding of adjacent lands. Of course, the city has no control over the elements, and is not responsible for loss occasioned by the act of God, or by the acts of the common enemy; yet having constructed such artificial channel, it is under a legal obligation to take care of said artificial channel, and of the waters that naturally flow in said stream, at all seasons.

If the damage complained of had occurred through and by means of a cloudburst, or unusual and unprecedented storm, the defendant, not being in fault, would not be responsible. But the injury complained of was caused by said artificial channel being too small to carry the waters of said stream during the spring high waters, and which water was the natural result of usual and ordinary causes, and the defendant is responsible, because it is the fault of said defendant that said artificial channel is not large enough.

.... In the case at bar, the defendant, for its benefit has done this thing. Having changed the channel of said stream and caused the waters thereof to flow where they did not, and would not, flow by nature, it must keep such artificial channel in condition to carry the waters diverted by it, in high as well as low water seasons, and protect the property of residents upon and near such artificial channel, or respond

in damages to the parties injured. If the acts of the mayor and common council which caused the injury complained of consisted in attempting to confine the waters of said stream to the natural channel thereof, to save the property of adjacent owners, and its streets, it would not, of course, be responsible. In the case at bar, if the waters of said stream had not been diverted from their natural course, the plaintiffs' property would not have been injured, but the waters which injured their property would have injured the inhabitants of Boise City, and its streets. It is contrary to natural justice to say, as to the injury complained of, which was caused by the defendant, for its financial benefit, to protect its streets and save it expense, that the plaintiffs, innocent parties, must suffer their loss in silence, and the defendant, though the gainer, is under no obligation to compensate plaintiffs for their loss.... In the case before us, a condition confronted by defendant city. Its streets were being overflowed and damaged by the waters of a natural stream flowing through its boundaries. The presence of the said natural stream obstructed its streets at times, endangered the health of its inhabitants, and was a source of expense and annoyance. To meet this condition, and avoid its consequent evils, the mayor and common council, in fact, the municipality itself, decide to change the course of said natural stream by building an artificial channel sufficient to carry the waters of said stream therein.... It became the duty of the defendant to construct said artificial channel of sufficient permanency, strength, and size to carry all of the waters of said stream, and for its failure to discharge this duty, it is responsible to anyone injured by such failure. [].

It is urged by the appellant that the evidence is not sufficient to support the judgment. It is one of the facts stipulated that during the high-water seasons of 1892, 1894, and 1897, the artificial channel in question would not carry the waters of said stream, and the same was overflowed, and the adjacent lands flooded. It is not agreed that during the springs of said years the flooding of said artificial channel was the result of any cause, other than the natural and ordinary causes which came from the breaking up of winter and the introduction of spring, and there was no evidence offered by the defendant to show that the injury complained of resulted from any unusual cause which could not be reasonably anticipated. If the said injury was the result of unavoidable casualty, or the result of conditions which are unusual and could not be reasonably anticipated, the existence of such conditions would be a defense, but such defense should be pleaded and proven. We think the evidence sufficient to support the judgment. The natural and reasonable inference from the agreed statement of facts in that the artificial channel in question is not large enough to carry the waters of Cottonwood creek during the spring seasons. This fact was demonstrated the next spring following its construction, showing that it was negligently made too small. Having actual notice that said artificial channel was not large enough to carry the waters diverted by the defendant, soon after its construction, the defendant has negligently omitted to enlarge the same, and, now that innocent parties have suffered, seeks to avoid liability ....

HUSTON, C.J., AND SULLIVAN, J., CONCUR.

NOTES

**(1) Analyzing duty**: Analysis of the duty element involves three issues:

**(a)** What is the source of the defendant's duty? Why is the defendant obligated to act carefully in relation to the plaintiff? This is a question of facts: what facts does the court point to in holding that the actor does (or does not) have a duty? Note that, because the source question is based on facts, the logic that underlies a decision that there is or is not a duty is analogic, i.e., the facts in this case are analogous (or not) to the facts in other cases that have held there is a duty. Overtime, the analogies are increasingly generalized until they become a "rule" - a statement with a hard center and fuzzy edges.

**(b)** What was the scope of the duty? That is, what was the defendant required to do to avoid breaching the duty owed to the plaintiff? This is the standard of care that the court uses to evaluate the defendant's conduct. In most cases this will be the general, reasonable-person under-the circumstances standard such as IDJI2.20.

**(c)** What interest is protected by the duty? Individuals have a number of interests that they seek to have protected by the legal system. Did defendant have a legally enforceable obligation not to invade the interest asserted by the plaintiff? The most common interest asserted in torts is the interest

in physical integrity, i.e., the claim is for "physical harm, i.e., "bodily harm" and "property damage" in the language of § 4 of Restatement (Third). As we will see, this does not exhaust the list of interests.

**(2)** What rationale did the court assert in requiring the city to compensate the plaintiff? What policies are advanced by obligating the city to act with care in regard to the interests of plaintiff? That is: why should the state be solicitous of the interests that plaintiff asserts? Wasn't the general welfare increased by rerouting Cottonwood Creek? Why isn't a net improvement in welfare a sufficient reason to allow defendant to act without being held responsible? What does this case suggest about the economic explanation of tort law? Which of the liability rationales best explains the result?

***(3) Willson [sic] v. Boise City* (pt. 2):** Twelve years later, the Wilsons were back in court again seeking damages for injuries to their property. The court reiterated its prior conclusion:

> if the municipality has undertaken to control and direct the flow of the waters of this stream. It has done that presumably for the benefit of the whole community. Since it has assumed the control and direction of the stream, it cannot tum its water loose upon other property owners and flood and damage them without also assuming a responsibility for such damages as may be sustained by the property owners on account of the negligence, or rather want of proper care and diligence upon the part of the city in providing for, directing and controlling the flow of such stream ....The city has undertaken the care and maintenance of this stream. It must now afford the property owner reasonable protection against the ravages of the stream in times of high water....

*Willson v. Boise City*, 20 Idaho 133, 117 P. 115 (1911). See also *Dunn v. Boise City*, 48 Idaho 550, 283 P. 606 (1929).

**KEIM v. GILMORE & PITTSBURGH R.R.**

Supreme Court of Idaho
23 Idaho 511, 131
P.656(1913)

AILSHIE, C.J.-This is an appeal from a judgment awarding respondent $10,000 damages. [Keim was injured by a moving train while on the station grounds at the town of Leadore. At the time of the accident, Keim was walking back to his home in the village of Junction, which is about one mile from the depot at Leadore. To return to his house, it was necessary for him to cross the railroad tracks. Rather that following the wagon road, however, he walked north to the depot. When he reached the depot, he saw a train of cars on the track, either moving or just starting up. He therefore walked along a gravel walk that ran parallel to the track in front of the depot. He was from five to seven feet from the track. A baggage truck was standing about forty feet down the track from the depot.) As he walked past this truck, leaving it between him and the passing train, a projecting jack arm on a moving steam shovel car which was attached to the train struck the truck and threw it with violence against respondent, knocking him over, severely injuring him, and rendering him unconscious and permanently maimed and disabled.

The first question to be considered is the alleged negligence of the appellant. Appellant insists that no negligence is shown on the part of the railroad company. Now, it appears, and is undisputed, that the whole mischief was caused by this projecting jack arm on the moving steam shovel car. It appears that these arms are placed on each side of such a car to be used in steadying the car when it is in operation, and that they are ordinarily either turned back or taken off when the car is being hauled over the road. On this occasion the jack arm on the side of the car next to the depot and to respondent was projecting. Itis uncertain as to the exact distance of this projection, but it seems quite dear from the evidence in the record that it was anywhere from eleven to twenty-two inches. Itis clear that the fault here was not with the employee who left the truck alongside the track. The truck was far enough away from the track to clear any ordinary car which was accustomed to pass over the track; and, indeed, it was not touched, so far as the evidence shows, by any car until the steam shovel car came along. Clearly there was no negligence on the part of the man who left the truck at this place, unless he had notice that the steam shovel car was going to be pulled over the road at this time in the condition in which it was when it passed this truck. The whole trouble in this matter lay with those who were operating the train. If they

were going to pull a car over the road with projections on the sides extending from eleven to twenty-two inches farther out than any of the cars usually transported over the road, then it was clearly the duty of such operators to notify other employees to govern their actions accordingly in the matter of leaving freight, baggage, trucks, etc., along the side of the track, and it was likewise the duty of such operatives to maintain a lookout for the protection of those who might be injured or taken unawares by reason of this increased danger from the projections from the steam shovel car. An employee or even a trespasser at the station grounds may know with almost exact accuracy the distance to which the cars which the company hauls over its road project over the track or beyond the rail. He may accordingly leave freight, baggage or other articles along the track where it would entail no danger upon anyone except for just such an unforeseen condition as arose in this case. The only persons who had it in their absolute power to prevent such an accident as this were the operatives of the train. They might warn other employees or in this case they might have taken off these arms and reduced the car to the standard width, and in the latter event no injury would have befallen the respondent and no damage would have been entailed.

It has been argued with a great deal of force and ingenuity that the operatives of this train could not possibly foresee that Keim would be immediately opposite this truck when the steam shovel car would pass the truck and that they are therefore guilty of no negligence. This argument, however, confesses that the operatives of that train knew that the jack arm would strike the truck, and that they were carrying along with them a danger which might inflict upon Keim or any other person similarly situated either at a station ground or anywhere else along the track. The negligence lies back of and prior to the hitting of this truck by the jack arm of the steam shovel car. The real negligence was in carrying this car over the road in a train of cars without maintaining a proper lookout to prevent just such injuries as this. It is clear that they were maintaining no lookout to prevent accidents from the special hazard of this car. It is testified by a competent witness that one railroad company would not accept a car from another railroad company for shipment over its line in the condition this car was in, namely, with the jack arms in place and projecting as was the case with this car.

....The railroad company set the danger in motion; they were the active agents carrying an unusual danger over their road.

The judgment should be affirmed, and it is so ordered.

SULLIVAN AND STEWART, J.J., CONCUR.

NOTES

(1) What is the source of the defendant's duty? What was the scope of the duty? What interest is protected by the duty?

(2) Duty and breach are closely intertwined: the scope of the duty is the standard of care that is used to evaluate whether defendant breached its duty. Is Keim a breach case? Was defendant making the same argument that the defendant made in *Adams v. Bullock*?

(3) Note the specificity with which the court defines the scope of defendant's duty. Keim was decided during the same period in which Justice Oliver Wendell Holmes writing for the United States Supreme Court crafted the look-listen-and-alight in *Baltimore & Ohio RR. v. Goodman* [Franklin, Rabin, & Green at 60].

(4) The question of creation of risk can arise in many contexts. For a discussion of this in the employment setting, see, Monique c. Lillard, “Their Servants’ Keepers: Examining Employer Liability for the Crimes and Bad Acts of Employees”, 43 Idaho Law Review 709-765 (2007)

**McKINLEY v. FANNING**

Supreme Court of Idaho
100 Idaho 189, 595 P.2d 1084 (1979)

BAKES, J.: This is an appeal from summary judgments against plaintiff appellant Dorothy McKinley. McKinley, who slipped and fell on a public sidewalk, sought to recover damages resulting from that accident. We reverse.

In 1969, June and Wayne Fanning were the owners of the Clearwater Hotel in Pierce, Idaho, and the Clearwater Cafe which was located in part of the hotel building.... McKinley was the lessee, occupier and operator of the Clearwater Cafe from 1969 until1972. During that time the Fannings hired Northwest Homes, Inc., to install on the building an awning which extended over the sidewalk in front of the cafe.... Because of the manner in which the awning was installed, water allegedly drained into one comer of the awning and then onto the sidewalk in front of the cafe. The record is clear that McKinley knew of the installation of the awning and that water drained from it onto the sidewalk. The record is also clear that McKinley was aware that because of this drainage ice occasionally accumulated on the sidewalk beneath the comer of the awning. The record indicates that the awning did not reach all the way to the curb but lacked approximately 2 1/2 to 3 feet from covering the entire sidewalk.

In her deposition McKinley testified that on the date of the accident there was an accumulation of three to four inches of snow and slush on the street and on that portion of the sidewalk not covered by the awning and that there was an accumulation of ice on the sidewalk underneath the comer of the awning where water had drained onto the sidewalk. She testified that on the date of the accident she got out of her car, which was parked in front of the cafe, stepped up onto the sidewalk and took two or three steps to a point under the edge of the awning where she slipped and fell on ice which had accumulated from water draining off the comer of the awning. The injuries she sustained from the fall required surgery and ultimately required her to cease the operation of the cafe.

McKinley brought suit against the Fannings and Northwest Homes, alleging that her injuries were the result of Northwest Homes' negligent installation of the awning and the Fannings' negligent failure to correct the improper installation and to remedy the hazard it created. Both defendants moved for summary judgment, which the district court granted. McKinley appeals from those summary judgments.

As to the defendant Fanning, McKinley testified in her deposition that on several occasions she had advised Fanning that the awning had been improperly installed and had caused water to drain onto the sidewalk creating a dangerous condition. She alleged in her amended complaint that Fanning: "negligently failed to correct the improper installation of said awning after having actual notice of the unreasonable hazard thereby created."

Furthermore, McKinley alleged in the amended complaint that the awning had been installed in violation of the municipal code of the City of Pierce, which provided that the roof of a marquee must "be sloped to downspouts which shall conduct any drainage from the marquee under the sidewalk to the curb" and that the construction of the awning violated this ordinance and was therefore negligence. Either of those two allegations raised factual issues which could not be resolved on summary judgment. Fanning's assertion on the motion for summary judgment that McKinley herself had violated a city ordinance requiring "the owner or tenant of any premises abutting or adjoining any public sidewalk to remove all snow and/or ice from such sidewalk" was not sufficient to defeat her claim for recovery. That assertion merely raised an issue of contributory negligence. Since the advent of comparative negligence, contributory negligence of the plaintiff is not grounds for granting summary judgment in favor of the defendant but requires the trier of fact to compare the contributory negligence of the plaintiff with that of the defendant. See I.C. §§ 6-801, -802.

Neither does the assertion that Fanning, as lessor, owed no duty to McKinley, the lessee, to prevent or remedy the hazardous condition because McKinley was aware of the danger supply adequate grounds for summary judgment. In this case the injury was allegedly sustained not as a result of a

dangerous condition on the business premise of the cafe, but rather as the result of an allegedly dangerous condition on the public sidewalk abutting the cafe. Thus, the panoply of rules concerning the landowner's duties to persons on the property and the classification of those persons, such as trespassers, invitees, licensees and lessees, which are often made in those kinds of cases are inapposite here. The duty of care involved in this case is that owed by a landowner to pedestrians using a public sidewalk abutting the property. Certainly Fanning, who was the owner of the entire premises, lessor of the cafe and apparently the possessor of the hotel, had a duty to pedestrians using the public sidewalk to exercise reasonable care not to create a dangerous condition on the sidewalk. Fanning had a further duty to remedy any dangerous condition which his alterations of the property had caused if it jeopardized safe passage on the public sidewalk. Although McKinley was the lessee of the cafe, at the time of the accident she nevertheless was still a member of the public, a user of the sidewalk, and therefore, a person to whom Fanning owed that duty of care. However, because McKinley was a lessee and may have had some knowledge of the dangerous condition, she may have had a separate duty to correct it, a knowledge and duty not chargeable to the ordinary pedestrian using the sidewalk. But this difference between McKinley and the more typical pedestrian does not relieve Fanning of the duty to use due care to avoid creating a hazard on the sidewalk, but only raises an issue of contributory negligence of McKinley which must be resolved by the jury, not the court on a motion for summary judgment.

For the foregoing reasons the judgment of the district court granting summary judgment is reversed and the cause remanded for further proceedings....

DONALDSON & BISTLINE, JJ., CONCUR.

SHEPARD, C.J., DISSENTING: I must dissent on the basis that (1) to me the record discloses no unresolved issues of material fact, and (2) the majority leaves unresolved, and therefore furnishes no guidance to the trial court on remand, a number of legal issues raised by this appeal....

.... At this juncture, we must assume that the plaintiff-appellant slipped on an accumulation of ice and snow on the sidewalk in front of her business premises, and that the hazardous condition was created by drainage from an awning over the sidewalk. We must also assume that she sustained injuries and that the injuries resulted in damage.

From these facts, the trial court and this Court must determine whether an actionable cause for negligence exists in McKinley against the defendants-respondents. To assert, as does the majority, that issues of negligence and proximate cause are for the jury to resolve, I submit merely begs the questions presented by this appeal. In my view, the above set forth facts do not lead to a conclusion of the existence of actionable negligence. Hence, the purpose of summary judgment in avoiding useless trials is well served in the instant case. []

Prior to the enactment of Idaho's comparative negligence statute in 1971, a plaintiff was barred from recovery against a negligent defendant if plaintiffs own negligence contributed to the injury. However, since the enactment of that statute, I.C. § 6-801, a plaintiff may recover against a negligent defendant if plaintiffs negligence was "not as great" as defendants*. Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976); *Fairchild v. Olsen*, 96 Idaho 338, 528 P.2d 900 (1974). Nevertheless, the negligence, if any, of the plaintiff is prematurely raised unless and until a case of actionable negligence on the part of the defendant is supported by the record. Only after there has been found to be a breach of a duty by the defendant has a sufficient cause of actionable negligence been made out. *Rehwalt v. American Falls Reservoir District No. 2*, 97 Idaho 634, 550 P.2d 137 (1976). I would conclude that there has been no breach of a duty by the defendant Fanning toward the plaintiff McKinley.

The elements of a cause of action based upon negligence can be summarized as (1) a duty recognized by law, requiring a defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage*. Brizendine v. Nampa Meridian Irrigation District*, 97 Idaho 580, 548 P.2d 80 (1976); []

Prosser has analyzed the concept of duty as it arises in negligence:

> It is better to reserve "duty" for the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other, and to deal with particular conduct in terms of a legal standard of what is required to meet the obligation. In other words, "duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in the light of the apparent risk. What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty. The distinction is one of convenience only, and it must be remembered that the two are correlative, and one cannot exist without the other.

W. PROSSER, LAW OF TORTS § 53 (4th ed. 1971); *Brizendine v. Nampa Meridian Irrigation District, supra.*

Each element of negligence must be present for the plaintiff to recover on a negligence claim. Thus, a sufficient allegation of actionable negligence must begin with a duty or obligation of a defendant to protect a plaintiff from injury and a failure to discharge that duty. Relevant to the issue of duty, the Restatement (Second) of Torts § 355 sets forth a general rule of non-liability for conditions on the property arising after the lessor transfers possession. That section provides:

Except as stated in §§ 357 and 360-362, a lessor of land is not subject to liability to his lessee or others upon the land with the consent of the lessee or sublessee for physical harm caused by any dangerous condition which comes into existence after the lessee has taken possession.

Thus, in general, the lessor has no duty to prevent the existence of any dangerous condition on the leased property created during the tenancy. However, as noted in the above stated section, there exist certain exceptions to the general rule of nonliability.

It is argued that Restatement (Second) of Torts § 362 may provide such an exception. That section provides as follows:

> § 362. *Negligent Repairs By Lessor*. A lessor of land who, by purporting to make repairs On the land while it isin the possession of his lessee, or by the negligent manner in which he makes such repairs has, as the lessee neither knows nor should know, made the land more dangerous for use or given it a deceptive appearance of safety, is subject to liability for physical harm caused by the condition to the lessee or to others upon the land with the consent of the lessee or sublessee. (Emphasis added.)

It is undisputed that McKinley was aware of the construction of the awning, and that the construction of the awning caused drainage onto the sidewalk with its resultant accumulation of ice and snow on the sidewalk. Comment d to § 362 declares that the lessor is subject to liability if, but only if, the lessee neither knows nor should know that the purported repairs have not been made or have been negligently made and so relying upon the deceptive appearance of safety, subjects himself to the dangers or invites or permits his licensees to encounter them. Conversely, it would follow that if the lessee knows or should know that the purported repairs have not been made or have been negligently made then the lessor is not liable under this exception. []

Once Mrs. McKinley knew of the condition caused by the awning, the lessors Fannings were under no further legal duty owed to the lessee McKinley. The liability of the lessor remains only so long as the lessee had no knowledge of the danger, his duty was to either correct the defective awning or warn of the danger caused by the defective awning, and once the lessee knew of the danger, the warning is no longer necessary. [] I find it more than difficult, therefore, to understand the assertion of the majority that the lack of duty flowing from Fanning to McKinley is irrelevant.

McKinley also contends that the awning was constructed in violation of a local building code ordinance. That building ordinance provides as follows:

> Section 4505(f). *Roof Construction*. Every roof and skylight of a marquee shall be sloped to downspouts which shall conduct any drainage from the marquee under the sidewalk to the curb. However, failure to comply with that ordinance herein would at best only establish that the awning had been constructed in a negligent manner.

The Restatement (Second) of Torts § 362 specifically states that the fact that repairs were made in a negligent manner is not actionable where the lessee has knowledge of that negligent construction. The record in this case demonstrates that there is no genuine issue about the material and dispositive fact that Mrs. McKinley was fully aware of the accumulation of ice beneath the awning. Even if all of the remaining issues of fact are resolved in favor of McKinley, it cannot be found that the defendants breached a duty owed to her.

The majority observes that,

> [B]ecause McKinley was a lessee and may have had some knowledge of the dangerous condition, she may have had a separate duty to correct it, a knowledge and duty not chargeable to the ordinary pedestrian using the sidewalk. But this difference between McKinley and the more typical pedestrian does not relieve Fanning of the duty to use due care to avoid creating a hazard on the sidewalk, but only raises an issue of contributory negligence of McKinley which must be resolved by the jury, not the court on a motion for summary judgment.

Such conclusion, I believe, only confuses the concept of duty and contributory negligence. McKinley, as lessee, had a duty to clear the ice and snow from the sidewalk caused by a defective condition of the premises of which she had knowledge. She breached that duty, and she herself was injured as a result thereof. I fail to see how an issue of contributory negligence arises. The majority provides us only with muddy water and murky analysis.

McFADDEN, J., CONCURS.

NOTES

(1) What is the source of the duty? What is the scope of the duty? What interest is protected by the duty? Which of the three elements do the dissenters challenge?

(2) What is the dispute between the majority and the dissent? What is the relevance of the lessor-lessee relationship between plaintiff and defendant? What is: what is the status of the plaintiff? How does the majority define her status? How does the dissent? What is the unstated assumption implicit in the dissent's characterization of plaintiff's status?

(3) What role should plaintiffs? knowledge of the risk play in determining liability? Does the majority simply ignore the fact that she knew of the icy conditions?

(4) What role should the statute play in the decision? What is the dissents argument about the statue? Is it persuasive?

(5) What policies are advanced by obligating the lessor to act with care in regard to the interests of plaintiff? That is: why should the state be solicitous of the interests that plaintiff asserts? Which of the rationales for tort liability- retribution, deterrence, compensation, or risk-spreading - offers the best justification for imposing a duty on defendant?

(6) Scope of the duty owed by a landlord to her tenant or the tenant's visitors: Shepard argues that the lessor owes no duty to the lessee for conditions that occur after possession has been transferred to the lessee. Cf. *Olin v. Honstead*, 60 Idaho 211, 91 P.2d 380 (1939); *McKenna v. Grunbaum*, 33 Idaho 46, 190 P.2d 919 (1920).

(7) ***Idaho Northern R.R. v. Post Falls Lumber Co***.: Defendant was driving logs down a stream to its sawmill when they jammed, flooding plaintiff's property. After concluding that defendant had a duty to exercise care commensurate with the risks, the court noted that plaintiff was charged with a corresponding duty when it undertook to build its railroad up Prichard Creek. It was chargeable with notice that Prichard Creek was a stream capable of floating logs and lumber and that it might be used for such purpose. It was also chargeable with notice of the natural conditions of the country and the frequency of floods and freshets.

It was likewise chargeable with notice that if anyone attempted to float Jogs or lumber down the stream, they would necessarily, in the course of such navigation, be likely to at some places and at some times strike the banks of the stream and that in doing so there would necessarily be some abrasions of the banks. If the company sought to convert one bank of the stream into a railroad grade and track, it was under the necessity of exercising such reasonable precaution in building the grade and protecting the same as the nature of the stream and the natural conditions of the country and use of the stream for the floating of logs and lumber would demand of a reasonably prudent person. It was also chargeable with due care and caution in the building and construction of bridges across the stream. *Idaho Northern R.R. v. Post Falls Lumber Co*., 20 Idaho 695, 119 P. 1098 (1911).

What is the source of the duty in this case?

**GIBSON v. HARDY**

Court of Appeals of Idaho
109 Idaho 247, 706 P.2d 1358 (1985)

SWANSTROM, J.: Ned and Mame Hardy appeal from a district court judgment awarding damages to plaintiffs Gibson and Swallow caused by the Hardys in negligently performing a slash piling contract for the United States Forest Service (USFS). The Hardys assert that the judgment must be set aside because of the following errors: first, that plaintiffs had no justiciable interest in the property which was admittedly damaged or destroyed by the Hardys; second, that the trial court erred in concluding the Hardys breached a legal duty to plaintiffs to exercise due care not to damage or destroy wood materials being salvaged by plaintiffs; ....We affirm the judgment as to liability but we vacate and remand on the issue of damages.

In July 1978 Marne Hardy signed a contract with the USFS for slash piling several designated "units" or areas of forested land in the Island Park area of eastern Idaho. Marne's husband, Ned, actually performed the contract. For convenience, we will simply refer to one or both of these parties as "Hardy." The contract work involved cutting down or pushing over standing trees and piling them along with all other logs, treetops and limbs within certain unit boundaries for later disposal by burning. The work was to be fully performed in ninety days.

At approximately the same time, Gibson and Swallow, as salvage operators, contracted with the USFS to purchase all salvageable trees which were to be cut and removed from what we will call the Meadow Creek unit. The Gibson-Swallow salvage operation involved cutting small diameter lodge pole pines to form poles and posts for sale in Nevada. The salvage contract, in Gibson's name, carried a termination date of October 30, 1978. However, the contract further provided that the "sale may terminate prior to above date due to slash piling." The Meadow Creek unit, where Gibson and Swallow were allowed to cut and remove trees, was included in the Hardy contract to be slash piled. The Hardys had no contractual obligation with Gibson and Swallow.

Gibson and Swallow worked the Meadow Creek unit for approximately twenty-four days and claimed they had many poles and posts cut and lined up in preparation for loading. On July 30, 1978, Gibson, Swallow and their crew left the Meadow Creek unit unattended and traveled to Nevada for a

three-day weekend. On August 3, after completing work at his first location, Hardy proceeded to the Meadow Creek area and slash piled the unit where Gibson and Swallow had been working. The salvage operators returned to find that all salvageable material, including cut and piled posts and poles, had been destroyed by being bulldozed into large piles of debris for burning. The USFS offered Gibson and Swallow an alternative area to work, which they refused. Subsequently, Gibson and Swallow filed this action against the Hardys, seeking damages for the loss of their property.

Hardy first asserts that the salvage operators had "no justiciable interest" in the property that was destroyed. He relies on a provision of Gibson's salvage contract to support his argument. The provision states that "[t]itle to all timber included in this contract shall remain in the United States until it has been scaled or measured, paid for and removed from sale area." Hardy argues that this provision does not provide Gibson and Swallow an interest in the trees that had been standing or in the cut poles and posts because the material had not been removed, resulting in the title still vesting in the Forest Service. We find this contention to be without merit. It was established beyond dispute at trial that Gibson fully paid the USFS for the salvage on the Meadow Creek unit in advance. In spite of the printed contract language, no scale or measurement of the material had to be made before its removal by the salvage operators. The salvage contract gave Gibson and Swallow the right to cut and remove all salvageable material on the unit. They were prevented from doing this only by the destruction caused by Hardy. We hold that Gibson and Swallow had a sufficient interest to bring a cause of action for damages.

Hardy next asserts that he did not breach any duty to Gibson and Swallow and, therefore, was not negligent in destroying the trees, poles and posts. We recognize that negligent conduct and breach of contract are two distinct theories of recovery. "Ordinarily, breach of contract is not a tort, although a contract may create the circumstances for the commission of a tort." *Just's Inc. v. Arrington Construction Co*., 99 Idaho 462, 583 P.2d 987 (1978). Negligence arises out of some duty imposed by law, irrespective of any contract. *Taylor v. Herbold*, 94 Idaho 133,483 P.2d664 (1971). Therefore, the first issue to be resolved is whether there was a duty on the part of Hardy toward Gibson and Swallow.

It has been established that "one owes the duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury." *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980), *quoting Kirby v. Sanville*, 286 Or. 339,594 P.2d 818,821 (1979).in addition, "[e]very person has a general duty to use due or ordinary care not to injure others, ...and to do his work, render service; ls or use his property as to avoid such injury." *Whitt v. Jarnagin*, 91 Idaho 181,418 P.2d 278 (1966); []. In determining whether such duty has been breached by the allegedly negligent party, his conduct is measured against that of an ordinarily prudent person acting under all the circumstances and conditions then existing. *Nagel v. Hammond*, 90 Idaho 96,408 P.2d 468 (1965).

Having established the duty of Hardy and the standard by which his conduct is to be judged, it must be determined whether that duty extends to Gibson and Swallow. Because this is an action in tort, the relevant questions are whether the duty was breached and whether the breach proximately caused actual damages to Gibson and Swallow. *Alegria v. Payonk*, supra. Hardy claims a breach of duty did not occur because Gibson-Swallow's salvage rights were subject to certain limitations, all relating to the condition that the slash pile operation had priority over the salvage operation. We have previously discussed the relevant contractual provisions and have held that, under their contract, Gibson and Swallow had an equitable interest in the poles and posts cut, but not removed from, the Meadow Creek unit.

We must now tum to whether an ordinary prudent person acting in the same situation would have proceeded to slash pile the Meadow Creek unit under the circumstances facing Hardy. As previously mentioned, Hardy provided a work schedule to the Forest Service. A forest service official testified that this work schedule was created in part to accommodate the salvage operations. Based on this schedule, the Forest Service officials assured Gibson and Swallow on July 30 that the slash piling operation "was two-three weeks away." In fact, without informing anyone, Hardy commenced slash piling on the Meadow Creek unit on August 3. Hardy testified that he saw evidence of post and pole cutting going on. He noticed some trees cut and piled in the area and he noticed a campsite with a tent and trailer. He was

aware that salvage operators were working in the general forest area. Further, Hardy testified that he could have driven an approximately fifteen-minute drive to the Forest Service office to request a guide to his next scheduled work area. He did not do this as he felt it would unduly delay his operation. The undisputed evidence also showed that 100 yards away from the unit Gibson and Swallow were working was another unit to which Hardy could have moved. No salvage operation was going on there. There were several other units, also included in Hardy's contract, to which he could have moved without any significant delay to his own operation and without interference with any salvage operations.

Upon the facts of this case, it could be concluded that an ordinary prudent person would not have proceeded with the slash piling of the unit in question. Further, it appears from the facts of this case that Hardy could reasonably have foreseen that proceeding to slash pile the Meadow Creek unit would damage or destroy the poles and posts cut by the salvage operators. Therefore, Hardy's conduct was a proximate cause of the damage. We will not disturb the district court's finding of negligence.

WALTERS, C.J., AND BURNETI, J., concur.

NOTES

(1) What is the source of the defendant's alleged duty? What is the scope of the duty? What interest is protected by the duty?

(2) Interests: The Restatement (Second) Torts § 1 provides: "The word 'interest' is used ... to denote the object of any human desire." For example, emotional tranquility is an object of desire for many people and thus an "interest." The term carries no implication that the interest is or is not given legal protection. Society may regard a particular desire as improper and may, therefore, impose criminal or civil liability on efforts to satisfy the desire. Alternatively, society may recognize the desire as sufficiently worthy to impose criminal or civil liability on those whose conduct defeats its realization. Interests that fall within the latter category- interests given legal protection - are "rights." As noted in the introduction to this chapter, rights and duties are correlatives: an interest becomes a right because society imposes a duty on other to refrain from invading the interest.

The interests- the list of rights- protected by tort law is not static. As the Restatement notes, "The entire history of the development of tort law shows a continuous tendency to recognize as worthy of legal protection interests which previously were not protected at all.... It is altogether unlikely that this tendency to give protection to hitherto unprotected interests and to extend a greater protection to those now infrequently protected has ceased." RESTATEMENT (SECOND) OF TORTS § 1, comment e. Emotional tranquility presents a classic example of this tendency to protect additional interests; it also demonstrates why courts are reticent to protect new interests.

(3) Did Gibson and Swallow own the timber? If not, how can plaintiff have a "right" that imposes a "duty" on defendant to act with care in regard to their interest?

In *Stanger v. Hunter*, 49 Idaho 723, 291 P. 1060 (1930), the court reversed a verdict for plaintiff because he had failed to allege "any right or interest" in the Ford roadster that was damaged in the collision. Can Gibson be distinguished from Stanger? Did Gibson assert some "right or interest" in the posts and poles?

In *Gissel v. State*, 111 Idaho 725, 727 P.2d 1153 (1986), the plaintiffs sued to recover part of the wild rice that they had illegally harvested on both state and Forest Service lands. The court held that "the Gissels do not seek the return of property which rightfully belonged to the state - but only that portion which belonged to the Forest Service. The Gissels, as prior possessors, have a superior right as against the state to possession of the proceeds attributable to Forest Service land." Does Gissel support the decision in Gibson?

Recall: (a) to say that A has a right is to say implicitly that everyone else has a duty not to damage the right and (b) to say that B has a duty not to harm A is to say that A has a right to be free from that harm. Did Gibson and Swallow have a right in the timber? If so, how did the acquire the "right"?

**A TRANSITIONAL NOTE**

The Restatement (Third) of Torts defines "negligence" as:

> A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.

RESTATEMENT (THIRD) OF TORTS § 3 (2010) (emphasis added). This is the general rule that can be synthesized from the cases from Wilson to Hardy, which effectively adopt a default position: misfeasance gives rise to a duty of care. That is, everyone has a duty to act with reasonable care so as not to create a risk to others.

Restatement (Third) builds on this definition of "negligence" in a subsequent section:

> An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.

*Id*. §7(a) (emphasis added).

> An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm ..., unless the court determines that the ordinary duty of reasonable care is inapplicable.

*Id*. §6 (2010).

"Physical harm" is defined as

> the physical impairment of the human body ("bodily harm") or of real property or tangible person property ("property damage"). Bodily harm includes physical injury, illness, disease, impairment of bodily functions, and death.

*Id*. §4.

These provisions and the cases from Wilson to Hardy support a general, default rule which can be stated as: A person has a duty to act carefully when she has acted, and her act creates a foreseeable risk of harm to another person. Both the Idaho caselaw and the Restatement also recognize limitations on this general duty rule.

We now tum to the most significant of the limitations: situations in which the defendant's negligent conduct did not cause "physical harm.

## 2. THE PROBLEM OF NONPHYSICAL HARMS

NOTES

**(1)** We begin this section of the materials with invasions of emotional interests. As noted, emotional harm is the paradigm: the courts fear that the potential liability is out of proportion to the culpability because the amount of emotional distress that might result from any bit of careless conduct is unknowably large. Emotional harms fall into two general categories:

**(a)** negligent infliction of emotional distress: In these cases, defendant's conduct causes emotional distress either through

**(i) direct invasions:** The Restatement (Third) (Tentative Draft No.5) has two sections on negligent infliction of emotional distress. The first states:

> **§46. Negligent Conduct Directly Inflicting Emotional Disturbance on Another**
>
> An actor whose negligent conduct causes serious emotional disturbance to another is subject to liability to the other if the conduct:
>
> (a) places the other in immediate danger of bodily harm and the emotional disturbance results from the danger; or
>
> (b) occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance.

**(ii) percipient witnesses:** The second of the two sections in Restatement (Third) (Tentative Draft No. 5) on negligent infliction of emotional distress provides:

> **§47. Negligent Infliction of Emotional Disturbance Resulting from Bodily Harm to a Third Person**
>
> An actor who negligently causes serious bodily injury to a third person is subject to liability for serious emotional disturbance thereby caused to a person who:
>
> (a) perceives the event contemporaneously, and
>
> (b) is a close family member of the person suffering the bodily injury.

**(b) invasions of relational interests:** If the actor's conduct causes the death of one spouse, the other spouse is likely to suffer emotional distress in addition to economic loss. This loss is "consortium," the conjugal fellowship of spouses and the right of each to the company, co-operation, affection, and service of the other spouse. Originally, the term comes from a common law cause of action, *per quod consortium amisit* ("by which he has lost the companionship") through which a husband could recover for bodily injury done to his wife by a third party. With the decline of the chattel status of the wife, the cause of action was expanded to cover both spouses. In some jurisdictions - including Idaho - consortium claims extend to other family members. These claims- as well as other relational emotional distress claims- are most frequently brought in the context of a wrongful death action.

(3) "physical harm" and "bodily harm": Is the invasion of the interest in emotional integrity "bodily harm" and thus "physical harm" that falls within the Restatement (Third) definition of the default duty rule? Comment b. to § 4 states:

> *Bodily harm and emotional harm*. The definition of bodily harm is meant to preserve the ordinary distinction between bodily harm and emotional harm. Accordingly, if a defendant's negligent conduct (for example, negligent driving) frightens the plaintiff (for example, a pedestrian crossing the street), the harm to the plaintiffs' nerve centers caused by this fear does not constitute bodily hard. This distinction is not precise and may be difficult to make in certain cases, but the more restrictive rules for emotional harm ... require such a determination to be made. The essential difference is that bodily harm usually provides objective evidence of its existence and extent while the existence and severity of emotional harm is usually dependent upon the report of the person suffering it or symptoms that are capable of manipulation or multiple explanations.

> Whether a specific injury constitutes bodily harm and therefore supports a claim for liability under §§ 5, 6, and 20-23 of this Restatement is a question of law for the court to decide.

RESTATEMENT {THIRD) § 4 cmt. b (2010).

**(4) Economic and noneconomic damages:** In 1990, the legislature modified the damages available in tort actions.

> **(a) Definitions**: The statute begins with several definitions:
>
> (3) "Economic damages" means objectively verifiable monetary loss, including, but not limited to, out-of-pocket expenses, loss of earnings, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, medical expenses, or loss of business or employment opportunities.
>
> (5) "Noneconomic damages" means subjective, nonmonetary losses including, but not limited to, pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party; emotional distress; loss of society and companionship; loss of consortium; or destruction or impairment of the parent-child relationship.
>
> (7) "Personal injury" means a physical injury, sickness or death suffered by an individual.
>
> (8) "Property damage" means loss in value or in use of real or personal property, where such loss arises from physical damage to or destruction of such property.
>
> (9) "Punitive damages" means damages awarded to a claimant, over and above what will compensate the claimant for actual personal injury and property damage, to serve the public policies of punishing a defendant for outrageous conduct and of deterring future like conduct.

I.C. § 6-1601.

Does "noneconomic damages" include "personal injury"?

> **(b) Noneconomic damages:** The statute included a cap on noneconomic damages:
>
> (1) In no action seeking damages for personal injury, including death, shall a judgment for noneconomic damages be entered for a claimant exceeding the maximum amount of two hundred fifty thousand dollars ($250,000); [providing for adjustments to the amount recoverable based on the industrial commission's adjustments to the average annual wage].
>
> (2) The limitation contained in this section applies to the sum of: (a) noneconomic damages sustained by a claimant who incurred personal injury or who is asserting a wrongful death; (b) noneconomic damages sustained by a claimant, regardless of the number of persons responsible for the damages or the number of actions filed.
>
> (3) If a case is tried to a jury, the jury shall not be informed of the limitation contained in subsection (1) of this section.
>
> (4) The limitation of awards of noneconomic damages shall not apply to:
>
> (a) Causes of action arising out of willful or reckless misconduct.
>
> (b) Causes of action arising out of an act or acts which the trier of fact finds beyond a reasonable doubt would constitute a felony under state or federal law.

I.C. § 6-1603.

The constitutionality of the statutory cap was upheld in *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 4 P.3d 1115 (2000). The supreme court held that the cap was simply a change in the common law of personal injury, pursuant to legislature's power under the state constitution to modify or abolish common law causes of action.

The operation of the cap is discussed in *Homer v. Sani-Top, Inc*., 143 Idaho 230, 141 P.3d 1099 (2006).

**(c) Punitive damages**: The legislature (i) increased the burden of persuasion required to obtain punitive damages, (ii)adopted special pleading requirements, and (iii)capped punitive damages at $250,000. See I.C. § 6-1604.

**(5) Evolution of legal rules**: As you work through this section, pay attention to dates when cases were decided. Since the law is not static, you should be sensitive to the historical development: what are the various positions adopted by the courts at different times? For example, in *Giffen v. City of Lewiston*, 6 ldaho 231,55 P. 545 (1898), plaintiff was permanently crippled by a fall caused by the removal of planks from the sidewalk. The Idaho Supreme Court summarily concluded that the trial court had not erred in instructing the jury that "disfigurement of the plaintiff caused by the injury ... is an element of damage; but annoyance to the plaintiff caused by contemplation of disfigurement is too remote to be considered as an element of damage resulting from personal injury." Would a contemporary case allow a claim for emotional distress arising out of a disfiguring injury?

**(6)** As the court noted in *Hatfield v. Max Rouse & Sons Northwest*, a claim for emotional distress "may ... be asserted in connection with the ...torts of negligent or intentional infliction of emotional distress." *Hatfield v. Max Rouse & Sons Northwest*, 100 Idaho 840, 606 P.2d 944 (1980).

**(7)** Finally, as you read the cases focus on the reasons that the courts give for being reticent to extend protection to emotional tranquility. The cases frequently involve problems arguably caused by the presence of real suffering and the difficulty in fashioning limits. One result has been a series of devices intended to limit liability- the validating rules.

## a. Emotional Interests

### i. Negligent Infliction of Emotional Distress

#### A Direct Invasions

**LINDSAY v. OREGON SHORT LINE R.R.**

Supreme Court of Idaho
13 Idaho 477, 90 P. 984 (1907)

SULLIVAN, J.- This action was brought to recover damages on account of the alleged wrongful expulsion of the respondent from one of the appellant's passenger trains at Dewyville, Utah, on or about the nineteenth day of August 1905. The respondent alleges, among other things, that in the morning of that day he with his wife, who was ill, went to the station at Dewyville for the purpose of taking passage upon appellant's passenger train for his home in Montpelier, Idaho; that he had a ticket which entitled him to a passage on that train; that he boarded the train, and as he approached the door of one of the coaches thereof the brakeman thereon, an agent and employee of the appellant company, did "maliciously, wantonly, willfully, negligently and wrongfully" order respondent off of said train, and placed himself between respondent and the door of said coach and refused to permit him to enter said coach, or any coach; that he took hold of the respondent's shoulder and turned him from said door, and commanded, and thus compelled him, to leave said train; that respondent's wife was a passenger on said train and was in a feeble, weak and helpless condition, and required his care and attention, of which fact he informed said brakeman. General damages in the sum of$975 and special damages in the sum of $25 were prayed.

Demurrer to the complaint was overruled and an answer was filed denying generally the allegations of the complaint. The cause was tried by the court with a jury and a verdict was rendered in favor of the respondent for the sum of $300, and a judgment entered thereon. An order denying a new trial was made and this appeal is from that order.

There was certain evidence introduced as to the anxiety of the respondent on account of the condition of his wife. Counsel for appellant contended that this was not a legitimate item of damages; that damages cannot be recovered for mental distress and anxiety in this case and cites a number of authorities sustaining that position. There is a clear distinction drawn in the cases as to what anxiety and mental suffering a plaintiff who is expelled or ejected by a common carrier may recover for, and we think the correct rule in cases like the one at bar is clearly stated in Moore on Carriers, page 887, as follows: "Where a person has been wrongfully and unlawfully expelled or ejected by the carrier from a train or car, he may recover in an action against the carrier the amount of the fare to the place to which he was entitled to be carried, damages for the loss of time occasioned by the delay, and any other pecuniary loss necessarily caused thereby and proven to be a proximate result of the ejection, and a reasonable compensation for the indignity, humiliation, wounded pride and mental suffering involved in and resulting from such wrongful expulsion."

Sutherland, in his work on damages, [], states the rule as follows: "We conceive the correct rule to be that mental suffering or nervous shock may be recovered whenever it is the natural and proximate result of the wrong done, if such wrong gives the injured party a cause of action." []

If the plaintiff had a right of action for being expelled from the train on which he had taken his sick wife, we think it is clear that he can recover for his anxiety and mental suffering on account of thus being separate from her. The unwarranted act of the servant of the appellant was the direct and sole cause of such separation. [] In *Proctor v. Southern Cal.Ry. Co*., 130 Cal. 20, 62 P. 306, it was held that a woman might recover for mental distress for being separated from her baggage. If this is the correct rule, we think that a husband might be entitled to recover for mental distress for being put off from a train on which he was traveling with his sick wife, and it is suggested by counsel for respondent that a man's wife ought to sustain as close and sacred relation to him as a woman's baggage to her.

Other assignments of error go to the refusal of the court to give certain instructions requested by counsel for the appellant, to the effect that the acts complained of must not only have been wrongful and negligent under the pleadings, but that they must have been willfully wrong. We do not think there is anything in this contention, as we are clearly of the opinion that under the allegations of the complaint the [plaintiff] might recover for ordinary negligence.

The judgment is affirmed ....

AILSHIE, C.J., concurs.

NOTES

(1) What is the source of duty in Lindsay? What is the scope of duty? What interest is protected by the duty?

(2) RESTATEMENT (THIRD) § 46: Does Undsay fall within the liability rule stated in the draft Restatement (Third) § 46?

(3) **Proof of injury (pt. 1):** How can plaintiff prove that he was infact injured? Note that this question has two aspects:

(a) was the interest actually invaded? When the actor's conduct causes a broken leg, it is possible to introduce an x-ray into evidence and have a physician explain to the jury what the x-ray shows. What can replace the x-ray when the injury is emotional distress?

(b) what is the value of the loss caused by injury to the interest? How do you value the loss of emotional integrity? Note that this problem is not limited to emotional distress claims. Beyond the medical bills and loss wages, what is the value of the loss caused by a broken leg?

Recall that the Idaho worker's compensation statute partially resolves this problem by assigning values to categories of injuries- a broken leg, for example, may be worth $ 250. How does the statute capping noneconomic losses address this issue?

**(4)** ***Maloney v. Winston Bros. Co*.:** Plaintiff was injured in a drilling accident while employed to construct a tunnel through the Bitterroot Mountains. As a result of the accident, his left leg was shorter than his right. Defendant argued that the jury's damage award was too generous. The court noted that

> [t]he pecuniary and financial loss sustained can be estimated with a reasonable degree of certainty. On the other hand, the amount allowed for humiliation, pain and suffering entailed by the injury must be left to the arbitrary judgment of the jury, *Lindsay v. Oregon ShortUneRy*., 13 Idaho 477, 90 P. 984(1907); *Tarr v. Oregon Short UneRy*., 14 Idaho 192,93 P.957 (1908), subject only to correction by the courts for abusive and passionate exercise.

*Maloney v. Winston Bros. Co*., 18 Idaho 740, 111 P.1080(1910).

**(5) Tort and contract (pt. 1):** The Lindsay case had its origin in the breach of the transportation contract by the railroad. The Idaho Supreme Court has more recently addressed the relationship between torts and contracts in the area of negligently inflicted emotional distress in *Brown v. Fritz*, 108 Idaho 357,699 P.2d 1371(1985). Brown purchased a residence from the Fritzes. She quickly discovered a large number of problems. Among the more serious was the faulty design of the sewage system, which caused raw sewage to accumulate beneath the house and which, because of the winter weather, could not be immediately remedied. Brown spent approximately $10,000 to repair the deficiencies of the property. She sued the Fritzes for misrepresentation and negligent infliction of emotional distress. After reviewing the various Idaho decisions, the court concluded:

> Based upon all of the above, we hold that in Idaho, when damages are sought for breach of a contractual relationship, there can be no recovery for emotional distress suffered by a plaintiff. If the conduct of a defendant has been sufficiently outrageous, we view the proper remedy to be in the realm of punitive damages.
>
> We emphasize that our ruling today speaks only to damages asserted for emotional distress which arise from or have their roots in the breach of a contractual relationship. We do not speak to the question of purely tortious conduct arising outside of and apart from a contractual relationship. We leave to another day the carving out of conduct which, while arising in contract, might be conclusively presumed to inflict emotional distress, e.g., mutilation of dead body, *Hill v. Travelers' Ins. Co*., [], or removal of a body from its casket, *Boyle v. Chandler*, []. *See Hatfield [v. Max Rouse & Sons Northwest*,] 100 Idaho 840, 606 P.2d 944 (1980).

*Brown v. Fritz*, 108 Idaho 357, 699 P.2d 1371 (1985).

The *Brown* decision was followed in *Hathaway v. Krumery*, 110 Idaho 515, 716 P.2d 1287 (1986) (per curiam), in which the court held that the negligent repair of an airplane did not give rise to liability for emotional distress since "the 'roots' of the plaintiffs' claim in this case results from the contractual relationship which arose when the defendant contracted to perform repair and maintenance on plaintiffs' aircraft." It further noted that "[t]his Court has refused to recognize a cause of action arising from negligent infliction of emotional distress where there was no physical injury."

In a subsequent case involving a claim for wrongful discharge, the court also reaffirmed Brown, but was careful to note that a claim that began in a contractual relationship might nonetheless arise independently of the contractual claim:

> In Idaho, plaintiffs may not recover for emotional distress in breach of contract cases, but punitive damages might be appropriate if the defendant's conduct is sufficiently egregious. *Brown v. Fritz*, 108 Idaho 357,362,699 P.2d 1371, 1376 (1985).
>
> However, a claim for infliction of emotional distress is not prohibited any time a breach of contract claim is involved. In order for the plaintiff to state a claim for infliction of emotional distress, the conduct complained of must arise independently of the breach of contract claim.

*Taylor v. Herbold*, 94 Idaho 133, 138,483 P.2d 664,669 (1971).in wrongful discharge cases, claims of infliction of emotional distress are allowed if the facts of the case support such a claim in addition to the contractual claims. See, e.g., *Olson v. EG & G Idaho, Inc*., 134 Idaho 778, 783-84,9 P.3d 1244, 1249-50 (2000). In Olson, this Court upheld a jury verdict in favor of the defendant employer on an emotional distress claim arising from an employee's termination. *Id*. *Thomas v. Medical Center Physicians*, 61 P.3d 557, 138 Idaho 200 (2002).

Does Brown and its progeny overrule *Lindsay*? Did the claim for emotional distress in Lindsay "arise independently of the breach of contract claim"?

We will return to these issues in the materials on economic loss below.

**SUMMERS v. WESTERN IDAHO POTATO PROCESSING CO.**

Supreme Court of Idaho
94 Idaho 1, 479 P.2d 292 (1971)

McQUADE, J. -This appeal is from a summary judgment by the district court. The action is for damages arising out of an industrial accident.

The plaintiff-appellant, Dorla Summers, alleged in her complaint that she was instructed to clean a certain piece of machinery at respondents' processing plant, and in the course of doing so her clothing became entangled in the machinery. She was pulled into the machinery and received certain physical injuries of a relatively minor nature. Her clothing was ripped off, and she was left "standing nude in front of her fellow employees." The appellant applied for and received workmen's compensation benefits for the physical injuries. She then brought this action seeking recovery of $10,000 for "great mental anguish together with nervous shock" and for pain and suffering. Appellant stresses in her brief on appeal that she is not suing for pain and suffering from the physical injuries but for the pain, suffering, mental anguish and nervous shock resulting from having her clothing stripped from her body in front of fellow employees. She alleges the accident resulted from the negligence of her employer.

The district court held respondents herein were entitled to a summary judgment, on the Basis of respondents' motion therefor, which is based on the assertion that appellant's claim was barred by the Idaho Workmen's Compensation statutes. []

Appellant contends that tortious injuries not covered by the Workmen's Compensation law give rise to civil actions for damages sounding in tort. In support of this assertion it is urged that I.C. §§72-102, 72-201, and 72-203 only abolished civil actions for injuries for which a workman is entitled to compensation under the act. Section 72-201, appellant contends, only brings within the coverage of the act injuries "caused by an accident *** which results in physical violence to the physical structure of the body."

It is correct that actions based upon injuries otherwise remediable by common law action, which are not covered under the Idaho Workmen's Compensation scheme, are not abrogated by the Workmen's Compensation statutes. The statutes themselves make this evident.

The injury that is the subject of this action arose out of the employment of the appellant by respondent Western Idaho Potato Processing Company. The injury was dearly a result of an industrial accident, as defined in I.C. §72-201. The only issue, then, is whether the injury for which recovery is sought is covered by the Idaho Workmen's Compensation law.

This Court held in *Miller v. Bingham County*, [79 Idaho 87, 310 P.2d 1089 (1957)], that physical injuries resulting from emotional shock are covered by the Idaho Workmen's Compensation law. In that case, the injured party had suffered a stroke a short while after he received a severe fright during the course of his employment. If appellant is alleging specific physical injuries as a consequence of the mental anguish she suffered as a result of the accident, her case falls squarely within the guiding

precedent of the Miller case. She is then barred from any common law action by this state's Workmen's Compensation Statutes.

If appellant is not alleging physical injuries, she must establish a right of recovery at common law for purely emotional trauma, negligently caused. Appellant cites no authority and presents no argument in support of the proposition that there is a common law right of recovery for purely emotional trauma, negligently caused. The rule is to the contrary. Recent cases in other jurisdictions, dealing with claims for recovery for negligently caused emotional trauma, have extended the common law right of recovery only so far as to allow recovery where there were physical manifestations of the injury. []

If, then, appellant is seeking recovery for purely emotional trauma, there is no common law right of recovery. If she is seeking recovery for emotional trauma manifested by physical injuries, her action is precluded by our statutory Workmen's Compensation scheme.

McFADDEN, C.J., & DONALDSON, SHEPARD, & SPEAR, JJ., concur.

NOTES

(1) Did the court hold that there was no duty, i.e., that Ms. Summers had no right to emotional tranquility? Did the court hold that the duty had not been breached? Did the court hold that the breach of the duty had already been compensated? What interest does the court focus on? What is the scope of duty?

(2) Are Undsay and Summers consistent? What was the basis of the Lindsay decision? Did the husband in Undsay have recovered solely for emotional distress?

(3) THE common law? The court states that "If ...appellant is seeking recovery for purely emotional trauma, there is no common law right of recovery." What is the basis or justification for this statement? The English courts at the time that Idaho was created as a territory had refused to recognize a claim for invasion of emotional tranquility. *See Lynch v. Knight*, 9 H.L.C.577, 11 Eng.Rep.854 (House of Lords 1861) ("The law does not pretend to redress mental pain when the unlawful act complained of consists of that pain alone"); *Allsop v. Allsop*, 5 H. & N.534,157 Eng. Rep. 1292(Ex.1861) ("illness arising from the excitement [i.e., emotional distress] is not the sort of damage which forms aground of action"). If this is the common law rule to which the Court alludes, how can it continue by stating that the common law recovery has been extended?

(4) Rationales: It is interesting to note that the judges in *Allsop* cited the same concerns that trouble their modem counterparts: the large number of possible claims ('We ought to be careful not to introduce a new element of damage, recollecting to what a large class of actions it would apply"), the possibility of fanciful (or-less politely-fraudulent) claims ("The Courts have always taken care that parties shall for fanciful or remote damages" and "there is a distinction between the suffering of mind and the suffering of body"), and the idiosyncratic nature of the loss ("This particular damage depends on the temperament of the party affected").

(5) *Miller v. Bingham County*: Plaintiff suffered a stroke following a severe fright; he was not, however, physically touched by defendant. Both the majority and the dissent agreed that it was not necessary that there be physical contact with the claimant's body in order to award compensation. *Miller v. Bingham County*, 79 Idaho 87, 310 P.2d 1089 (1957). *See also Roberts v. Dredge Fund*, 71 Idaho 380, 232 P.2d 975 (1951), where the deceased was frightened to death. Are *Miller* and *Roberts* consistent with *Summers*?

Both *Miller* and *Roberts* were workers compensation cases rather than torts cases. The issue in such a case is whether there is substantial evidence in the record before the Industrial Commission to uphold its decision that the injury was work related. Should the difference in the forum lead to different results? Recall *Louie v. Bamboo Gardens*, 67 Idaho 69, 185 P.2d 712 (1947).

(6) Does *Summers* fall within the liability rule stated indraft Restatement (Third) § 46? Recall that the section states:

> An actor whose negligent conduct causes serious emotional disturbance to another is subject to liability to the other if the conduct:
>
> (a) places the other in immediate danger of bodily harm and the emotional disturbance results from the danger; ....

RESTATEMENT {THIRD) OF TORTS § 46 (Tentative Draft No. 5).

Setting the workers compensation statute aside, would *Summers* be able to recover damages for her emotional distress under this section? Was she "in immediate danger of bodily harm"? The comments to this section notes that these cases are frequently denominated "zone- of-danger" situations. Was *Summers* within the zone of physical danger when her clothes became entangled in the machinery? Was her emotional distress a result of that danger?

Note that the section does not require physical consequences. The *Summers* court, on the other hand, states in dicta that other jurisdictions have allowed "claims for recovery for negligently caused emotional trauma, ...only ...where there were physical manifestations of the injury." What role would be served by requiring physical manifestations? What are physical manifestations?

**(7)** ***Neal v. Neal***: Thomas Neal filed for divorce after his wife, Mary, discovered that he was having an extramarital affair. Mary counterclaimed for divorce and also asserted tort claims against Thomas and Jill LaGasse. The trial court granted defendants' motions for summary judgment; the Court of Appeals affirmed. Mary Neal petitioned for and was granted review by the supreme court.

The court provided this description of Mary's claim:

> Mary Neal seeks to recover from Thomas Neal, under theories of negligent and intentional infliction of emotional distress, for emotional distress resulting from the fear that she may have contracted a sexually transmitted disease. For purposes herein, we accept that Thomas Neal's sexual relationship with LaGasse subjected his wife to the risk of acquiring such diseases if carried by LaGasse. However, Mary Neal has not alleged that either Thomas Neal or LaGasse has any sexually transmitted disease nor has she alleged that she has in fact contracted any such disease. In fact, the record reveals that she does not have any such disease.
>
> Damages are recoverable for emotional distress claims resulting from the present fear of developing a future disease only if the mental injury alleged is shown to be sufficiently genuine and the fear reasonable. We hold that there can be no reasonable fear of contracting such a disease absent proof of actual exposure. []
>
> Because Mary Neal has not even alleged actual exposure to any sexually transmitted disease, she cannot satisfy the requirement of a reasonable fear to recover for emotional distress. Therefore, the district court properly dismissed her cause of action in this regard. We further conclude that because Mary Neal cannot satisfy the reasonable fear requirement for recovery for emotional distress, we do not consider whether she has satisfied the additional requirement that her fear be sufficiently genuine.

*Neal v. Neal*, 125 Idaho 617, 873 P.2d 871 (1994). If Mary could prove that she had been exposed to a disease, would she have been required to prove that she also suffered physical manifestations from her distress?

Was Mary within the zone-of-danger situation in Restatement (Third) § 46? Was she "in immediate danger of bodily harm"?

Does her relationship with her husband within § 46(b) "specified categories of ... relationships in which negligent conduct is especially likely to cause serious emotional disturbance"? Thomas's conduct,

of course, was intentional and thus is not covered by § 46. The tort of intentional infliction of emotional distress is noted below.

**(8)** ***Brown v. Matthews Mortuary, Inc*.:** The day after Charles Brown died in a Logan, Utah hospital his wife, Ella, and his son, Michael, returned to their home in Montpelier, Idaho where they contacted defendant to arrange cremation and a memorial service. Matthews Mortuary arranged to have the cremation performed by Aultorest Crematorium of Ogden, Utah. Approximately three weeks after the memorial service defendant delivered a plastic box in a brown wrapper. The box remained unopened for nearly a year, until Michael took the remains to scatter in the Elk Valley area near Montpelier. When Michael removed the brown wrapper, the burial transfer certificate located inside bore the name of Michael Calvin Jackson. All of the parties concluded that Charles' remains had been lost.

Ella and Michael filed a complaint against Matthews Mortuary and Aultorest Memorial Crematoriurm alleging that the defendants had negligently mishandled the cremated remains of Charles and as a result, plaintiffs suffered mental anguish. The supreme court reversed beginning its analysis with *Summers*:

> In order to recover damages for emotional distress, the well-established law in Idaho clearly requires that emotional distress be accompanied by physical injury or physical manifestations of injury. In *Summers v. Western Idaho Potato Processing Co*., 94 Idaho 1,479 P.2d292 (1970), the plaintiff had her clothing ripped off by machinery leaving her standing nude in front of her fellow employees. In an action against her employer she sought damages for pain, suffering, mental anguish and nervous shock. In Summers we held that a plaintiff could not recover for pure emotional distress absent an accompanying physical injury. We have continued to adhere to this rule in other cases. See *Czaplicki v. Gooding Joint School Dist. No. 231*, 116 Idaho 326, 775 P.2d 640 (1989) (physical symptoms such as severe headaches, occasional suicidal thoughts, sleep disorders, reduced libido, fatigue, stomach pains and loss of appetite were sufficient to withstand summary judgment); ....

Relying on *Prosser* and *Keeton* on the Law of Torts and the Restatement (Second) of Torts § 868, the court noted that there is an exception to "this general rule" where defendant negligently mishandles a corpse. The court quotes Prosser and Keeton's rationale for the exception: "What all of these cases appear to have in common is an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious. Where the guarantee can be found, and the mental distress is undoubtedly real and serious, there may be no good reason to deny recovery."

The court concludes, however, that

> the case law clearly holds that the only person entitled to the exception outlined above is the person entitled to the proper disposition of the body. The 'primary and paramount rights to possession of the body of a decedent, and to control burial or other legal disposition of the body, are in the surviving spouse.' (] But see Restatement (Second) of Torts § 868, comment g. Therefore, absent physical injury manifesting emotional distress, we hold that only the spouse, or next surviving kin, may bring a cause of action pursuant to this exception.
>
> ....Under the exception to the general rule, which we now recognize, Ella Brown, as the surviving spouse, need not prove or show physical injury in order to recover for emotional distress arising out of the mishandling of her deceased husband's cremated remains.
>
> The court also emphasized that "we do not hold that a defendant in this type of case is strictly liable for a claim of mishandling of a body. Plaintiffs must still prove all of the elements of negligence and damages in order to recover. The mere fact that mishandling of a body has occurred does not automatically entitle plaintiffs to recover damages for emotional distress."

> Furthermore, the court held, Michael is not the surviving spouse, or next surviving kin, and as such he does not come within the exception we recognize, and in order to recover damages for negligently inflicted emotional distress must show physical manifestations of injury.

*Brown v. Matthews Mortuary, Inc.,* 118 Idaho 830,801 P.2d 37 (1990).

Is *Brown* an example of the second category of "directly inflicting emotional disturbance"? Note that the supreme court in Brown did not require the decedents wife to prove that she had suffered any physical manifestations from the distress.

What other "categories of activities, undertakings, or relationships" can you imagine "in which negligent conduct is especially likely to cause serious emotional disturbance"?

(9) Intentional infliction of emotional distress (outrage): The judicial hostility to claims for invasion of emotional tranquility is further demonstrated by the example of the nominate tort of intentional infliction of emotional distress. Normally intentional conduct is much more likely to lead to liability given the greater social stigma attached to intentional conduct. In *Hatfield v. Max Rouse & Sons Northwest*, 100 Idaho 840, 606 P.2d 944 (1980), the Court was presented with a claim for both intentional and negligent infliction of emotional distress. It began by noting that "[t]he treatment of intentional infliction of emotional distress as a tort in itself, if the absence of a physical injury, is relatively new to the law."

> [C]ommentators have recognized the concern of the courts that a rule of law which allows recovery of damages for emotional distress in the absence of physical injury may lead to the pressing of fraudulent claims. [] For this reason, the tort of intentional infliction of emotional distress is generally held to lie only in the presence of outrageous intentional conduct on the part of the defendant which leads to severe emotional distress. By requiring both conduct of an "outrageous" nature and "severe" emotional distress this rule afford courts of means of limiting fictitious claims.

The court was unwilling to conclude that the mortuary's conduct in *Brown v. Matthews Mortuary* was sufficient to give rise to an action for intentional infliction of emotional distress. It has generally been unwilling to find the requisite conduct or injury. *See Davis v. Gage*, 106 Idaho 735, 682 P.2d 1282 (1984) (conduct failed to cause severe emotional distress); *Yeend v. United Parcel Service*, 104 Idaho 333,659 P.2d 87 (1983) (employer's conduct in requiring an injured employee to continue working despite injuries insufficiently outrageous); *Rasmuson v. Walker Bank & Trust Co*., 102 Idaho 95, 624 P.2d 1098 (1981) (breach of trust by a fiduciary insufficiently outrageous); *Hatfield v. Max Rouse & Sons Northwest*, 100 Idaho 840, 606 P.2d 944 (1980) (action of auctioneer in selling skidder contrary to contract insufficiently outrageous); but see *Gill v. Brown*, 107 Idaho 1137,695 P.2d 1276 (Ct. App.1985) (reversing trial courts dismissing of claim for intentional infliction of emotional distress where defendant shot plaintiff's donkey); see also *Pounds v. Denison*, 115 Idaho 381, 766 P.2d 1262 (Ct. App. 1988).

(10) The torts of negligent and intentional infliction of emotional distress are discussed in Chapter 11 of Summary of Idaho Employment Termination Law, Monique C. Lillard, Idaho State Bar, 2016.

B. Percipient Witnesses

**CZAPLICKI v. GOODING JOINT SCHOOL DISTRICT No. 231**

Supreme Court of Idaho
116 Idaho 326, 775 P.2d 640 (1989)

HUNTLEY, J.- [Garrett Czaplicki, a six-year-old boy, was a kindergarten student. On the day he died, Garrett's mother, Rose, was working as a teacher's aide. She heard people running and someone fall in the classroom. She turned and saw it was Garrett who had fallen. Garrett rose to his knees and Rose went to him and asked, "Where does it hurt?" Garrett began to gesture with his right arm and then collapsed in unconsciousness into his mother's arms. She shouted for an ambulance. The school's principal, Richard Conley, instructed the school secretary not to call an ambulance and walked to where Garrett was. After briefly examining the child, Conley picked him up and walked back to the school office with Garrett and laid him on a bench. The sheriffs' dispatcher log indicates that the school for an ambulance at 2:20p.m. Marie Klingler, the school librarian and a trained Emergency Medical Technician (EMT), was summoned to the office. She repositioned Garrett's head, covered him with a blanket, and elevated his legs. She testified that she observed that Garrett was breathing shallowly, and that every few seconds he would take a gasp of air. The EMT with the ambulance immediately performed an assessment of Garrett's condition and noted a complete absence of heartbeat and breathing. The EMTs began cardiopulmonary resuscitation (CPR) and Garrett was transported to Gooding County Memorial Hospital, where he was pronounced dead. Plaintiffs' experts testified that "My opinion is that the interval from the time the problem first started to the time treatment was initiated was too long, and that once treatment was initiated, it was not appropriate treatment, and had appropriate treatment been given at the proper time, the child would be alive now." The expert also testified that in his medical opinion "had EMT assistance been provided even a minute sooner most likely it would have saved Garrett's life." Garrett's parents brought an action for emotional distress.]

It is beyond dispute that in Idaho no cause of action for negligent infliction of emotional distress will arise where there is no physical injury to the plaintiff. *Hathaway v. Krumery*, 110 Idaho 515, 716 P.2d 1287 (1986); *Hatfield v. Max Rouse &Sons Northwest*, 100 Idaho 840, 606 P.2d 944 (1980). The "physical injury" requirement is designed to provide some guarantee of the genuineness of the claim in the face of the danger that claims of mental harm will be falsified or imagined. Hatfield. Physical manifestations of the emotional injury enable a plaintiff to posit a claim for negligent infliction of emotional distress. Hatfield. The Czaplickis' complaint alleges that defendants' actions have proximately caused "severe emotion and result in physical pain and injury to the plaintiff, Rose Czaplicki," and have "caused severe emotion and commensurate physical injury to plaintiff Russell Czaplicki." The Czaplickis describe various emotional injuries that have manifested themselves in physical symptoms such as severe headaches, occasional suicidal thoughts, sleep disorders, reduced libido, fatigue, stomach pains and loss of appetite.

In *Rasmuson v. Walker Bank & Trust Co*., this Court stated:

> The plaintiff also appeals the district court's dismissal of her counts seeking recovery for negligent and intentional infliction of emotional distress caused by negligent, bad faith and reckless trust management. This Court's recent opinion in *Hatfield v. Max Rouse & Sons Northwest*, 100 Idaho 840, 606 P.2d 944 (1980), specifies the requirements to successfully bring these torts. Inasmuch as there were no allegations of physical manifestations involved in the case at bar, the tort of negligent infliction of emotional distress does not lie.

Construing the facts in the existing record most liberally in the Czaplickis' favor, as is required of this Court in reviewing the district court's summary judgment decision, [], reveals at a minimum that a genuine issue of material fact exists with respect to the Czaplickis' claims for the negligent infliction of emotional distress.

BISTLINE & JOHNSON, JJ., concur.

SHEPARD, J. dissenting [on a different issue]. BAKES, C.J., dissented - ....

[O]ur prior cases have required that any claim for damages for negligent infliction of emotional distress be accompanied with objective physical manifestations before any such claim is cognizable. Subjective claims of pain, injury or suffering are not sufficient. There must be objective physical manifestations. Complaints such as those raised by the plaintiffs in this case, such as loss of appetite, stomach pains, fatigue, reduced libido, sleep disorders, suicidal thoughts and headaches, are not the kinds of objective physical manifestations which our cases, and the cases from other jurisdictions around the country, have allowed recovery for under a claim of negligent infliction of emotional distress. *Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171, 181 (1982) ("In order to recover for negligent infliction of emotional distress, the plaintiff must allege and prove physical harm [which] must be manifested by objective symptomology and substantiated by expert medical testimony"); *Sears, Roebuck & Co. v. Young*, 384 So. 2d 69, 71 (Miss. 1980) (no recovery allowed for mental distress without a showing of "objectively observable physical consequences"); W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER & KEETON ON THELAWOFTORTs 54 at364 (5th ed.1984) ("[T]he mental distress [must] be certified by some physical injury, illness or other objective physical manifestation"); *Gill v. Brown*, 107 Idaho 1137, 1138, 695 P.2d 1276, 1277 (Ct. App. 1985) ("In order for the tort of negligent infliction of emotional distress to lie, the actions of the defendant must have caused some physical injury to the plaintiff which accompanies the emotional distress").

NOTES

(1) What is the source of the duty? Is the source of the duty in *Czaplicki* the same as that in *Lindsay*? Why is the interest in emotional integrity protected in this case? Why does the court limit the duty in the way that it does?

Is *Czaplicki* distinguishable from *Lindsay* and *Summers*? Was Ms. Czaplicki the direct victim of the defendant's negligence? Are the reasons for restricting recovery for emotional distress even more persuasive when the claimant is a "sentient witness" rather than a direct victim?

(2) The second of the two sections in Restatement (Third) (Tentative Draft No. 5) on negligent infliction of emotional distress provides:

> §47. *Negligent Infliction of Emotional Disturbance Resulting from Bodily Harm to a Third Person*
>
> An actor who negligently causes serious bodily injury to a third person is subject to liability for serious emotional disturbance thereby caused to a person who:
>
> (a) perceives the event contemporaneously, and
> (b) is a close family member of the person suffering the bodily injury.

Would Rose Czaplicki be able to recover under this provision? Did the principal "cause serious bodily injury" to Garrett? Was Rose's emotional disturbance "serious"? Note that the section does not require physical consequences. Do the physical manifestations that the Idaho courts require provide proof that the emotional disturbance is serious?

(3) The role of physical manifestations: Despite the court's statement that "[i]t is beyond dispute that in Idaho no cause of action for negligent infliction of emotional distress will arise where there is no physical injury to the plaintiff," Czaplicki is arguably the first case where the principle is actually necessary to the court's decision. Why does the court require physical manifestations?

(a) *Hatfield v. Max Rouse & Sons Northwest*, which is cited by the Czaplicki court, offered a more extended discussion:

> the courts cited the difficulty of proving the presence of emotional distress and measuring the loss it caused in monetary terms, the resulting difficulty of tying the actions of the defendant proximately to the distress of the plaintiff, the presumed triviality of harm involved, and the possibility of a flood of fraudulent litigation.... [C]ommentators have recognized the concern of the courts that a rule of law which allows recovery of damages for emotional distress in the absence of any physical injury may lead to the pressing of fraudulent claims....
>
> > According to Dean Prosser, the infliction of minor emotional distress, so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence, where the elements of extreme outrage and moral blame which have had such weight in the case of the intentional tort are lacking.
>
> PROSSER, LAW OF TORTS § 54, at 329 (4th ed. 1971).

(b) *Carrillo v. Boise Tire Co., Inc*. was a claim for wrongful death, physical injuries, and emotional distress that resulted from a vacation trip gone bad. Prior to leaving, Marisela took the family vehicle into Boise Tire to have the tires inspected and rotated. The next day, the right-rear wheel separated from the vehicle without warning while the vehicle was being driven at highway speeds. The driver was severely injured, his wife was killed, and their eighteen-month old daughter allegedly suffered emotional distress. The court offered the following analysis of the child's claim:

> We hold that, in the instance of a young child, lacking the capacity to verbalize regarding physical manifestations of emotional distress, the exposure to a negligently, inflicted violent contact, such as a car accident, coupled with evidence demonstrating emotional distress, is sufficient evidence to support an award of noneconomic damages.
>
> Due to the risk of fraudulent claims, the difficulty of proving causation, and the belief that some degree of emotional distress is a foreseeable fact of everyday life, courts have long conditioned recovery for emotional distress on plaintiffs' ability to offer tangible proof of emotional distress. *See Hatfield v. Max Rouse & Sons Northwest*, 100 Idaho 840,851,606 P.2d 944, 955 (1980) (overruled on other grounds by *Brown v. Fritz*, ...); [] Thus, this Court held over forty years ago that a plaintiff who alleges emotional trauma as the result of another's negligence must demonstrate that she has physically manifested the distress. *Summers v. Western Idaho Potato Processing Co*., 94 Idaho 1, 2, 479 P.2d 292, 293 (1970). Our previous decisions recognize that there may be circumstances in which proof of a negligently inflicted physical impact is sufficient to support an award for resulting emotional distress. Hatfield, 100 Idaho at 851, 606 P.2d at 955) (characterizing Summers as holding that there is no right of recovery "for emotional distress in the absence of physical causes or manifestations ....") (emphasis added)). Given that eighteen-month old Nayeli was involved in a violent car accident during which the vehicle she was in rolled at high speed, resulting in serious injuries to her father and her mother's death, we hold that the experience of the car accident itself was a sufficient physical cause as to support a finding of negligent infliction of emotional distress.
>
> Although multiple medical tests immediately after the accident revealed that Nayeli had not suffered an identifiable physical injury, there is evidence in the record to support the district court's finding that Nayeli displayed physical manifestations of emotional trauma. This Court has recognized physical manifestations of emotional distress as including sleep disorders, headaches, stomach pains, suicidal thoughts, fatigue, loss of appetite, irritability, anxiety, reduced libido and being "shaky-voiced." *Brown v. Matthews Mortuary, Inc*., 118 Idaho 830, 837, 801 P.2d 37,44 (1990); *Czaplicki v. Gooding Joint Sch. Dist. No. 231*, 116 Idaho 326, 332, 775 P.2d 640,646 (1989); *Cook v. Skyline Corp*., 135 Idaho 26, 35, 13 P.3d 857, 866 (2000). Here, the trial court found that following the accident, Nayeli regressed in development, appeared withdrawn, and suffered nightmares. Under our precedent, these physical manifestations are sufficient

to support recovery for negligent infliction of emotional distress.
*Carrillo v. Boise Tire Co., Inc*., 152 Idaho 741,274 P.3d 1256 (2012).

The decision's rationale is ambiguous. Consider the following readings:

(a) Nayeli's "violent contact" in the car accident is a sufficient guarantor of genuineness of the emotional distress when it is "coupled with evidence demonstrating emotional distress. This suggests that both a physical impact and independent evidence is necessary.

(b) The second iteration of the holding seemingly reduces the requirements: "the experience of the car accident itself was a sufficient physical cause to support a finding of negligent infliction of emotional distress. [emphasis added] This statement suggests that the facts of the accident alone are sufficient to overcome the courts' traditional concerns with "fraudulent claims." Does this mean that the accident falls within the exception the court noted in *Brown v. Fritz* [n.4 following Lindsay]: "We leave to another day the carving out of conduct which ... might be conclusively presume to inflict emotional distress"?

(c) The final paragraph notes that although Nayeli "had not suffered an identifiable physical injury," she suffered sufficient emotional distress "[u]nder our precedent," e.g., Czaplicki. Did the decision change the requirements for recovery of emotional distress?

**(4) Proof of injury (pt. 2):** Do "physical manifestations" as ephemeral as "severe headaches, occasional suicidal thoughts, sleep disorders, reduced libido, fatigue, stomach pains and loss of appetite," serve the function of screening out fraudulent claims?

In *Cook v. Skyline Corp.,* the plaintiffs purchased a manufactured house built by Skyline and sold and assembled by defendant Norwest Home Center, Inc. After delivery and assembly, the Cooks' concluded that the house was defective. When Norwest was unable to remedy the problems to the couple's satisfaction, they took their concerns to Skyline. Concluding that this did not remedy their problems, they filed suit alleging breach of contract, breach of warranty, and Skyline's negligent selection of Norwest as a dealer. At trial the Cooks testified that living in and dealing with the problems arising from their defective home caused emotional distress. Sandra Cook testified that the situation was "very stressful," that the problems put distance between herself and her husband, that she felt ill just being in the house, and that she suffered from frustration, headaches and irritability. Sam Cook testified that he suffered from ulcers and anxiety, and that he was "shaky" and "shaky-voiced." Sam also testified that he was "not ashamed to say that [he] even cried." In its memorandum and order granting a new trial, the district court ruled it had previously erred in letting the jury consider emotional distress in awarding damages to the Cooks because the Cooks failed to support their emotional distress claims with expert testimony.

> The Cooks argue the district court erred in ruling that expert testimony was necessary to recover on a negligent infliction of emotional distress claim, citing *Czaplicki v. Gooding Joint School District No. 231*, 116 Idaho 326, 775 P.2d 640 (1989). In Czaplicki, this Court held that a plaintiff's claim for emotional distress damages will survive summary judgment as long as they allege physical manifestations of the emotional distress, because such allegations reveal "at a minimum that a genuine issue of fact exists with respect to the [plaintiff's] claims for the negligent infliction of emotional distress." *Czaplicki*, 116 Idaho at 332, 775 P.2d at 646. In a later case, this Court interpreted *Czaplicki* to hold the allegations asserted by the lay witnesses in their complaint "were sufficient to constitute an allegation of a manifestation of a physical injury to raise an issue of fact which required a trial on that issue." *Evans v. Twin Falls County*, 118 Idaho 210, 218,796 P.2d 87,95 (1990) (emphasis added). However, in Evans, this Court went on to hold that in order to "allege and prove a claim for negligent infliction of emotional distress there must be both an allegation and proof that a party claiming negligent infliction of emotional distress has suffered a physical injury, i.e., a physical manifestation of an injury caused by the negligently inflicted emotional distress." Evans, 118 Idaho at 218, 796 P.2d at 95 (emphasis added).

> .... It is clear from Evans that I.R.E. 701 affords the district court discretion to determine whether a lay witness may testify as to his or her opinion regarding certain matters, but testimony offered by a lay person relating to the cause of a medical condition should be disregarded. See Evans, 118 Idaho at 219, 796 P.2d at 96.

*Cook v. Skyline Corp.,* 135 Idaho 26, 13 P.3d 857 (2000).

Is expert medical testimony required in all cases in which plaintiff asserts that she suffered emotional distress? Is expert testimony required only when the emotional distress is not parasitic to some other claim? Is expert testimony required only when the emotional distress produces physical manifestations that lie outside the average juror's competence?

*Carrillo v. Boise Tire* also seems to cloud the Evans-Cook requirement that "proof that a party claiming negligent infliction of emotional distress has suffered a physical injury, i.e., a physical manifestation of an injury caused by the negligently inflicted emotional distress" and that the proof must come from a medical expert ("testimony offered by a lay person relating to the cause of a medical condition should be disregarded"). Although Nayeli's caretaker testified on her emotional problems following the accident, apparently no medical testimony was offered.Is this perhaps what the court alluded to when it wrote, "the experience of the car accident itself was a sufficient physical cause as to support a finding of negligent infliction of emotional distress"? *Carrillo v. Boise Tire Co., Inc*., 152 Idaho 741,274 P.3d 1256 (2012).

**(5) Tort and contract (pt. 2):** Is *Cook v. Skyline* consistent with *Brown v. Fritz* in which the court held that damages for "emotional distress which arise from or have their roots in the breach of a contractual relationship" cannot be recovered and the plaintiff must instead seek punitive damages? Is *Cook* distinguishable from *Brown v. Fritz*?

(6) **Proof of injury (p. 3):** Plaintiffs' two-year old daughter was visiting Home Depot with her father when an employee using a high-lift loader attempted to remove a package of countertops manufactured by defendant from a high shelf. The package split, and the child was killed by falling debris. On appeal, defendant argued that the evidence was insufficient to support the award for emotional distress to the parents. The court disagreed:

> The district judge ... presented a thorough analysis as to why the jury's verdict for Virgil was supported by substantial and competent evidence. In his decision he recounted the evidence of Virgil's physical manifestations of emotional distress, the testimony of a grief psychologist regarding the devastation that occurs when a parent loses a child and Virgil's testimony about his mental pain and suffering over the loss of his daughter and the horrifying experience of being present during the accident.

*Homer v. Sani-Top, Inc.,* 143 Idaho 230, 141 P.3d 1099 (2006).

**(7) Economic and noneconomic damages:** Recall that in 1990, the legislature modified the damages available intort actions by capping noneconomic damages. The statutory provisions are set out in the notes that introduce the materials on emotional interests.

### ii. Consortium (herein also: Survival and Wrongful Death)

NOTES

(1) Idaho Code provides:

> § 5-310: Action for injury to unmarried child- The parents may maintain an action for the injury of an (1) unmarried minor child, and for the injury of (2) a minor child who was married at the time of his injury and whose spouse died as a result of the same occurrence and who leaves no issue, and (3) a guardian for the injury of his ward, when such injury is caused by

the wrongful act or neglect of another, but if either the father or mother be dead or has abandoned his or her family, the other is entitled to sue alone. Such action may be maintained against the person causing the injury, or if such person be employed by another person, who is responsible for his conduct, also against such other person.

§ 5-311: Suit for wrongful death by or against heir or personal representatives - Damages - (1) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may begiven as under all the circumstances of the case as may be just.

(2) For the purposes of subsection (1) of this section, "heirs" mean:

(a) Those persons who would be entitled to succeed to the property of the decedent according to the provisions of subsection (21) of section 15-1-201[4], Idaho Code.

(b) Whether or not qualified under subsection (2)(a) of this section, the decedents spouse, children, stepchildren, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the illegitimate child of a mother, but not the illegitimate child of the father unless the father has recognized a responsibility for the child's support.

1. "Support" includes contributions in kind as well as money.
2. "Services" mean tasks, usually of a household nature, regularly performed by the decedent that will be a necessary expense to the heirs of the decedent. These services may vary according to the identity of the decedent and heir and shall be determined under the particular facts of each case.

(c) Whether or not qualified under subsection (2)(a) or (2)(b) of this section, the putative spouse of the decedent, if he or she was dependent on the decedent for support or services. As used in this subsection, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(d) Nothing in this section shall be construed to change or modify the definition of "heirs" under any other provision of law.

**§5-319: Death or transfer of interest- Procedure- Actions by or against public officers** -An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action or proceeding survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding. An action or proceeding brought by or against any public officer in his official capacity and which action or proceeding is pending at the time of his death, resignation, retirement or removal from office does not abate. The court on its own motion or on motion for substitution may substitute the successor in office and allow the action or proceeding to be continue against such successor. [originally enacted 1881; amended 1931]

[4] I.C. 15-1-201(21) defines "heirs" as "those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent. These statutes in tum provide shares to the following categories of persons, often contingently upon the absence of other categories: spouse [ §15-2-102], issue, parents, and issue of parents [§ 15-2- 103].

**§5-327: Personal injuries- Property damage- Death of wrongdoer. Survival of action.**
Causes of action arising out of injuryto the person or property, or death, caused by the wrongful act or negligence of another, except actions for slander or libel, shall not abate upon the death of the wrongdoer, and each injured person or the personal representative of each one meeting death, as above stated, shall have a cause of action against the personal representative of the wrongdoer; provided, however, the punitive damages or exemplary damages shall not be awarded nor penalties adjudged in any such action; provided, however, that the injured person shall not recover judgment except upon some competent, satisfactory evidence corroborating the testimony of said injured person regarding negligence and proximate cause.
[originally enacted 1949; amended 1965 and 1971]

(2) The Uniform Model Survival and Death Act provides:
(3)

**§ 1: [Definitions]**

As used in this Act:
(1) "Actionable conduct" means an act or omission that causes the death of a person for which the person could have brought and maintained a personal injury action if he had not died; the term includes an act or omission for which the law imposes strict liability or liability for breach of warranty.

(2) "Survivors of a decedent" means:
(i) the surviving spouse, ascendants and descendants of the decedent, and
(ii) individuals who were wholly or partially dependent upon the decedent for support and were members of the decedent's household or related to the decedent by blood or marriage.

(3) "Closely-related survivors" means the surviving spouse and ascendants and descendants of the decedent.

**§2: [Survival Actions]**
(a) An action or a [claim for relief] [cause of action]:

(1) does not abate by reason of the death of a person to or against whom it accrued, unless by its terms it was limited to the person's lifetime;
(2) may be maintained by or against the personal representative of a decedent; and
(3) is subject to all defenses to which it was subject during the decedent's lifetime.

(b) Damages recoverable in behalf of a decedent under this section for an injury causing his death are limited to those that accrued to him before his death, plus reasonable burial expenses paid or payable from his estate. Damages so recovered become a part of the decedent's estate and are distributable in the same manner as other assets of the estate. This section does not affect the measure of damages allowable under the law for any other damages recoverable under any other [claim for relief] [cause of action].

**§3: [Death Actions]**

(a) With respect to any death caused by actionable conduct, the decedents personal representative, acting in a fiduciary capacity on behalf of the survivors of the decedent, may bring and maintain a death action against any person or the estate of any person legally responsible for the damages, including an insurer providing applicable uninsured or underinsured motorist coverage. The death action is subject to all defenses that might have been asserted against the decedent had he survived.

(b) If no personal representative is appointed [within six months after decedent's death] the death action may be brought and maintained by a closely-related survivor acting in a fiduciary capacity.

(c) Any survivor having a potential conflict of interest with other survivors may be represented independently in the death action.

(d) In the death action, damages awarded to survivors of a decedent are limited to the following elements:

(1) Medical expenses incident to the injury resulting in death and reasonable burial expenses paid or payable by the survivors, to the extent that the decedent's estate could have recovered under Section 2 had the payments been made by the decedent or his estate; [and]
(2) The [present] monetary value of support, services and financial contributions they would have received from the decedent had death not ensued[.][; and]
[(3) For closely-related survivors, [reasonable compensation for decedent's pain and suffering before death if not separately recovered under Section 2, and] reasonable compensation for mental anguish and loss of companionship [not exceeding the sum of$ ].]

(e) Punitive or exemplary damages [are not recoverable] [are recoverable only if they would have been recoverable by the decedent had death not ensued].

(f) The trier of fact shall make separate awards to each of the survivors entitled to damages. Conduct of a survivor which contributed to the death is a defense to the survivor's recovery to the same extent as in other actions.

(g) The decedent's personal representative or a closely-related survivor qualifying under subsection (b)may compromise any claim arising under this section, before or after an action is brought, subject to confirmation by a judge of the court [in which the action is or could have been brought] (appointing the personal representative]. The personal representative or closely-related survivor shall apply to the court for confirmation by [petition], stating the terms of the compromise, the reasons therefor, and the names of all survivors having an interest in the distribution of the proceeds. The court, upon notice, shall hold a hearing which all survivors and their legal representatives may attend and shall confirm or disapprove the settlement. If the settlement is confirmed and any of the survivors or their representatives disagree with the distribution prescribed by it, the judge shall order any distribution a trier of fact may make under subsection (f).

**§4: [Joinder of Actions]**

Actions under Sections 2 and 3are separate actions but shall be joined for trial if they if the are based upon the same actionable conduct. Separate verdicts and awards shall be rendered in each action.

(3) Compare and contrast the Idaho wrongful death and survival statutes with the Uniform Survival and Death Act on the following points:

(a) What interests are protected in a survival action?
(b) What interests are protected in a wrongful death action?
(c) Who is entitled to bring each type of action?
(d) Who is entitled to participate in any recovery in each type of action? Why?
(e) What types of damages may be recovered in each action?
(f) What defenses are available in each action?

To the extent that you cannot answer these questions from the text of the Idaho statutes, consider the following cases. It is important as you work through the Idaho statutory and caselaw to note the dates.

(4) The distinction between a survival action and a wrongful death action:
A survival action is for the damages the deceased suffered and would have sued for had he survived, while a wrongful death action, in contrast, involves the damages suffered by the heirs of the decedent because of his death such as loss of guidance, support, etc.
*Gavica v. Hanson*, 101 Idaho 58, 608 P.2d 861 (1980).

**A Survival of Actions**

**CRAIG v. GELLINGS**

Idaho Court of Appeals
148 Idaho 192, 2119 P.2d 1208 (2009)

lANSING, C.J.: This appeal challenges the district court's order dismissing Leann Craig's personal injury action on the ground that her claims abated when Craig died during the pendency of the action. We affirm.

**I. BACKGROUND**

Craig, an unmarried woman, brought a personal injury action against Steven John Gellings, Deverl Wattenbarger, Bart Wattenbarger, Carol Wattenbarger, and Wattenbarger Farms ("Respondents") for damages arising out of an automobile accident. Before the action was concluded, Craig died from causes unrelated to the accident. The personal representative of Craig's estate thereupon moved to be substituted as the plaintiff, and the Respondents moved to dismiss the case, asserting that personal injury actions do not survive an unmarried plaintiff's death. The district court granted the motion to dismiss and did not address the personal representative's motion. Craig's attorney appeals, challenging the dismissal of Craig's claims for economic damages.

**II. ANALYSIS**

**A. Survival of Personal Injury Claims for Economic Loss**

The question presented to this Court- whether Craig's claims for economic loss caused by personal injuries survive her death- is a question of law over which we exercise free review. []

Idaho has no statutory law governing the survival of a personal injury action after the death of an unmarried plaintiff. *See Evans v. Twin Falls County*, 118 Idaho 210,215,796 P.2d 87, 92 (1990). In the absence of legislative enactment on a subject, Idaho Code § 73-116 specifies that the common law governs. It states:

> The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state.

It has long been recognized by the Idaho Supreme Court that at common law, a personal injury action abated with the death of either party. *Stucki v. Loveland*, 94 Idaho 621, 622, 495 P.2d 571,572 (1972); *Kloepfer v. Forch*, 32 Idaho 415,418, 184 P. 477,477-78 (1919). This common law rule has been modified to some extent, however, by the Idaho Legislature. First, I.C. § 5-311, authorizes wrongful death actions for heirs or personal representatives when the wrongful act or neglect of another caused the decedent's death. This statute does not allow a decedent's claims to survive but creates a new cause of action in

favor of heirs or personal representatives. *Vulk v. Haley*, 112 Idaho 855, 858, 736 P.2d 1309, 1312 {1987). Second, LC.

§5-327, expressly abrogates the common law rule that a personal injury action abates upon the death of the tortfeasor; it does not alter the rule as it applies to the death of the claimant.

The Idaho Supreme Court found a third legislative modification of the common law rule in the enactment of Idaho's community property statutes. The Court held in *Doggett v. Boiler Engineering & Supply Co*., Inc., 93 Idaho 888, 892,477 P.2d511, 515 {1970), partially overruled by Evans, 118 Idaho at 216, 796 P.2dat 93, that a married person's cause of action for personal injury is a community property right and therefore survives the death of the injured spouse so that damages accrued prior to the death may be recovered by the surviving spouse. The Doggett community property abatement exception was narrowed however, by the decision in Evans, where the Supreme Court held that general damages for pain and suffering, as distinguished from economic loss damages, are the injured spouse's separate property, not community property, and therefore do not survive the demise of the injured spouse. Evans, 118 Idaho at 216, 796 P.2d at 93.

No statute or Idaho Supreme Court decision has modified or overruled the abatement doctrine where, as here, the injured plaintiff is an unmarried person. To the contrary, the Supreme Court recently held that because the plaintiff died without leaving a surviving spouse, his claim for negligent medical care was extinguished and could not be pursued by the personal representative of his estate. *Steele v. Kootenai Medical Ctr.,* 142 Idaho 919, 921, 136 P.3d 905, 907 {2006}.

While acknowledging these precedents, Appellant argues that the common law abatement rule should no longer be followed. Appellant argues that there is inconsistency and injustice in the current state of Idaho's tort law that allows creditors, including tort claimants, to pursue their claims against a decedent's estate while disallowing the same estate from carrying forward the decedent's personal injury claim against a tortfeasor whose wrongful act has depleted the estate's assets. Appellant also argues that the interest of a surviving spouse, whose community interest in a personal injury claim was preserved by the Doggett decision, is functionally equivalent to the interest of an unmarried decedent’s estate when a personal injury resulted in economic damages to the estate. Because the abatement rule does not apply when community property was depleted, the argument goes, it should not apply when the estate of an unmarried person has been depleted. Appellant claims support for these arguments in comments made by the Supreme Court in its Doggett opinion.

We must agree that the tone of the Doggett opinion is critical of the common law rule and seems to signal a willingness of the Supreme Court at that time to overrule the abatement doctrine in a Mure case. For example, the Court stated:

> [W]hen established things are no longer secure in a fast-changing world, the court should re-examine the precedents and determine if they provide a proper standing under present conditions.
>
> We have examined the precedents and the reasons for the rule of non-survivability of causes of action following the death of a plaintiff. We find the precedents unclear and unsatisfactory and the purported reasons for the rule virtually non-existent. We suggest therefore that a continuation of such a rule serves no purpose.

*Doggett*, 93 Idaho at 892, 477 P.2d at 515. Nevertheless, overruling the abatement rule is not what the Supreme Court did either in Doggett or in its subsequent decisions. In Doggett, the Supreme Court issued a narrow ruling; it held only that the common law was impliedly modified by community property statutes, allowing claims for depletion of community assets to survive. ld. As noted above, the Supreme Court's

more recent decisions in Steele[5] and Evans adhere to the common law abatement rule with respect to claims that do not belong to a marital community.

This Court is not free to disregard precedents of the Idaho Supreme Court. Therefore, regardless of how persuasive the Appellant's arguments may be concerning the logic or fairness of the abatement rule, it is not within the authority of this Court to overrule the common law abatement doctrine.

**III. CONCLUSION**

The judgment of the district court dismissing this action is affirmed.

JUDGE GRATTON AND JUDGE PROTEM PERRY CONCUR.

NOTES

(1) *Kloepfer v. Forch*: Plaintiff requested defendant, a druggist, to sell him sodium arsenite for use as a pesticide on his clover crop. Defendant instead sold plaintiff sodium arsenate. The arsenate destroyed the crop and plaintiff brought an action alleging that defendant "sold and supplied [plaintiff] with sodium arsenate and carelessly, negligently, falsely and fraudulently represented to [plaintiff] that it was sodium arsenite and [he] not knowing the difference between said chemicals, used the same upon [his] crops and thereby destroyed them." The trial court granted defendant's motion for summary judgment and plaintiff appealed.

While the appeal was pending, Jacob Forch died. When a motion was made to substitute Rosina Forch, executrix of decedent's estate, as plaintiff, the issue became whether the cause of action survived Jacob's death.

> As a general rule, in the absence of a statute providing otherwise, causes of action *ex contractu* survive while causes ex delicto do not. However, there are well-recognized exceptions to both branches of the rule. As was said by the supreme court of Virginia in *Lee's Admr. v. Hill*, 87 Va. 497, 12 S.E. 1052: "The true test is, not so much the form of the action, as the nature of the cause of action. Where the latter is a tort unconnected with contract, and which affects the person only, and not the estate, such as assault, libel, slander, and the like, there the rule*, Actio personalis*, etc., applies. But where, as in the present case, the action is founded on a contract, it is virtually *ex contractu*, although nominally in tort, and there it survives."...
>
> We have no statutory provision abrogating the common-law rule of survival of causes of action above referred to. Applying that rule to this case it may be said that while the action is, in form, ex delicto, the cause is, in fact, *ex contractu*. The injury for which recovery is sought grows out of the contract of purchase of sodium arsenate represented by the vendor to be sodium arsenite, and the application thereof to the crops of plaintiff and his assignors whereby those specific pieces of property were destroyed. These facts distinguish this case from those where recovery is sought for injury to the person or for torts resulting in damage to the estate, generally, and make these claims assignable and cause them to survive the death of a party to the action. The motion to substitute Rosina Forch, executrix, for Jacob Forch as plaintiff herein is granted.

*Kloepfer v. Forch*, 32 Idaho 415, 184 P. 477 (1919).

**(2)** ***Moon v. Bullock***: On October 6, 1941, two automobiles collided at the intersection of Meridian and Ustick Roads. One car was driven by Arthur Bullock, the other by Benjamin Moon. Moon's father Edwin was a passenger in his car. Both Arthur Bullock and Edwin Moon died enroute to the hospital. Edwin Moon's wife brought a wrongful death action against Bullock's estate; Benjamin Moon brought an action for the damage to his automobile and for his medical bills. The trial court dismissed the action,

[5] In Steele the Supreme Court remanded the case, however, to allow the decedent's personal representative a chance to amend the complaint to allege a claim for wrongful death.

concluding that the cause of action did not survive the death of the alleged tortfeasor, Arthur Bullock. The case was appealed to the Idaho Supreme Court which affirmed the trial court's decision:

> Under the common law the death of either party to a civil action causes the abatement of a pending action. In such an event the action is dead and cannot be continued by the substitution of a representative. The only way such an action can be revived is by the bringing of a new action; and only actions in which the cause of action survives can be thus revived. []
>
> To prevent the delay and expenses incident to the bringing of a new action, our Code provides:
>
> > "An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action or proceeding survive or continue. In case of the death or disability of a party, the court, on motion may allow the action or proceeding to be continued by or against his representative or successor in interest."
>
> (§5-319, I.C.A.)
>
> Clearly the only change that this statute has wrought in the common law, is that in the case of the death (the only contingency here pertinent) of a party to a pending action, the action may be continued by a substituted party, and it will not be necessary to commence a new action; provided, that only actions wherein the cause of action survives, may be so continued. The statute is not a general survival statute; it still recognizes the general common law rule that certain actions and causes of action die irretrievably with the death of a party. *Kloepfer v. Forch*, 32 Idaho 415, 184P.477(1919); [].

*Moon v. Bullock*, 65 Idaho 594, 151 P.2d 765 (1944).

Following the decision in *Moon*, the legislature enacted I.C. § 5-327.Was the holding in *Moon* reversed prospectively by the legislature? Did the legislature do more than reverse *Moon*?

### B. Wrongful Death Actions

**RUSSELL v. COX**

Supreme Court of Idaho
65 Idaho 534, 148 P.2d 221 (1944)

AILSHIE, J.- This is an appeal from a judgment sustaining demurrer to plaintiff's complaint and dismissing her action. The complaint alleges:

> That the plaintiff, Ruth Russell, is the mother, and the defendant, Marcus E. Cox, is the surviving husband of Lottie Melvina Cox, deceased; that the decedent died childless, and she was pre-deceased by her father; that the said plaintiff and the said defendant are all of the heirs at law of the said decedent.
>
> That the defendant, Marcus E. Cox, on or about the 16th of July 1942, with force of arms, did wrongfully shoot and mortally wound the plaintiffs' daughter, Lottie Melvina Cox, of which mortal wound her said daughter, on the 16th day of July 1942, dies; ****

The action was instituted under § 5-311, I.C.A., which reads as follows:

> When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and

> the preceding section, such damages may be given as under all the circumstances of the case may be just.

Respondent contends that "at common law a tort committed by one spouse against the person or character of the other does not give rise to a cause of action in favor of the injured spouse." It is further contended that "In action for death [§ 5-311] by wrongful act the act must have been such as would have entitled injured party to maintain an action therefor if death had not ensued."

On the other hand, appellant contends that the statute (§ 5-311, I.C.A.) creates "a new cause of action ***for the benefit of a third person"; and that it did not accrue to the deceased in his lifetime but accrued only immediately following his death.

We had the consideration of this statute before us in *Whitley v. Spokane, Ry*., 23 Idaho 642, 132P. 121(1913), afl'd, 237 U.S.487 (1915), and held, among other things, that "The cause of action is not anything that ever belonged to the decedent or to his estate. It never accrued to the decedent." In the course of our discussion of the question involved, it was said:

> This brings us to a consideration of the nature of this cause of action and the status of respondent in the courts of Idaho. Section 4100 of the Rev. Codes [now § 5-311, I.C.A.] authorizes the prosecution of an action by the 'heirs of personal representatives; of a deceased person against a person wrongfully causing the death of such person, and any judgment obtained in such an action inures to the benefit of the heirs of the decedent, and in no case becomes a part of the assets of the estate of the deceased. Except for this statute, no such action could be prosecuted in this state and no such cause of action could accrue in this state. [] The legislature had this power to confer this right on any heir or representative it saw fit to name or withhold the authority altogether. [] The cause of action is not anything that ever belonged to the decedent or to his estate. lt never accrued to the decedent. The action is allowed upon the theory that the wrongful death of the ancestor works a personal injury to his heirs, in that it deprives them of some pecuniary or other benefit which they would have received except for the death of the ancestor. The statute confers this right of action on the heirs, and it gives it directly to them or a personal representative such as an executor or administrator, and when such representative prosecutes the action, he does so as *trustee for the heirs*.

Here it is admitted that appellant and respondent are the only heirs of Lottie Melvina Cox, deceased. Appellant is, therefore, entitled under the statute (§ 5-311) to prosecute this action. It is not a survival action, but an action, the right to prosecute which did not accrue in the lifetime of decedent but only upon her death. In other words, this right of action did not accrue to Lottie Melvina Cox or her estate. At the time of the accrual of the present action, the relation of husband and wife (between Marcus E. Cox, respondent, and Lottie Melvina Cox) had been terminated and no longer existed. For that reason, it becomes wholly unnecessary for us to consider the contention made by respondent, that an action in tort can not be maintained in this state by a wife against her husband. The recovery, if any, from the action, can not be community property.

The circumstance that, where death results from the wrongful act of another, the injured party may in his lifetime sue for damages or compromise his cause of action for personal injuries, does not in any way militate against the right of the heirs or personal representatives of the decedent to prosecute their independent action for her wrongful death. In other words, the cause of action, which accrued to the injured party during her lifetime, may be prosecuted or compromised by the injured party and the receipts inure to the benefit of her estate; whereas, the right of action, which accrues on the death of the injured party, can only be prosecuted by her "heirs or personal representatives" and does not benefit the estate.

The contention, that our death statute provides a substituted and not a new right of action, is wholly untenable. []

It is true, as said by the Supreme Court in *Northern Pacific Ry. Co. v. Adams*, 192 U.S. 440, that, "They [the heirs] claim under him [deceased], and they can recover only in case he

could have recovered damages had he not been killed, but only injured." That is to say, the cause of action arises out of the same state of facts, whether prosecuted by the injured party during his lifetime or by his heirs after his death; but the heirs must prove the additional fact, that the decedent died as a result of the wrongful or negligent act. Whether prosecuted by the injured party during his lifetime or by the heirs after his death, it must be shown, under our statute, that the injury was the result of a wrongful or negligent act. The right of action, however, in the one case arises in favor of the injured party and, in the other case, the right of action is conferred upon his "heirs or legal representatives."

If the facts, out of which the right of action accrued to the injured party, (aside from capacity to sue) are not such as would have enabled him to prosecute an action in his lifetime, of course they would not be sufficient to authorize the prosecution of an action by his heirs after his death. In the one case, any judgment obtained would inure to the benefit of the injured party during his lifetime and enhance his estate on his death; whereas, a judgment obtained by his heirs would inure exclusively to their benefit and not to the benefit of the estate.

The judgment of the trial court is reversed, and the cause is remanded with direction to overrule the demurrer and to take further proceedings in accordance with the views herein expressed.

GRVENs & DUNLAP, JJ., concur. HOLDEN, C.J., dissents [without opinion.]

NOTES

(1) While the decision seems in accord with basic fairness, is the opinion consistent with Moon in its view of the proper roles of legislature and judiciary? Could the decedent have sued the defendant for her injuries if she had lived? If not, how can the court say that the heirs "claim under [the deceased], and they can recover only in case [the deceased] would have recovered damages had [the deceased] not been killed, but only injured"? At the time the decision was handed down, could one spouse sue another spouse in tort?

**BEVAN v. VASSAR FARMS, INC.**

Supreme Court of Idaho
117 Idaho 1038,793 P.2d 711 (1990)

BOYLE, J. - In this wrongful death action brought by the parents of a deceased twenty-eight-year-old son, we are called upon to determine whether the jury's apportionment of fifty percent contributory negligence attributed to the decedent bars the parents' recovery.

On September 27, 1985, Darrell Bevan was killed when a "com chopper" farm machine ran over him while he was attempting repairs. His parents, plaintiffs Wesley and Docia Bevan, hereafter "Bevans," brought this wrongful death action against Vassar Farms, the chopper's owner and Darrell's employer, pursuant to the Idaho wrongful death statute. I.C. § 5-311. Over Bevans' objection the jury was instructed to compare Darrell's negligence with that of Vassar Farms and impute Darrell's negligence to his parents. The special verdict form returned by the jury listed the negligence of decedent and Vassar Farms each at fifty percent. The trial court entered judgment on the verdict for defendant Vassar Farms and Bevans' appeal asserting that the Idaho wrongful death statute does not provide for such imputation of negligence. In addition, Bevans assert that they should be allowed full recovery, or in the alternative that their recovery should be diminished only by the percentage of negligence attributable to their son.

The issue before us is whether I.C. § 5-311, Idaho's wrongful death statute, requires a decedent's contributory or comparative negligence to be imputed to his heirs, thereby precluding their cause of action for damages resulting from the decedent's wrongful death.

I.C. §5-311 provides in [subsection (1)].

Bevans asserts that the absence of language in the statute, I.C. § 5-311, providing that heirs may maintain an action for wrongful death only whenever the wrongful act would have entitled the person injured to maintain an action if death had not ensued, demonstrates the legislature's intent not to require such to be a condition for recovery by a decedent's heirs. Bevans request that we overrule well established precedent and the long line of cases from this Court providing a different interpretation. Notwithstanding the absence of the suggested language in I.C. § 5-311, it is well established in this jurisdiction that " If the decedent's negligence would have barred his recovery against the defendant for injuries had he survived, then the decedent's heirs are barred from recovery in a wrongful death action." *Anderson v. Gailey*, 97 Idaho 813, 822, 555 P.2d 144, 153 (1976); *Clark v. Foster*, 87 Idaho 134, 391 P.2d 853 (1964); *Hooton v. City of Burley*, 70 Idaho 369,219P.2d651 (1950); *Russell v. Cox*,65 Idaho 534, 148P.2d221 (1944); *Hegelson v. Powell*, 54 Idaho 667,34 P.2d 957 (1934); *Sprouse v. Magee*, 46 Idaho 622,269 P. 993 (1928).

Bevans argue that in deciding *Sprouse v. Magee*, this Court incorrectly relied upon the United States Supreme Court's decision in *Northern Pacific Ry. v. Adams*, 192 U.S. 440 (1904), because that decision was based on facts where the defendant owed no legal duty to the decedent. In *Northern Pacific Ry*., the United States Supreme Court held where there is no legal duty owed to the decedent there can be no "wrongful act." Therefore, the heirs in Northern Pacific Ry. had no action because "they claim under him, and they can recover only in case he could have recovered damages had he not been killed, but only injured." 192 U.S. at 450.

In *Sprouse v. Magee*, 46 Idaho 622, 269 P. 993 (1928) this Court held that it was reasonable to bar the heirs' recovery against a defendant if the deceased himself could not recover because such limitation existed in the Lord Campbell's Act, the original model for all wrongful death statutes. The Idaho legislature, in enacting I.C. § 5-311, adopted the substance of Lord Campbell's Act.

Furthermore, the Idaho legislature, dating from the time of *Sprouse v. Magee*, 46 Idaho 622, 269 P. 993 (1928), through the present, has been and continues to be aware of this Court's interpretation and application of I.C. § 5-311 and has not found it necessary to enact legislation to change or modify the wrongful death recovery law as interpreted by the decisions of this Court.

In support of their argument that the decedent's contributor)' negligence is not intended to be imputed to the decedent's heirs, Bevans argue that the language in I.C. § 5-311, "[w]hen the death of a person is caused by the wrongful act or neglect of another' should be interpreted to mean that all that is needed for recovery under this statute is a "wrongful act of another" which contributed to the death of the decedent. They contend that Vassar Farm's negligent maintenance of the machinery contributed to the death of the decedent, therefore the decedent's heirs have the right to recover under the statute regardless of the fifty percent apportionment of negligence to the decedent. To adopt such an interpretation would result in essentially a strict liability standard where recovery would be automatic in those cases where the heirs had no involvement in the events leading to the death of their decedent notwithstanding the extent of the decedent's negligence. Such an interpretation would allow the heirs in most cases to recover even though their decedent's negligence was equal to or greater than that of the defendant. We are not prepared to go so far. The position asserted by Bevans is clearly contrary to the intent of the wrongful death statute, I.C. § 5-311, and the contributory negligence statutes in I.C. § 6-801 through § 6-807.

The language of I.C. § 5-311 specifically states as a condition of recovery that the wrongful act of another must have caused the death of the decedent. In the present case, the jury found the defendant and Darrell Bevan equally responsible for his death. Furthermore, "wrongful act or neglect," as it is used in the statute, means a "wrongful act or neglect" as against the deceased. It necessarily follows based on the well-established law in this jurisdiction that if a defendant is not liable for injuries to the decedent had death not ensued, then there is no basis for recovery by the decedent's heirs. If a defendant's conduct does not make him liable to an injured party, then that defendant cannot be held liable in the event of

death for damages resulting from the same conduct. Thus, there is no basis for recovery of damages by the heirs of the decedent in this case because fifty percent of the negligence was apportioned to him.

[After examining the comparative fault statutes, the court concluded that plaintiffs' arguments] would render meaningless the long line of case authority interpreting and applying the wrongful death and comparative negligence statutes of this state. A wrongful death action "is allowed upon the theory that the wrongful death of the ancestor works a personal injury to his heirs, in that it deprives them of some pecuniary or other benefit which they would have received except for the death of the ancestor." *Russell v. Cox*, 65 Idaho 534,538, 148 P.2d 221 (1944). However, it has been held that the heirs claim under the decedent, *Northern Pacific Ry. v. Adams*, 192 U.S. 440,450 (1904); *Helgeson v. Powell*, 54 Idaho 667,34 P.2d 957 (1934), and that a wrongful death action "arises out of the same state of facts, whether prosecuted by the injured party during his lifetime or by his heirs after his death." *Russell v. Cox*,65 Idaho 534, 538, 148 P.2d 221, 222 (1944).

In an action for personal injuries, a plaintiff cannot recover when it is proven by the evidence that his negligence was a proximate cause of his injury, and that his negligence was equal to or greater than the negligence of the defendant notwithstanding that the evidence may also show negligence on the part of the defendant. Since his parents' claim arises from the same facts, they should not be entitled to recover for losses and damages resulting from their son's death when he equally contributed to his own death.

We continue to follow long standing and well-established precedent in the Idaho case law which construes the wrongful death statute and the comparative negligence statutes and hold that the plaintiffs can recover for wrongful death only when the wrongful act would have entitled the person injured to maintain an action if death had not ensued. Thus, if the decedent's negligence was not as great as that of the defendants, then decedent's heirs would be entitled to recover for their loss reduced by the percentage of decedent's negligence. However, where the decedent's negligence is equal to or greater than the defendant's negligence, then the decedent's heirs are barred from recovery as would be the injured party had he survived. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144(1976); *Fairchild v. Olsen*, 96 Idaho 338, 528 P.2d900 (1974); *Clark v. Foster*, 87 Idaho 134,391 P.2d853(1964); *Hooton v. City of Burley*, 70 Idaho 369, 219P.2d651 (1950); *Russell v. Cox*, 65 Idaho 534, 148 P.2d 221 (1944); *Hegelson v. Powell*, 54 Idaho 667,34 P.2d 957 (1934); *Sprouse v. Magee*, 46 Idaho 622, 269 P. 993 (1928).

Accordingly, we affirm.

BAKES, C.J., AND BISTLINE, JOHNSON AND McDEVITT, JJ. CONCUR.

NOTES

**(1)** The traditional description of a wrongful death action is that it is "derivative," that is, that the heirs have a claim only if the decedent had a claim. Given this derivative status of the action, what interest of the heirs is protected by a wrongful death action? Is it accurate to describe the interest as relational, that is, as an invasion of the relation between the decedent and his heirs since such a description would suggest that the decedent's contribution to the event was irrelevant- at least as long as the defendant's conduct was a cause of the event that led to the death?

**(2) The condition precedent in the wrongful death statute:** *Russell v. Cox* and *Bevan* both involve the prohibition on the heir's suit when the decedent would have been precluded from suing. The ability of the decedent to recover is considered a "condition precedent" to the heir's recovery.

In *Castorena v. General Bectric*, plaintiffs brought wrongful death actions against various manufacturers of asbestos-containing products. Although each action was filed within two years of each decedent's death; each decedent, however, had been diagnosed with an asbestos-related illness more than two years prior to their deaths. The district court held that the heirs' claims were barred by the running of the statute of limitations on the decedents' claims: since decedents could not have brought the claim, the court concluded that the heirs were also barred. Following a detailed examination of Idaho's

wrongful death statute, the supreme court concluded, "In line with well-reasoned and long-lasting precedent in case law, we find that Idaho's wrongful death act contains an implied condition precedent." The more "challenging issue," the court asserted, was the scope of the condition precedent.

> [Defendants] argue that a wrongful death action is treated like a continuation of the right that the decedent had to bring a cause of action for his injury, and where the decedent would have been barred from bringing that action - for any reason - the decedent's heirs are likewise barred. A review of Idaho's case law on this issue demonstrates that Respondents' interpretation is unpersuasive. There is a distinction between requiring that the heirs or personal representative of the decedent may only recover where the harm done to the decedent was of such a character as would have entitled the decedent to relief, on the one hand, and requiring that the decedent must have been procedurally able to bring suit himself immediately prior to his death, on the other. Idaho's wrongful death action does not create a survival action, but an entirely new cause of action on behalf of a decedent's heirs and personal representatives.
>
> The implied condition precedent in I.C. § 5-311 allows a defendant to raise a defense of contributory negligence against the decedent's heirs where such a defense could have been brought against the decedent himself. [citing *Sprouse v. Magee*, 46 Idaho 622, 625-26, 269 P. 993, 994 (1928); *Bevan v. Vassar Farms, Inc*., 117 Idaho 1038,793 P.2d 711 (1990); and *Turpen v. Granieri*, 133 Idaho 244, 247,985 P.2d 669, 672 (1999)].
>
> In the[se] cases, this Court has consistently held that in order to bring a cause of action for wrongful death a plaintiff must demonstrate that the defendant's wrongful act or omission, which led to the decedent's injury and resulting death, constituted an actionable wrong, for which the decedent would have been entitled to relief had he brought suit. It has likewise consistently been held that those bringing an action for wrongful death are subject to the same defenses that could have been offered had the decedent himself filed suit, such as contributory or comparative negligence. In other words, the defendant must have been the cause of the decedent's injury such that he would have been liable to the decedent in a tort action.
>
> The court then turned to *Russell v. Cox*. After quoting most of the case, the court concluded, 'Thus, in Russell, when this Court was asked to consider a defense related to the decedent's personal standing to bring a claim, rather than to the wrongful nature of the injury itself, this Court found that the condition precedent did not apply." A similar conclusion was reached in *Chapman v. Cardiac Pacemakers, Inc*., 105 Idaho 785, 673 P.2d 385 (1983).
>
> The reason for this interpretation is simple, practical, and fair. The injury bringing about the entitlement to relief in an action brought by the decedent, prior to his death, or in an action by the decedent's heirs or estate representatives after the decedent's death, is identical. Where the injury was not actionable under traditional tort analysis, the heirs should not be permitted to recover where the decedent himself could not have recovered. However, the action created by Idaho's Wrongful Death Act is more than a mere survival action; it provides compensation for the harm that the heirs experience due to the decedents' death. In short, a wrongful death action is an independent action grounded in identical causation. The statute of limitations applies to each actionable wrong individually. As the actionable wrong for a wrongful death action is not complete until the death of the decedent, the statute of limitations does not begin running until that time. Therefore, we hold that the condition precedent does not apply to the statute of limitations, and the Appellants here filed their wrongful death actions in a timely fashion.

*Castorena v. General Electric*, 149 Idaho 609,238 P.3d 209 (2010).

**(3) An historical review:** For a detailed historical account of the development of Idaho case law on §5-311 in its various incarnations, see the dissenting opinion by Justice Bistline in *Nebeker v. Piper Aircraft Corp*., 113 Idaho 609, 747P.2d 18(1987) (Bistline, J., dissenting). The issue in the case whether a child can recover for the death of a parent has been mooted by the 1984 amendment of § 5-311 to include a definition of "heirs."

**C. Consortium**

**KELLY v. LEMHI IRRIGATION & ORCHARD CO.**

Supreme Court of Idaho
30 Idaho 778, 168 P. 1076 (1917)

McCARTHY, D.J. -This is an action brought by Harry Kelly, as administrator of the estate of Ira L. Davis, deceased, against the Lemhi Irrigation and Orchard Company. It is charged in the complaint that the defendant wrongfully caused the death of the deceased while in its employ by providing the crew, of which he was a member, with a hay derrick which was unsafe and defective in certain particulars expressly set forth; that by reason of such defects said derrick fell and inflicted injuries upon deceased from which he died. The evidence shows that four married sisters and two older brothers are the sole heirs of the deceased. There is no evidence that any of said brothers or sisters were in any way dependent, financially, upon the deceased or had ever received any financial aid from him, nor does the evidence show any likelihood that they would have received any such aid in the Mure. In fact, the complaint does not contain any allegation that the heirs ever had received or ever expected to receive financial aid. The complaint alleges that the heirs were entitled to the society, companionship, help and advice of their brother and that by reason of the negligence of the defendant they have been deprived of his society, companionship, help and advice. The jury found a verdict for $2,500. Under the evidence the verdict must have been based upon the loss to the heirs of his companionship and society, as there was no evidence of any other loss.

Appellant specifies as error that the damages are excessive, in that the evidence does not show that the collateral heirs suffered any damages, and that the court should have instructed the jury, as requested by appellant, that no damages could be recovered for the loss of the comfort and protection of the deceased. The statute under which the action is brought [current version at I.C. § 5-311] is as follows:

> When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just.

In England and in some of the states the courts have held that under a statute creating liability for wrongfully causing death, recovery is limited to damages for a pecuniary injury, which we understand to mean an injury directly causing financial loss. In almost all of the states where this has been held the recovery is limited expressly by statute to pecuniary injury. No such express limitation is made by our statute; therefore, these decisions are not in point. In England and in some of the states such is the holding, even though the statute does not expressly limit recovery to pecuniary injury. In California, under a statute like ours, the court holds that recovery is limited to pecuniary injury. []

....This court has held, in case of a parent, recovery may be had for the loss of the society and companionship of a child. *Anderson v. Great Northern Ry*., 15 Idaho 513, 99 P. 91 (1908). As to whether this is to be considered a pecuniary injury, as said by the California court, this court did not expressly hold. Taking the words as meaning an injury which directly causes a financial loss, we do not see how it can be said that such an injury is a pecuniary injury. It is, however, a substantial, serious and material injury and should be compensated in damages, as held by this court .... If the loss of the society and companionship be a substantial loss which should be compensated, this should apply to any heir, if it can be shown that he has suffered such loss. The statute itself makes no discrimination in this respect. Suppose a brother and sister are left orphans a tan early age, with ample means, but with no other near relatives. If the brother is killed after they have grown up together and he has borne toward her the part of father as well as brother, then the loss of his society and companionship is a substantial and material loss to her, almost to the same extent as if he had been her father instead of her brother. In the present case the evidence shows that Mrs. Kelly, a sister of the deceased, had brought him up, really taking the place

of his mother. A rule which bars collateral heirs, in all cases, from recovering damages for loss of society and companionship does not strike us as just or sensible, and we find no basis for such a rule in the statute. In the words of the statute, such damages should be allowed as under all the circumstances of the case may be just. Each case must stand on its particular facts. Under the usual conditions of life itis not probable that, in the ordinary case, a collateral heir can show any substantial damages because of loss of society or companionship. However, if in any case a collateral heir can prove there have been such close companionship and relations between himself and the deceased that he has suffered a substantial loss from the termination of that companionship, then the jury may be allowed to consider that fact as an element of damages, in a similar way, although perhaps not generally to the same degree, as it would be considered if the relationship had been in the direct line instead of collateral. Of course, no such companionship is implied from the mere relationship, it must be proved to have existed. If such fact be proved, then it may be considered as an element of damages in all cases which come under the statute.

Applying the above rule to the evidence in this case, we conclude there is sufficient evidence of the close relations and companionship between the deceased and his sister, Mrs. Kelly, to warrant the jury in considering the loss of that companionship as a ground of substantial damage. We conclude there is not sufficient evidence of close relations and companionship between the deceased and the other heirs to warrant the jury in considering the loss of that companionship as a ground of substantial damage ....

MORGAN & RICE, JJ., concur.

NOTES

(1) What is the source of the duty in this case? Did defendant do anything to the plaintiff? That is, what interest of the plaintiff was damaged by defendant's conduct?

(2) Consortium claims in wrongful death actions: The cause of action in Kelly was predicated upon Idaho's wrongful death statute which provides that "[i]n every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just." I.C. § 5-311(1). In *Packard v. Joint School District No. 171*, the Court of Appeals offered this summary of the law:

> Our Supreme Court recently noted, in *Gavica v. Hanson*, 101 Idaho 58, 608 P.2d 861 (1980), that "the precise boundaries of damages allowable under the statute have never been completely delineated." What delineation now exists may be traced largely to *Wyland v. Twin Falls Canal Co*., 48 Idaho 789, 285 P.2d 676 (1930). In that case, our Supreme Court held that "just" damages under the statute included the value of a decedent's services in the care of his family and in the education of his children. The Court also referred, in dictum, to cases from other jurisdictions, construing substantially similar statutes to allow recovery for loss of companionship, protection, bodily care, intellectual culture, and moral training- but not for mental suffering or wounded feelings caused by the death of the deceased. []
>
> This dictum subsequently was cited by the Supreme Court in *Hepp v. Ader*, 64 Idaho 240, 130 P.2d 859 (1942). The Court in Ader, apparently treating the Wyland dictum as settled law in Idaho, stated:
>
> > Although the decisions are agreed that recovery may not be had for grief and anguish suffered by the surviving relatives of the deceased, it may be had, in Idaho, for loss of society, companionship, comfort, protection, guidance, advice, intellectual training, etc. []
>
> The preclusion against recovery for grief and anguish was reiterated in *Checketts v. Bowman*, 70 Idaho 463, 220 P.2d682 (1950), *Gavica v. Hanson*, 101 Idaho 58, 608 P.2d 861 (1980), and most recently in *Volk v. Baldazo*, 103 Idaho 570, 651 P.2d 11 (1982).
>
> The foregoing summary of Idaho authority discloses that exclusion of survivors' grief and mental anguish from the elements of "just" damages, under our statutes, has not been critically examined. It is the product of a dictum preserved through the decades by a series of cursory and passing references. More importantly, in none of the cases cited has it been held, or even suggested, that a jury must be given a prohibitory instruction- specifically informing them that they shall not make any award for grief, mental anguish, or like elements.

*Packard v. Joint School District No*. 171, 104 Idaho 604, 661 P.2d 770 (App. 1983).

(3) Consortium claims in actions other than wrongful death: As the court in Packard noted, consortium claims in wrongful death actions "are creatures of statute, authorized by I.C. § ...5-311." Consortium claims arising from death thus are limited by the requirement in § 5-311 that "such damages may be given as under all the circumstances of the case may be just." Consortium claims arising from nonfatal injuries lack this statutory basis. The Idaho courts have not, however, drawn a sharp line between claims for loss of consortium resulting from injury rather than death.

(a) *Phillips v. Erhart*: Jim Phillips rented an office on the second floor of a commercial building in Meridian owned by Milt and Mary Erhart. The stairs to the second floor were on the outside of the building. The Emarts decided that the steps had become a hazard and that they should be replaced. Milt made the repairs. He encountered some difficulties with two of the treads (the vertical part of a step) and attached them on only one side of the bracket supporting the treads. Phillips fell while descending the stairs and was found lying face down on the concrete landing at the bottom of the stairs. The jury awarded Gale Phillips $556,200 in noneconomic damages for loss of consortium. The Erhart's appealed the jury verdict, arguing the award was disproportionate. In support of this argument, the Erharts summarize Mr. Phillips's injuries and resulting impairments as follows:

> Phillips came to the emergency room with a closed head injury that caused a loss of consciousness, contusions on a leg, abrasions on his face and/or neck, a tom right rotator cuff ultimately requiring surgery, a disc problem, a broken jaw, and a broken tooth. He was agitated, anxious, and impenitently confused and forgetful. Phillips received large doses of morphine for his severe pain. Phillips suffered a traumatic brain injury and post-concussive syndrome, including problems with forgetfulness, decreased short-term memory, blurred vision, difficulty with light exposure, problems with sleeping, balance, dizziness, nausea, hot flashes, taste changes, trouble focusing and spelling, and personality changes. He would become emotional and irritable. Phillips suffered mild cognitive deficits and depression and a little PTSD. He was treated by a battery of physicians and therapists. He has been permanently placed on at least four medications. He has developed a nervous eye tick. At the time of trial, Phillips was still very nervous, anxious, and fidgety. Improvements notwithstanding, Phillips suffered permanent disabilities from the accident.
>
> Lay witnesses testified about Phillips' condition. Work supervisor George Schendler stated that Phillips had significant memory issues requiring him to take notes and that he physically shook at work. Co-worker Ron Sundberg testified to Phillips' problems with memory and organization. Co-worker Angela Sisco testified that Phillips was no longer a funny, gregarious, and outgoing person. Phillips' performance ratings fell below expectations.
>
> Phillips became afraid of the water and could no longer dive for abalone, an activity he had enjoyed since his youth. He was uncomfortable driving his own boat, he would get easily disoriented on hunting trips and lost if left. He would get very frustrated and cry over mistakes. [Citations to the record omitted.]
>
> Virtually all of the long-term consequences of Mr. Phillips's injuries listed by the Erharts would also result in Mrs. Phillips losing "aid, care, comfort, society, companionship, services, protection and conjugal affection" of Mr. Phillips. The jury was instructed that a male of Mr. Phillips's age has a life expectancy of 42.7 years. Considering Mr. Phillips's life expectancy and the impact his permanent injuries will have on his relationship with Mrs. Phillips, the jury award to her does not indicate it was given under the influence of passion or prejudice.

*Phillips v. Erhart*, 151 Idaho 100,254 P.3d 1 (2011)

(b). *Vannoy v. Uniroyal Tire Co*.: Plaintiff was injured when a tire he was mounting exploded. The jury awarded plaintiffs wife $74,895.81 for the loss of consortium. The trial court ordered remittitur of all but $20,000 and the wife appealed. The Idaho Supreme Court noted:

> An award of damages for loss of consortium should be supported by substantial competent evidence of the loss of services, society, companionship, sexual relations, etc. [] However, we agree with plaintiffs that an award for loss of consortium damages may also be supported by circumstantial evidence such as the extent of the injury and hospitalization. In the present case, plaintiffs presented no direct evidence of the husband and wife relationship or the losses to that relationship. The loss of consortium damages could only be supported, if at all, by circumstantial evidence of the extent of the injury, hospitalization and an inference from Mrs. Vannoy's very limited testimony which states that "our home lifestyle changed after the accident. -˙"

*Vannoy v. Uniroyal Tire Co.,* 111 Idaho 536, 726 P.2d648 (1986). The court concluded that the trial court had not abuse its discretion in ordering remittitur.

(c). *Hayward v. Yost*: The court approved an award for "the loss of protection, comfort, society and companionship" to the parents of a child who suffered brain damage as a result of being struck by an automobile. *Hayward v. Yost*, 72 Idaho 415, 242 P.2d 971 (1952).

(4) A condition precedent to consortium claims? Are consortium claims that are not brought under the wrongful death statute subject to a similar condition precedent? That is, are they derivative in the sense that they are subject to any defenses to which the injured person is subject?

(a) *Runcom v. Shearer Lumber Products, Inc*.: Plaintiff/husband was injured while repairing a boiler; the jury concluded that he was 10% responsible for his injuries. The court refused to reduce plaintiff/wife's award by the 10% negligence attributable to her husband. The Idaho Supreme court reversed:

> We now consider the defendant's assignment of error which raises the issue of whether a spouse's damages for loss of consortium should be reduced by the percentage of comparative negligence assigned to the injured spouse. The trial court refused the reduction. At the time when contributory negligence was a complete bar to recovery, it was held in all American jurisdictions which ˙considered the question, that the contributory negligence of a spouse completely barred the non-physically injured spouse's claim for loss of consortium. []Although this Court never directly addressed the issue, we have no reason to believe that a different rule would have been adopted in Idaho. []While that rule was criticized by some writers on the basis that it was harsh, it was, nevertheless, the law.
>
> Much of the harshness of the rule has been eliminated with the advent of comparative negligence in which slight contributory negligence does not act as a complete bar to recovery, and a spouse's claim for loss of consortium is similarly not completely barred. The issue has been considered by at least eight courts in comparative negligence jurisdictions such as Idaho, the majority of which have ruled that the loss of consortium damages should be proportionally reduced. [)We agree with the majority. The claim for loss of consortium is a wholly derivative cause of action contingent upon a third party's tortious injury to a spouse. We have held that a wife's claim for loss of consortium against a direct employer, because of its derivative nature, is barred by the exclusive remedies required by the workmen's compensation statutes. *Coddington v. City of Lewiston*, 96 Idaho 135,525 P.2d330 (1974).This rule is consistent with the lawin the analogous situation of an heir's action for wrongful death, in which the comparative negligence of the decedent is also considered. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144(1976).The Restatement of Torts (Second) § 494 applies this same rule to both wrongful death actions and loss of consortium actions. It would be inconsistent "to hold that an injured party's negligence would bar or limit his recovery for direct injury, but would not affect his spouse's recovery for indirect injury." [] The present case is distinguished from an action in which a person is claiming damages for his or her own personal physical injuries, which claim is non-derivative and not dependent on the spouse's cause of action and negligence attributable to the spouse. See *Rogers v. Yellowstone Park Co*., 97 Idaho 14, 539 P.2d 566 (1975). The derivative nature of a claim for loss of consortium, an interest in consistency in the law, and persuasive authority from other jurisdictions cause us to hold that the trial court erred in refusing to reduce Linda Runcom's damages by 10%, the percentage of negligence attributable to her husband.

*Runcom v. Shearer Lumber Products, Inc.*, 107 Idaho 389,690 P.2d 324 (1984).

(b) *Coddington v. City of Lewiston: Runcom* announces a more general proposition: consortium claims are derivative. If the physically injured person could not recover, that person's spouse cannot. In Coddington, plaintiff's husband was injured when a trench he was excavating collapsed on him. The husband received workers compensation for his injuries. The wife brought a claim for consortium against his employer. The Idaho Supreme Court upheld the trial court's summary judgment for defendant:

> From [plaintiff's] complaint it is apparent that her loss of consortium was caused by a personal injury to her husband .... Since the [plaintiff's] claim for loss of consortium arises out of the personal injuries to her husband which were compensated under the Workmen's [sic] Compensation Act, her separate claim for damages is barred by I.C. § 72-203 which provides:
>
> > The rights and remedies herein granted to an employee on account of personal injury for which he is entitled to compensation under this act shall exclude all other rights and remedies such employee, his personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury.

*Coddington v. City of Lewiston*, 96 Idaho 135, 525 P.2d 330 (1974).

### iv. *Aside*: Wrongful Death and Economic Loss

#### HORNER v. SANI-TOP, INC.

Idaho Supreme Court
143 Idaho 230, 141 P.3d 1099 (2006)

TROUT, J.: This is a wrongful death case arising out of an accident that occurred in the Home Depot Store in Twin Falls, Idaho (Home Depot). Janessa Homer, who was two years old at the time, died after being struck by debris from a load of countertops which fell as a Home Depot employee removed them from a high shelf using a forklift. Defendant Sani-Top, Inc. (Sani-Top), the company that manufactured and packaged the countertops for shipment to Home Depot, appeals from a district court decision denying its post-trial motions to alter or amend the judgment and for a judgment notwithstanding the verdict.

#### I. FACTUAL AND PROCEDURAL BACKGROUND

After the accident, Janessa's parents Virgil Homer and Julie Homer-Cunningham (Virgil, Julie, or collectively the Homers) began negotiations with both Home Depot and Sani-Top. Initially, Home Depot voluntarily paid the Homers for Janessa's medical and funeral expenses incurred as a result of the accident. Ultimately, the Homers entered into a Settlement Agreement with Home Depot and fully released Home Depot from any further responsibility. Thereafter, the Homers, individually and on behalf of Janessa's sister, Hanna, filed a wrongful death action against Sani-Top, alleging Sani-Top had negligently designed and/or manufactured its packaging system for the countertops.

After a seven-day trial, the jury awarded over $4 million dollars to the Homer family, primarily relating to noneconomic damages. On the verdict form, the jury was instructed to apportion liability, if any, to Home Depot as well as Sani-Top. The jury assigned 87% of the fault to Home Depot and 13% of the fault to Sani-Top. Based upon the percentage of fault assigned by the jury, the district judge multiplied each plaintiff's total award by 13% and then entered separate judgments against Sani-Top for Virgil, Julie and Hanna Homer. As a result, Virgil and Julie were awarded $221,000 each (representing $26,000 in economic damages and $195,000 in noneconomic damages) and $130,000 for their daughter Hanna.

## III. ANALYSIS

### A. Motion to Alter or Amend the Judgment

Sani-Top argues the district judge abused his discretion in denying its motion to alter or amend the judgment, alleging the following: ... (3) there was insufficient evidence to support the award for economic damages; and (4) there was insufficient evidence to support the award to Virgil for emotional distress.

#### 3. Sufficiency of evidence to support economic damage award

Sani-Top argues there was insufficient evidence to support the award for economic damages to Virgil and Julie, which would be incurred by the Homers as a result of the loss of Janessa's financial support. The jury instructions defined economic damages to include:

> 3. The plaintiffs' loss of financial support from the decedent, and the present cash value of financial support the decedent would have provided to the plaintiffs in the future, but for the decedent's death, taking into account the plaintiffs' life expectancy, the decedent's age and normal life expectancy, the decedent's earning capacity, habits, disposition and any other circumstances shown by the evidence.

No direct factual evidence or expert testimony was presented to establish Janessa's potential earning capacity or the cash value of financial support she might have provided her parents in the future. And although Dr. Katz, a licensed psychologist specializing in grief and loss, discussed the loss of Janessa caring for and training Hanna, caring for her parents when sick, assisting in transportation and errands and the loss of assistance in taking care of her grandparents, these losses were spoken of in generalities and a review of the record reveals no evidence of any calculation of out-of-pocket expenses tied to these services.

Relying on the following quote in *Gardner v. Hobbs*, the district judge upheld the economic damage award, concluding "the surviving plaintiffs need not prove the precise amount of loss [for special damages], which is presumed from the death itself:"

> It is not necessary, in this state, for a husband or wife, in order to recover for the death of the other, caused by wrongful act or negligence, to plead or prove damages arising from loss of services, food, clothing, shelter or anything else which may be measured in dollars and cents. The same rule applies in cases where a parent sues for the death of a child or the child for the death of a parent. Pecuniary loss, in cases of this kind, will be presumed upon proof of death, caused by the wrongful act or negligence of the defendant, and the relationship of husband and wife, or parent and child, existing between the plaintiff and the deceased.

69 Idaho 288, 294, 206 P.2d 539, 543 (1949) (quoting *Hepp v. Ader*, 64 Idaho 240, 245-46, 130 P.2d 859, 862 (1942) (emphasis added)).

The Gardner Court's discussion of the Hepp case immediately preceding this quote clarifies that Hepp was dealing only with general damages:

> In *Hepp v. Ader*, a husband and daughter brought an action for the wrongful death of the wife and mother. The wife had been an invalid for 25 years and it was apparent that the husband suffered no financial loss by reason of her death. The court affirmed a judgment in favor of the husband based solely upon deprivation of "companionship," "society," "comfort," "love" and "affection" of the deceased.

*Gardner*, 69 Idaho at 294, 206 P.2d at 543.

In Gardner, this Court reviewed earlier cases and noted that Idaho had departed from the rule in California, which required that recovery, including loss of society and companionship, be limited to "pecuniary injury, that is, an injury directly causing financial loss." Supra at 294, 206 P.2d at 543. The

Gardner Court then referred to *Kelly v. Lemhi lrr. & Orchard Co*., 30 Idaho 778, 168 P. 1076 (1917), and noted this Court has approved recovery for loss of society and companionship- an injury for which there was no specific measure of financial loss. Thus, the significance of the quote from Hepp above is that damages may be recovered in a wrongful death case, even though they are not tied to a financial or "pecuniary loss" - such a loss is presumed with respect to loss of society or companionship. It does not mean that if a plaintiff seeks special, or out-of-pocket, damages, there is no need to prove them with any specificity or tie them to a particular loss.[6]

To reiterate, the Hepp language relied on in Gardner means that a plaintiff may recover for general damages in a wrongful death action without pleading or proving special damages. In addition, general damages, such as loss of society and companionship, will be presumed upon death when the plaintiff is the spouse, parent or child of the decedent. While the language is admittedly not very precise, there is nothing in the Hepp line of cases that supports the district court's conclusion that a plaintiff does not need to prove special damages if that type of relief is requested. In fact, in each of the cases cited by Hepp where the sufficiency of the evidence to support special damages was challenged, this Court responded by identifying the evidence that could be used to support the award for special damages. See *Butler v. Townsend*, 50 Idaho 542, 298 P.375 (1931) (evidence showed daughter had contributed $5 a week to her parents); *Wyland v. Twin Falls Canal Co*., 48 Idaho 789,285 P. 676 (1930) (evidence of obligation to pay medical and funeral expenses); *Willi v. Schaefer Hitchcock Co*., 53 Idaho 367, 25 P.2d 167 (1933) (evidence of decedent's earnings).

These early cases are consistent with more recent case law, which holds that in order for an award of special damages to be upheld, the plaintiff must put on some type of proof to support the damage award. "[C]ompensatory awards based on speculation and conjecture will not be allowed." *Moeller v. Harshbarger*, 118 Idaho 92, 93,794 P.2d 1148, 1149 (1990). "More recent cases before this Court have mandated when considering an award of damages for future losses, the question is whether the plaintiff has proven the damages with reasonable certainty." *Smith v. Mitton,* 140 Idaho 893, 104 P.3d 367 (2004) (internal citations omitted). In Mitton, this Court held that an award of lost wages was not based on hypothetical or speculative proof, but rather on substantial and competent evidence when "[e]vidence was submitted to the jury regarding what [Smith's] wages had been, what they were subsequent to the termination, and what they had become. Some hard numbers were given to the jury, some reasonable assumptions were also proposed." *Id*. at 900, 104 P.3d at 374 (emphasis added). The attorney presented a formula as to how to calculate Mure losses. *Id*.

In this case, the jury must have some guidance in determining what it will cost the Homers to replace the loss of services referenced by Dr. Katz, for example, the loss of Janessa caring for her sister, parents and grandparents. Because there is no evidence in the record to support economic damages as they relate to the loss of Janessa's financial support, the district judge abused his discretion in denying Sani-Top's motion to alter or amend the judgment to eliminate the economic damages award. The applicable legal standard is that damages must be proved with reasonable certainty and cannot be based on mere speculation.

**4. Sufficiency of evidence for emotional distress damages**

Sani-Top contends the district judge abused his discretion by denying its motion to alter or amend the judgment to reduce the emotional damages award to Virgil, arguing there is insufficient evidence to support the award. The district judge was in the best position to determine credibility and weigh the evidence. He presented a thorough analysis as to why the jury's verdict for Virgil was supported by substantial and competent evidence. In his decision he recounted the evidence of Virgil's physical manifestations of emotional distress, the testimony of a grief psychologist regarding the devastation that occurs when a parent loses a child and Virgil's testimony about his mental pain and suffering over the loss of his daughter and the horrifying experience of being present during the accident. Based on the substantial and competent evidence regarding Virgil's emotional distress, the district judge did not abuse

[6] This is consistent with I.C. § 6-1601(3), which defines economic damages ....

his discretion in denying Sani-Top's motion to alter or amend the judgment with respect to Virgil's emotional distress damages.

**IV. CONCLUSION**

.... This Court reverses the award of economic damages as they relate to the alleged loss of Janessa's financial support because the record provides no evidence to support such damages.

CHIEF JUSTICE SCHROEDER AND JUSTICES EISMANN AND JONES AND JUSTICE PRO TEM WALTERS CONCUR.

NOTES

**(1)** What evidence could the plaintiffs have presented to justify a claim for economic loss caused by the wrongful death of their child?

**(2)** The decision in Homer qualifies the earlier decisions in this section by limiting their broad language to "general damages" as distinguished from "special damages. Both are classified as "compensatory damages" that are intended to return individuals to the position they were in prior to the injury. For example, if a person is injured in an automobile accident, she could seek damages to cover her past and future medical expenses, damage to the motor vehicle, and the loss of earnings now and in the future. She could also seek damages for pain and suffering, mental anguish, and loss of consortium.

**(a) General damages** are those that are presumed to result from the wrong. In the example, pain and suffering, mental anguish, and loss of consortium are classified as general damages. General damages thus are for intangible losses that can be inferred from the facts surrounding the case.

**(b) Special damages** are the actual but not necessary result of the wrong; they are out-of-pocket costs of the event. In the example, the medical expenses, damage to the motor vehicle, and the loss of earnings now and in the future are classified as special damages. Thus, special damages are based on measurable dollar amounts of actual loss.
A third type of damages are:

**(c) Punitive or exemplary damages** are intended to punish the wrongdoer. They are available when the wrongdoer's conduct was aggravated the original wrong.

Recall that the legislature in 1990 limited noneconomic damages. In doing so, it defined both "economic damages" and "noneconomic damages" so that the terms generally correspond to general and special damages. See I.C. § 6-1601{3), (5). The legislature also made it more difficult to obtain punitive damages. I.C. § 6-1604. The statutory language can be found in the notes at the beginning of the materials on emotional interests.

**(3) Types of damages available**: The statute provides that "such damages may be given as under all the circumstances of the case as may be just." What is included?

**(a) Emotional damages:** Consortium is, of course, an emotional loss.
**(b) Economic damages:** *Homer v. Sani-Top* discusses the availability of economic damages in a wrongful death action.

In *Pfau v. Comair Holdings, Inc*., plaintiff's decedents were killed in a plane crash. Since Idaho law applied, the federal district court certified a question to the supreme court on the availability of recovery for "expectancies":

> Under Idaho's Wrongful Death Act and all related case and statutory law, are economic damages limited to the loss of support received or reasonably anticipated during the life of the decedent, or do they include damages for the loss of anticipated inheritance the claimants may have received after the natural death of the decedent, and/or the loss of the net accumulation of the decedent, and/or loss of earnings of the decedent?

This is, the court asserts, a question of statutory construction -in which the court is to attempt to determine and give effect to the legislative intent. The court examines a handful of cases - including *Wyland v. Twin Falls Canal Co*., 48 Idaho 789,285 P. 676 (1930), *Hepp v. Ader*, 64 Idaho 240, 130 P.2d 859 (1942), *Volk v. Baldazo*, 103 Idaho 570,651 P.2d 11 (1982), and *Westfall v. Caterpillar, Inc*., 120 Idaho 918, 821 P.2d 973 (1991)- that demonstrate to the court that "[f]or the past century, Idaho courts have followed a loss of support theory of damages. This theory measures damages as the loss to the survivors of what the decedent would have contributed to them in the form of support if he or she had lived. Following this theory, our earliest cases define 'just damages to include recovery for loss of companionship, protection, bodily care, intellectual culture, and moral training 'providing is sufficiently appears that pecuniary damages resulted from such loss. *Wyland v. Twin Falls Canal Co*., 48 Idaho 789, 796, 285 P. 676, 678 (1930)."

**(c) Punitive damages**: In *Gavica v. Hanson*, the Idaho Supreme Court concluded that punitive damages were available in wrongful death actions. The court held that the language in §5-311 authorizing "such damages ...as under all the circumstances of the case may be just" included punitive damages where such damages would otherwise be recoverable had the decedent survived:

> [Defendant argues that] a wrongdoer may be liable for punitive damages if he injures another, [but] that punitive damages should nevertheless be withheld if a wrongdoer so injures another as to cause death. We find no logic in such a conclusion. If wrongful conduct is to be deterred by the award of punitive damages, that policy should not be thwarted because the wrongdoer succeeds in killing his victim. To hold otherwise would violate the precept that this Court should avoid a statutory interpretation which produces an absurd result.

*Gavica v. Hanson*, 101 Idaho 58, 608 P.2d 861 (1980).

### b. Economic Interests

#### i. What is "Economic Loss"?

**BRIAN and CHRISTIE, INC. v. LEISHMAN ELECTRIC, INC.**

Idaho Supreme Court
150 Idaho 22, 244 P.3d 166 (2010)

ERSMANN, C.J.: This is an appeal from a judgment dismissing a claim for negligence in performing electrical work that caused a fire resulting in substantial damage to a restaurant and its contents. The district court dismissed this action on the ground that the claim was for purely economic damages and was barred by the economic loss rule. We vacate the judgment and remand for further proceedings.

**I. FACTS AND PROCEDURAL HISTORY**

Brian and Christie, Inc., d/b/a Taco Time, (Taco Time) owns and operates a Taco Time restaurant in Rexburg. In 1998, it engaged a general contractor to remodel the restaurant. The general contractor hired Leishman Electric, Inc., (Subcontractor) to perform the electrical work.

Taco Time purchased two used neon signs, transformers, and wiring from a third party and contracted with a sign company to install them. That company repaired and rewired one of the signs and installed both of them, including the transformers, on the restaurant building. It did not properly ground one of the signs, and one of the transformers lacked secondary ground fault

protection in violation of the National Electric Code. The sign company did not connect the signs to electrical power.

After the signs were installed, Subcontractor connected them to electrical power. Prior to doing so, it did not check the wiring performed by the sign company nor did it check to determine whether the transformers complied with the Electric Code. After Subcontractor connected the signs and transformers to electrical power, they caused a fire that resulted insubstantial damage to the building and its contents.

Taco Time filed a lawsuit against the sign company and Subcontractor. It amended its complaint to drop Subcontractor as a party and ultimately settled the lawsuit against the sign company. It then filed this lawsuit against Subcontractor on October 2, 2006.

On June 5, 2007, Subcontractor moved for summary judgment on the ground that the economic loss rule barred recovery against it on a negligence cause of action. The district court granted the motion ....

## III. ANALYSIS

### A. Did the District Court Err in Holding that Taco Time's Cause of Action Was Barred by the Economic Loss Rule?

Taco Time's complaint alleges a cause of action against Subcontractor for the negligent performance of electrical work. Taco Time contends that Subcontractor connected the neon signs and transformers to electrical power without first ascertaining that the signs were properly grounded and that the transformers complied with the National Electric Code; that such omission constituted negligence; and that such negligence caused a fire that damaged the restaurant and its contents. The district court held that Taco Time's cause of action was barred by the economic loss rule.

We first addressed the economic loss rule in *Clark v. International Harvester Co*., 99 Idaho 326, 581 P.2d 784 (1978). We noted, "The economic expectations of parties have not traditionally been protected by the law concerning unintentional torts." *Id*. at 335, 581 P.2dat 793. In explaining the considerations underlying the distinction between the recovery of damages in tort for physical injuries to person or property and the recovery of purely economic loss for breach of warranty or contract, we quoted from *Seely v. White Motor Co*., 403 P.2d 145, 151(Cal. 1965), as follows:

> He [a manufacturer] can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.

*Clark* was a products liability case. The plaintiff contended that the tractor he had purchased was negligently designed, resulting in breakdowns and a lack of power that caused him to lose profits in his custom farming operation. In addressing the manufacturer's duty, we explained:

> The law of negligence requires the defendant to exercise due care to build a tractor that does not harm person or property. If the defendant fails to exercise such due care it is of course liable for the resulting injury to person or property as well as other losses which naturally follow from that injury. However, the law of negligence does not impose on International Harvester a duty to build a tractor that plows fast enough and breaks down infrequently enough for Clark to make a profit in his custom farming business. This is not

> to say that such a duty could not arise by a warranty express or implied by agreement of the parties or by representations of the defendant, but the law of negligence imposes no such duty.

99 Idaho at 336, 581 P.2d at 794.

In *Clark*, the negligence in designing the tractor that the plaintiff had purchased did not cause any injury to person or property. It simply caused the tractor not to perform properly in plaintiff's business. The resulting purely economic losses incurred by the plaintiff were not recoverable under a negligence cause of action because the manufacturer had no duty to design and manufacture a tractor that would plow fast enough and break down infrequently enough for the plaintiff to make a profit in his custom farming business. In essence, manufacturing an inferior product does not breach any duty imposed under negligence law where the product does not cause harm to person or property.

".... However, in *Ramerth v. Hart*, 133 Idaho 194, 197, 983 P.2d 848, 851 (1999), we stated, "The economic loss rule applies to negligence cases in general; its application is not restricted to products liability cases."

ln *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co*., 97 Idaho 348,544 P.2d 306 (1975), we provided a definition of economic loss. The issue in Salmon Rivers was whether one could recover damages against a manufacturer for breach of an implied warranty in the absence of privity of contract. While deciding that issue, we stated that the difference between property damage and economic loss was: "Property damage encompasses damage to property other than that which is the subject of the transaction. Economic loss includes costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use." *Id*. at 351, 544 P.2d at 309.

We have since applied that definition to cases involving the purchase of defective personal property and real property. See *Tusch Enterprises v. Coffin*, 113 Idaho 37,41,740 P.2d 1022, 1026 (1987) (purchase of three defective duplexes); *Duffin v. Idaho Crop Imp. Ass'n*, 126 Idaho 1002, 1007,895 P.2d 1195, 1200 (1995) (purchase of defective seed potatoes); *Ramerth v. Hart*, 133 Idaho 194, 196, 983 P.2d 848, 850 (1999) (purchase of a defective airplane); *Blahd v. Richard B. Smith, Inc*., 141 Idaho 296, 300, 108 P.3d 996, 1000 (2005) (purchase of a defective house); *Aardema v. U.S. Dairy Systems, Inc*., 147 Idaho 785, 790, 215 P.3d 505, 510 (2009) (purchase of an allegedly defective milking system). In reaching its decision, the district court used this same definition, even though Taco Time's claim against Subcontractor did not involve the purchase of defective property. The district court's attempt to apply this formulation of the rule to a case involving the rendition of services illustrates why it does not apply to such cases.

First, the Salroon Rivers definition states, "Economic loss includes costs of repair and replacement of defective property which is the subject of the transaction ...."97 Idaho at 351,544 P.2d at 309. In applying that definition to this case, the district court held that "the subject of the transaction with which [Subcontractor] was involved was the remodel project" and that it was "the restaurant/building, not the services provided via remodeling, that was the subject of the transaction." In doing so, it misquoted the Salmon Rivers definition of economic loss.

Correctly quoted, that definition states, "Economic loss includes costs of repair and replacement of defective property which is the subject of the transaction...." *Id*. (emphasis added). In its analysis, the district court omitted the word "defective." Taco Time did not contend that it suffered economic loss because Subcontractor sold it a defective restaurant. The restaurant was not defective property. It did not spontaneously combust. Rather, Taco Time's claim is that Subcontractor's negligence in connecting the signs to electrical power caused a fire that extensively damaged the restaurant and its contents. In this case, there was no defective property which was the subject of the transaction.[7]

[7] Although one neon sign and one transformer may have been defective, Taco Time did not purchase those items from Subcontractor.

Second, the district court misunderstood what economic loss is. In its decision denying reconsideration, it wrote, "All of [Taco Time's] damage claims arise from restaurant property damaged by the fire, and such damages constitutes economic loss." It therefore held that Taco Time could not recover for damage to "the building, its contents, and the profits derived from the building's use that were damaged by the fire." Economic loss is not simply damages that can be measured monetarily. "Economic loss includes costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use." *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft, Co*., 97 Idaho 348, 351, 544 P.2d 306, 309 (1975). It includes costs to repair and replace the "defective property which is the subject of the transaction." As discussed above, the restaurant and its contents were not defective property.

In *Oppenheimer Industries, Inc. v. Johnson Cattle Co., Inc*., 112 Idaho 423, 426, 732 P.2d 661, 664 (1986), we rejected the contention that the loss of cattle due to the negligence of the deputy brand inspector was merely economic loss. In doing so, we stated, "It is also black-letter law that a cause of action in negligence is available for one whose chattel is lost or destroyed through the negligence of another." *Id*. The damage to Taco Time's restaurant and its contents was no more economic loss than was the loss of the cattle in *Oppenheimer*.

The district court's analysis shows the confusion that can occur by attempting to apply the Salmon Rivers definition of economic loss to a transaction not involving the purchase of defective property. The definition of economic loss stated in Salmon Rivers and utilized in *Tusch Enterprises v. Coffin*; *Duffin v. Idaho Crop Imp. Ass'n; Ramerth v. Hart*; *Blahd v. Richard B. Smith, Inc*.; and *Aardema v. U.S. Dairy Systems, Inc*., does not apply in cases involving the negligent rendition of services because such cases do not involve the purchase of defective property.[8]

For example, in *Just's, Inc. v. Anington Construction Co*., 99 Idaho 462, 583 P.2d 997 (1978), we did not use the Salmon Rivers definition of economic damages when deciding whether a contractor performing a construction project in a business district could be liable for economic damages suffered by a business allegedly due to the contractor's negligence. The contractor and a city had entered into a contract for an extensive construction project that included removing and replacing the streets, sidewalks, sewer and water lines, electrical services, and traffic control devices in the downtown business district. The contract required the contractor to take certain actions to minimize the disruption to the businesses within the project area. A business brought an action contending that it was a third-party beneficiary of the contract and that it was entitled to recover lost profits resulting from a decreased flow of customers allegedly caused by the contractor's negligence. The business did not contend that contractor had harmed the business's property.

We characterized the business's claim as follows, "The damages claimed by the plaintiff, lost profits, are purely economic losses allegedly suffered as a result of the defendant's negligent diversion of prospective customers of the plaintiff." *Id*. at 468, 583 P.2d at 1003.We then stated, "As a general rule, no cause of action lies against a defendant whose negligence prevents the plaintiff from obtaining a prospective economic advantage." *Id*. The reason for that general rule is that "a contrary rule, which would allow compensation for losses of economic advantage caused by the defendant's negligence,

[8] *Ramerth v. Hart*, 133 Idaho 194, 983 P.2d 848 (1999), can be read as holding that the negligent performance of services causing damage to the property being worked on is merely economic loss for which there is no recovery. Such a reading is incorrect. In Ramerth a mechanic was alleged to have negligently performed maintenance on an airplane, causing damage to its engine and airframe. Applying the Salmon Rivers definition of economic loss, the Court held that "the damages to the aircraft and engine alleged in this case were purely economic and, therefore, subject to the economic loss rule." *Id*. at 197,983 P.2d at 851. That holding must be read in context of its facts. The mechanic performed the services for Morris, who later sold the airplane to Ramerth before the negligent work or any damage was discovered. Morris and Ramerth agreed to sue the mechanic together to recover damages for his negligence, and during the litigation Morris assigned to Ramerth any tort claim he may have. Ramerth was the purchaser of defective property (the airplane) that had not caused any damage to him or to any of his property. In that circumstance, the economic loss rule applied. The airplane's value was less than he thought when he purchased it. "Economic loss includes ...commercial loss for inadequate value...? *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft, Co*., 97 Idaho 348, 351, 544 P.2d 306, 309 (1975). Morris had sold the airplane before the damage was discovered. At that point he did not have a cause of action against the mechanic because he had not suffered any loss from the mechanic's negligence. There was no allegation that the sale price of the airplane was reduced because of such negligence.

would impose too heavy and unpredictable a burden on the defendant's conduct." *Id*. at 470, 583 P.2d at 1005. We noted that if the business could recover such losses, so could "not only all the other businesses in the area, but also their suppliers, creditors, and so forth, Ad infinitum [sic]." *Id*. We concluded: "If the [contractor's] liability were extended to all those who suffered any pecuniary loss, its liability could become grossly disproportionate to its fault. Such potential liability would unduly burden any construction in a business area." *Id*. Although Just's was decided three years after Salmon Rivers, we did not use the Salmon Rivers definition of economic damages. Because Just's did not involve the purchase of defective property, such definition did not apply.

The economic loss rule does not limit the damages recoverable in a negligence action. "Unless an exception applies, the economic loss rule prohibits recovery of purely economic losses in a negligence action because there is no duty to prevent economic loss to another." *Blahd v. Richard B. Smith, Inc*., 141 Idaho 296, 300, 108 P.3d 996, 1000 (2005) (emphasis added). Damages from harm to person or property are not purely economic losses. "[E]conomic loss is recoverable intort as a loss parasitic to an injury to person or property." *Duffin v. Idaho Crop Imp. Ass'n*, 126 Idaho 1002, 1007, 895 P.2d 1195, 1200 (1995). As we stated in *Just's, Inc. v. Anington Construction Co*., 99 Idaho 462,469, 583 P.2d 997, 1004 n. 1(1978):

> This case in which the plaintiff seeks recovery for purely economic losses without alleging any attending personal injury or property damage must be distinguished from cases involving the recovery of economic losses which are parasitic to an injury to person or property. It is well established that in the latter case economic losses are recoverable in a negligence action.

Rather, the economic loss rule limits the actor's duty so that there is no cause of action in negligence. "The elements of common law negligence have been summarized as (1) a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage." *Alegria v. Payonk*, 101 Idaho 617, 619, 619 P.2d 135, 137 (1980). The seller has no duty under the law of negligence to design, manufacture, or sell property that will conform to the buyer's economic expectations.

Thus, in *Clark v. International Harvester Co*., 99 Idaho 326, 336, 581 P.2d 784, 794 (1978), this Court noted, "The law of negligence requires the defendant to exercise due care to build a tractor that does not harm person or property." We denied recovery, however, because "the law of negligence does not impose on International Harvester a duty to build a tractor that plows fast enough and breaks down infrequently enough for Clark to make a profit in his custom farming business." *Id*. (emphasis added). This Court acknowledged that such a duty could be created by contract, "but the law of negligence imposes no such duty." *Id*. Likewise, in *Just's, Inc. v. Arrington Construction Co*., 99 Idaho 462, 468, 583 P.2d997, 1003 (1978), the plaintiff sought to recover "purely economic losses allegedly suffered as a result of the defendant's negligent diversion of prospective customers of the plaintiff." In deciding whether the plaintiff had a cause of action to recover purely economic losses under a negligence cause of action, we identified the issue as "whether the alleged negligent conduct of the defendant invaded an interest of the plaintiff to which the law of negligence extends its protection." *Id*. We stated, "We are concerned here with the duties imposed by the Jaw upon the defendant with respect to the plaintiff's business, not with the duties imposed by the construction contract. *Id*. (emphasis added). We ultimately concluded that defendant did not owe plaintiff a duty to refrain from negligently interfering with plaintiffs' prospective economic advantage.

In order to recover for common law negligence, there must be "a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct." *Alegria v. Payonk*, 101 Idaho 617,619,619 P.2d 135,137 (1980). Every person has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him, and to do his work, render services or use his property as to avoid such injury." *Whitt v. Jarnagin*, 91 Idaho 181, 188,418 P.2d278, 285 (1966). "In circumstances involving the rendition of personal services the duty upon the actor is to perform the services in a workman-like manner. *Id*. *Hoffman v. Simplat Aviation, Inc*., 97 Idaho 32, 37, 539 P.2d 584, 589 (1975); accord *Stephens v. Stearns*, 106 Idaho 249,256,678 P.2d 41,48 (1984);

*Harper v. Hoffman*, 95 Idaho 933,935, 523 P.2d 536,538 (1974). If the actor negligently damages another's property in performing those services, the actor is liable for such damage. *S.H. Kress & Co. v. Godman*, 95 Idaho 614, 515 P.2d 561 (1973) (if repairman called to start the boiler fire in a store negligently failed to check whether the steam pressure relief valve was operating properly, and such negligence was a proximate cause of the boiler's explosion, repairman could be liable for the resulting damage to the store and its contents).

In this case, Taco Time alleges that Subcontractor negligently performed services in connecting the neon signs and transformers to electrical power and that such negligence caused a fire that damaged the restaurant and its contents. Such claim is not barred by the economic loss rule.

**IV. CONCLUSION**

We vacate the judgment and the order denying Taco Time's motion to file an amended complaint, and we remand this case for further proceedings that are consistent with this opinion.

JUSTICEs BURDICK, W. JONES, HORTON AND JUSTICE PROTEM KIDWELL CONCUR.

NOTES

(1) Defining economic loss: What is economic loss? In one sense, of course, everything is economic loss since tort law provides compensatory damages, i.e., dollars, for all losses. The court in Brian and Christie, however, explicitly rejects this, noting that "[e]conomic loss is not simply damages that can be measured monetarily." Traditionally, damages are divided broadly into personal injuries, i.e., physical and emotional injuries to the person, property damage, and economic loss. Although the distinction between personal injury and other losses is clear- both factually and ethically - the line between property damage and economic loss is more problematic because the two types of loss may overlap - sometimes substantially.

The most significant area of overlap involves injury to a product. For example, if a delivery truck is destroyed in a single-vehicle accident caused by the failure of its own brakes, is the damage "property damage" or" economic loss" in a suit against the product seller? In other words: does the existence of a contract between the parties affect the characterization of the type of loss? If the delivery truck had been a car would the claim be for property damage? That is: does the fact that the property is held to produce income rather than for personal use, affect the characterization of the type of loss? What is the justification if such external factors affect the characterization of the type of loss?

(2) "pure" economic loss: The court in *Brian and Christie* is also careful to note that economic loss, e.g., lost wages or profits, can be recovered in torts if the claimant also suffers physical harm, i.e., personal injury or property damage. The court quotes *Duffin* for the proposition that "[E]conomic loss is recoverable in tort as a loss parasitic to an injury to person or property."

(3) Duty: The court notes repeatedly that it is deciding a duty question. The court returns to *Clark*, noting that, although negligence imposes a duty of due care not to harm person or property, it does not impose a duty to ensure that the purchaser of a product can makes a profit by using the product. The court also quotes Just's for the same proposition. [if 23]

(4) "transactional property"': In *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft*, Co., the court offered the following definition:

> Although personal injuries stand distinctly apart from the [property damage, and economic loss], a delineation between the latter two is necessary. Property damage encompasses damage to property other than that which is the subject of the transaction. Economic loss includes costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use.

*Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co*., 97 Idaho 348, 544 P.2d 306 (1975). The court in Salmon Rivers thus drew the line between property damage and economic loss based on the identity of the property: if the property that is damaged is the subject of the transaction -the delivery truck that crashes due to brake failure- the loss is "economic." See also *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987) (a rental unit with substantial structural problems); *State v. Mitchell Construction Co*., 108 Idaho 335, 699 P.2d 1349(1984) (a roof coating that failed to perform); *Clark v. International Harvester Co*., 99 Idaho 326, 581 P.2d 784 (1978) (an underpowered tractor).

Although the court enunciated a bright-line rule, its subsequent decisions have dimmed the distinction. ln G*& M Farms v. Funk Irrigation Co*.-plaintiff purchased an irrigation system that failed to deliver the necessary volume of water; plaintiff suffered reduced crop yields. The damage, thus, was to non-transactional property - the growing crops - rather than to the transactional property- the irrigation system. Nonetheless, the court asserted that this was an economic loss and refused to allow a negligence claim. *G & M Fanns v. Funk Irrigation Co*., 119 Idaho 514, 808 P.2d 851 (1991). See also *Myers v.A.O. Smith Harvestore Products*, 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988) (review denied) (milk production at a dairy farm was reduced by problems with a feed storage and delivery system); *Oppenheimer Industries, Inc. v. Johnson Cattle Co*., 112 Idaho 423, 732 P.2d 661 (1987) (loss of property was property damage rather than economic loss).

But, as the court noted in Brian and Christie, transactional property is not the only type of economic loss. In *Just's, Inc. v. Arrington Construction Co.*, the court focused not on distinguishing between property damage and economic loss, but on the fact that plaintiffs claim was for "lost profits .... allegedly suffered as a result of the defendant's negligent diversion of prospective customers of the plaintiff." *Just's, Inc. v. Arrington Construction Co*., 99 Idaho 462, 583 P.2d 997 (1978).

(5) A matrix?: The court discusses three main cases, *Clark v. International Harvester Co., Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft*, *Co*., and *Just's, Inc. v. Arrington Construction Co*. Note how the court characterizes each of the cases. Do the court's characterizations of the cases create a matrix? The court's opinion discusses the cases in this order:

(a) *Clark*: the court's discussion of *Clark* focuses on the distinction between a risk of physical harm, i.e., risk of "injury to person or property" and a risk of nonphysical injury in this case "economic expectations." [8] The risk physical harm, the court states, is protected by a tort duty; the risk to economic expectations, one the other hand, is governed by contracts and the seller must warrant the product (caveat emptor).

(b) Salmon Rivers: the court described Salmon Rivers as providing a line between between property damage and economic loss. Physical harm to property, the court stated, was economic loss rather than property damage when the damaged property was "the subject of the transaction" between the parties. Thus, damage to non-transactional property was "property damage"; damage to transactional property was "economic loss." Does *Clark* fall into either category?

(c) Just's: the court discusses Just's as an economic loss case that did not involve transactional property. The court noted that the plaintiff had not alleged that any physical property was damaged. Instead, the court defined Just’s loss as deprivation of "prospective economic advantage." Is *Clark* an example of the loss of prospective economic advantage?

(6) Dale D. Goble, “ALL ALONG THE WATCHTOWER: ECONOMIC LOSS IN TORT (THE IDAHO CASE LAW),” 34 Idaho L. Rev. 225 (1998).

## A. Rationales for the Economic Loss Rule: A Lifeline[9]

### CLARK v. INTERNATIONAL HARVESTER CO.

Idaho Supreme Court
99 Idaho 326, 581 P.2d 784 (1978)

BAKES, J.: This is a products liability case in which the plaintiffs seek to recover consequential damages for economic losses resulting from an allegedly defective tractor manufactured by defendant International Harvester Company and sold to the plaintiffs by defendant McVey's, Inc., an International Harvester Co. dealer. The plaintiffs alleged a breach of implied and express warranties and negligent design and manufacture of the tractor....

Plaintiff Raymond W. Clark is a custom farmer in the Twin Falls, Idaho .... Custom farmers contract to plow or preplant (a fertilizer application) farmland and are generally compensated according to the number of acres plowed or pre-planted. They generally work intensive 10 to 15-hour work days but work only during the spring and fall. [In early January 1972, Clark purchased an International Harvester turbodiesel tractor from McVey's. The transmission of this tractor was equipped with a "torque amplifier" (TA). When the tractor is driven in the TA mode, the tractor is designed to develop more torque, or pulling power, at a sacrifice of speed. Clark began using the tractor in his custom farming business in March 1972.Between April 1972, and May 1973, Clark experienced several breakdowns because of bent or broken push rods in the engine. After each breakdown, McVey's repaired the tractor free of charge under the warranty. Because of these breakdowns Clark alleged he lost 11-1/2 days of work. In early fall of 1973, Clark noticed a loss of power in the tractor while pre-planting afield covered with potato vines, weeds and other debris. Pre-planting was impossible under these conditions. Clark believed this problem was caused by the inability of the tractor to pull the applicator with sufficient speed to vibrate the shanks of the applicator and thereby cause the debris to feed back through the shanks. McVey's tested the tractor and determined that there was no significant loss of horsepower at the PTO shaft. Nonetheless, Clark concluded that the tractor was notable to plow a sufficient number of acres per hour for it to be economically practical to operate the tractor that season. Clark investigated the possibility of renting a substitute tractor for the 1973fall season but determined that it would be too expensive. Because field conditions were better in the spring of 1974, Clark was able to operate the tractor on a limited basis for 14days, but at a slower speed than he had operated the tractor previously. At the trial Clark testified that he was only able to cover eight acres per hour when he felt he should have been able to cover twelve acres per hour.

[In December of 1973, Clark, through his attorney, had contacted Dr. Rudolf Limpert, an associate research professor of mechanical engineering at the University of Utah. Over the next six months, Limpert conducted several tests on the tractor and concluded that something was slipping in transmitting the power from the engine to the draw bar in the TA mode. Under Limpert's supervision, theTA unit was disassembled at a tractor repair shop in Twin Falls, Idaho. Upon disassembly, Dr. Limpert noted eccentric wear in a clutch shaft and had the TA unit replaced. Limpert tested the tractor after repair and determined that it was performing satisfactorily.

[Clark sued McVey's and International Harvester in October 1974, alleging negligent design and manufacture and breach of implied and express warranties. The defendants' motions for summary judgment were granted on the warranty claims and denied on the negligence claim.]

[9] See GRANT GILMORE, THE DEATH OF CONTRACT (1974).

## II. APPEAL OF DEFENDANT INTERNATIONAL HARVESIER

The defendant on appeal has made numerous assignments of error. They can be summarized as follows: ...4. The trial court erred in awarding consequential damages for purely economic loss in a tort action....

We first consider assignment of error No.4, which concerns the recovery of damages for economic loss in a negligence action, because, in our view, that is dispositive of the negligence issue. The specific question presented by this assignment of error is best demonstrated by distinguishing this case from those of our earlier and somewhat related cases. This case is not like *Shields v. Morton Chemical Co*., 95 Idaho 674, 518 P.2d 859 (1974), in which the plaintiff sought damages for economic loss as a result of seeds which were damaged by the defendant's chemicals. In the instant case the plaintiffs have not alleged that their economic losses were the ˙ result of any property damage caused by the defendants. This case is not like *Rindlisbaker v. Wilson*, 96 Idaho 752,519 P.2d 421 (1974), in which the plaintiff sought damages for profits lost as a result of a personal injury. In the instant case the plaintiffs have not alleged any personal injury. The negligence issue in this case is not like *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co*., 97 Idaho 348, 544 P.2d 306 (1975), in which the plaintiffs sought damages for economic loss for breach of an implied warranty. In that case we did not rule whether such damages were recoverable in a negligence action but held that a plaintiff who was not in privity of contract with the defendant could not recover economic losses based on a breach of an implied warranty. In this case it is conceded that there is privity.

In this action the plaintiffs seek recovery only of lost profits due to alleged "down time" and the costs of repairing and replacing allegedly defective parts. The instant case presents the very narrow question whether the purchaser of a defective product who has not sustained any property damage or personal injury, but only suffered economic losses, can recover those losses in a negligence action against the manufacturer.

This Court has not previously considered this issue. The majority of jurisdictions which have considered the issue have not permitted the recovery of purely economic loss in a products liability action sounding intort. [] However, a small minority of jurisdictions allow the recovery of purely economic losses in strict liability actions. []

One of the most fully articulated discussions of the considerations underlying this rule is found in Justice Traynor's majority opinion in *Seely v. White Motor Co*., 403 P.2d 145, 151 (Cal. 1965), which we cited approvingly in *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co*., 97 Idaho 348, 544 P.2d 306 (1975). In Seely the plaintiff sought to recover lost profits and a refund of the purchase price of a defective truck. The California Supreme Court ruled that such damages, although recoverable in a breach of warranty action, were not recoverable in strict liability in tort. The following passage from the majority opinion is pertinent to this case:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone. []

We believe the rule advanced by the majority of the jurisdictions and by the *Restatement* is sound for the reasons articulated by Justice Traynor in Seely. Since the tum of the century the law of tort has undergone unprecedented change as courts have endeavored to adapt it so as to satisfy the demands of

the commercial, marketing and manufacturing practices of this era. However, we recognize that the courts have not been alone in working to develop laws appropriate to the field of products liability. The legislature has enacted the Uniform Commercial Code. I.C. §§ 28-1-101 through -10-104. Chapter2 of that act, I.C. §§ 28-2-101 through -2-725, contains a comprehensive and finely tuned statutory mechanism for dealing with the rights of parties to a sales transaction with respect to economic losses. In the continuing development of the tort law of this state, it is important that we be cognizant of the legislature's actions in this area ....

The Idaho legislature, and indeed the legislatures of nearly every state in the Union, have adopted the UCC which carefully and painstakingly sets forth the rights between parties in a sales transaction with regard to economic loss. This Court, in the common law evolution of the tort law of this state, must recognize the legislature's action in this area of commercial law and should accommodate when possible the evolution of tort law with the principles laid down in the UCC.

The economic expectations of parties have not traditionally been protected by the law concerning unintentional torts. *Just's, Inc. v. Arrington Constr. Co*., 99 Idaho 462, 583 P.2d 997 (1978). We do not believe that any good purpose would be achieved by undermining the operation of the UCC provisions by extending tort law to embrace purely economic losses in product liability cases. Moreover, the UCC provisions provide the Court with ample room for the exercise of wide judicial discretion to ensure that substantial justice results in particular cases. See, e. g., §§ 2-302 and 2-719(3) (concerning unconscionable clauses and contracts), and §1-203 (imposing a general obligation of good faith).

.... Rather than obscure fundamental tort concepts with contract notions of privity, we believe it is analytically more useful to focus on the precise duty of care that the law of negligence, not the law of contract or an agreement by the parties, has imposed on the defendant International Harvester. The law of negligence requires the defendant to exercise due care to build a tractor that does not harm person or property. If the defendant fails to exercise such due care, it is of course liable for the resulting injury to person or property as well as other losses which naturally follow from that injury. However, the law of negligence does not impose on International Harvester a duty to build a tractor that plows fast enough and breaks down infrequently enough for Clark to make a profit in his custom farming business. This is not to say that such a duty could not arise by a warranty- express or implied- by agreement of the parties or by representations of the defendant, but the law of negligence imposes no such duty. Accordingly, the trial court erred in granting a judgment to the plaintiffs on their negligence count.

NOTES

(1) Why was there no duty in tort? What rationale does the court offer to support its conclusion that "pure" economic loss is not an interest protected in negligence?

(2) How does the rationale in Just's differ from that in Clark? Consider which of the rationales apply to the cases in the following typology of economic loss cases.

(3) Torts and contracts as risk allocation mechanisms: Both negligence (torts, generally) and contracts can be viewed as risk allocation mechanisms. Consider the Brian and Christie court's excerpt from *Clark v. International Harvester*.

> The law of negligence requires the defendant to exercise due care to build a tractor that does not harm person or property. If the defendant fails to exercise such due care, it is of course liable for the resulting injury to person or property as well as other losses which naturally follow from that injury. However, the law of negligence does not impose on International Harvester a duty to build a tractor that plows fast enough and breaks down infrequently enough for Clark to make a profit in his custom farming business. This is not to say that such a duty could not arise by a warranty express or implied by agreement of the parties or by representations of the defendant, but the law of negligence imposes no such duty.

*Clark v. International Harvester Co.,* 99 Idaho 326, 581 P.2d 784 (1978). To what type of risk does each apply? That is, who bears the risk of injuries to person or property? To economic expectations? Who makes the decision on how these risks are to be allocated between the parties? Can these risk allocations be reallocated by the parties?

Do these risk allocation differences shed light on the rationale for the economic loss rule?

### B. Rationales for the Economic Loss Rule: The Problem of Limits

#### JUSTS, INC. v. ARRINGTON CONSTRUCTION CO.

Supreme Court of Idaho
99 Idaho 462, 583 P.2d 997 (1978)

BAKES, J. -In 1972defendant respondent Arrington Construction Company and the City of Idaho Falls entered into a contract for the renovation of a five and one-half block portion of the downtown Idaho Falls business area in accordance with Project No.4B-42, of Local Improvement District (LID) No.42. The work to be done included the removal and replacement of all streets and sidewalks; the location, removal and replacement of all sewer and water lines; the removal and replacement of electrical services; the removal and replacement of light and traffic control systems; and the addition of trees, shrubs, and other beautification devices. The contract required the defendant to take certain precautions to limit the disruption to the businesses within the area to be renovated. The plaintiff appellant Just's, Inc., operated a retail business in leased premises located within the renovation area.

The plaintiff brought this action alleging in Count I of its complaint that it was a third-party beneficiary of the contract and that its business had been damaged by the defendant's failure to complete the project in a timely manner and to provide continuous access to plaintiff’s business as required by the terms of the contract. The second count of the complaint alleged similar damage because of the defendant's negligent performance of the contract. The district court initially denied the defendants motion to dismiss Count I, ruling that the plaintiff was a third-party beneficiary of the contract. However, when the district court later learned that the plaintiff was a lessee and not an owner of property within the LID, it dismissed Count I. After denying defendant Arrington's motion for summary judgment on Count II, the negligence issue was tried to a jury, which returned a verdict in favor of the defendant. On appeal, plaintiff assigns as error the dismissal of Count I of its complaint, and as to the trial of Count II, the refusal to admit certain items into evidence and the giving of certain jury instructions.

[Parts 1-111 of the opinion consider Plaintiff's contract claim. The court held:] We conclude therefore that this plaintiff is a member of the class of third persons intended to be benefitted by this contract and is entitled to sue for its breach.

**IV**

The plaintiff also seeks a new trial of Count II, its negligence theory of recovery, because of certain errors which it alleges occurred at the trial. However, we do not reach the merits of these assignments of error because we conclude that Court II fails to state a claim for relief, as the defendant asserted unsuccessfully in the district court. Court II of the complaint alleges in pertinent part:

> That defendant has carelessly and negligently and with total disregard for the property of plaintiff, failed to provide continuous access to and from plaintiff's place of business, failed to as rapidly as possible complete said project with as minimal disruption of plaintiff's business as possible, failed to limit the under-construction status of the block in which plaintiff's business is located to no more than thirty (30) continuous calendar days and failed to complete all portions of said Local Improvement District project on or before October 15, 1972.

The plaintiff claims that the defendant's negligent performance and breach of its contractual duties interfered with the flow of customers into the plaintiff's store, thereby decreasing its sales and net profits. In essence, the plaintiff claims that because of the defendant's negligence it lost business and its profits suffered as a result.

At the outset we emphasize that negligent conduct and breach of contract are two distinct theories of recovery. Ordinarily, breach of contract is not a tort, although a contract may create the circumstances for the commission of a tort. *Taylor v. Herbold*, 94 Idaho 133, 483 P.2d 664 (1971). See also *McAlvain v. General Insurance Co*., 97 Idaho 777,554 P.2d 955 (1976). A tort requires the wrongful invasion of an interest protected by the law, not merely an invasion of an interest created by the agreement of the parties. *Taylor v. Herbold*, supra.... Accordingly, the threshold question we must consider is whether the alleged negligent conduct of the defendant invaded an interest of the plaintiff to which the law of negligence extends its protection. We are concerned here with the duties imposed by the law upon the defendant with respect to the plaintiff's business, not with the duties imposed by the construction contract. The damages claimed by the plaintiff, lost profits, are purely economic losses allegedly suffered as a result of the defendant's negligent diversion of prospective customers of the plaintiff.

As a general rule, no cause of action lies against a defendant whose negligence prevents the plaintiff from obtaining a prospective economic advantage. *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974); []. In *Clark v. International Harvester Co*[10]., 99 Idaho 581 P.2d 784 (1978), a companion to this case, we applied this general rule to deny the recovery of economic losses sustained by a plaintiff who claimed a tractor he purchased was negligently manufactured. Dean Prosser has summarized the rule which we adopted in Clark, stating:

> Certain types of interests, because of the various difficulties which they present, have been afforded relatively little protection at the hands of the law against negligent invasions. Thus, interests of a pecuniary nature, such as the right to have a contract performed, the expectation of financial advantage, or the integrity of the pocketbook which may be damaged by reliance upon a representation, all present special problems. *** In general, however, it may be said that the law gives protection against negligent acts to the interest in security of the person, and all interests in tangible property. In other words, negligence may result in liability for personal injury or property damage.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS §54 (4th ed. (1971). With specific reference to interference with a prospective economic advantage, Prosser states:

> The cause of action has run parallel to that for interference with existing contracts. Again, the tort began with "malice," and it has remained very largely a matter of at least intent to interfere. Cases have been quite infrequent in which even the claim has been advanced that the defendant through his negligence has prevented the plaintiff from obtaining a prospective pecuniary advantage; and the usual statement is that there can be no cause of action in such a case. There are, however, a few situations in which recovery has been permitted, all of them apparently to be justified upon the basis of some special relation between the parties. In all probability, as in the case of interference with existing contracts, liability for negligence is not impossible, but it must depend upon the existence of some special reason for finding a duty of care. No case has been found in which intended but purely incidental interference resulting from the pursuit of the defendant's own ends by proper means has been held to be actionable.

As applied by the courts, however, the rule has been expressed in different ways and its result explained on various grounds. For example, some courts have simply ruled that the defendant owes no

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[10] This case in which the plaintiff seeks recovery for purely economic losses without alleging any attending personal injury or property damage must be distinguished from cases involving the recovery of economic losses which are parasitic to an injury to person or property. It is well established that in the latter case economic losses are recoverable in a negligence action. [] See, e.g., *Rindlisbaker v. Wilson*, 95 Idaho 752, 519 P.2d 421 (1974) (loss of profits resulting from personal injury); *Shields v. Morton Chemical Co*., 95 Idaho 674, 518 P.2d 857 (1974) (loss of profits resulting from damaged seed beans).

duty to plaintiffs seeking compensation for such purely economic losses. *See e.g*., *Mandal v. Hoffman Const. Co.*, 270 Or. 248, 527 P.2d 387 (1974) (contractor for a city denied recovery of economic losses resulting from another contractor's negligent performance of its contract with the city). Other courts have reached the same result by applying the doctrine of proximate cause. See, e.g., *Rickards v. Sun Oil Co*., 23 N.J. Misc. 89, 41 A.2d 267 (1945) (denying merchant on island recovery for lost profits caused by negligent destruction of only bridge connecting mainland with island). Still other courts have found such economic losses to be too remote to permit recovery. See, e.g*. Byrd v. English*, 117 Ga. 191,43 S.E. 419 (1903) (denying recovery by printer who lost profits because contractor had negligently broken power line supplying electricity to his presses). Courts have also denied recovery of purely economic losses on the ground that they were too speculative. See, e.g., *Cain v. Vollmer*, 19 Idaho 163, 112P.686(1910) (plaintiff denied recovery of profits lost because of lost use of negligently injured jockey); *Dunlop Tire & Rubber Corp. v. FMC Corp*., 53 A.D.2d 150, 385 N.Y.S.2d 971 (1976) (recovery of lost profits resulting from plant shutdown caused by explosion in neighboring chemical plant denied). This general rule has also been applied in product liability cases to deny recovery of purely economic losses in negligence and strict liability in tort actions. []

Though the rule as been expressed indifferent ways, the common underlying pragmatic consideration is that a contrary rule, which would allow compensation˙ for losses of economic advantage caused by the defendant's negligence, would impose too heavy and unpredictable a burden on the defendant's conduct. The United States Court of Appeals in *Union Oil Co. v. Oppen*, supra, referring to the rule, stated:

> [The general rule] has strength. It rests upon the proposition that a contrary rule, which would allow compensation for all losses of economic advantages caused by defendant's negligence, would be subject the defendant to claims based upon remote and speculative injuries which he could not foresee in any practical sense of the term.

This plaintiff is surely not the only person who may have suffered some pecuniary losses as a result of the downtown renovation project. For example, others who may have suffered pecuniary losses could conceivably include not only all the other businesses in the area, but also their suppliers, creditors, and so forth, ad infinitum. In contrast to the recognized liability for personal injuries and property damage, with its inherent limitations of size, parties and time, liability for all the economic repercussions of a negligent act would be virtually open-ended. *Stevenson v. East Ohio Gas Co*., 73 N.E.2d 200 (Ohio App. 1946). If the defendant's liability were extended to all those who suffered any pecuniary Joss, its liability could become grossly disproportionate to its fault. Such potential liability would unduly burden any construction in a business area.

However, there are exceptions to this rule against the recovery of purely economic losses, and the rule need not be applied mechanically. But such exceptions generally involve a special relationship between the parties, []; cf. *MeAlvain v. General Ins. Co*., supra (insurance agent), or unique circumstances requiring a different allocation of risk. See, e.g., *Union Oil Co. v. Oppen*, supra (commercial fishing grounds damaged by negligent oil spill). However, neither situation is present in this case. We conclude, therefore, that the better result in this case is reached by applying the general rule which limits the recovery of economic losses in negligence actions to those situations involving personal injury or property damage. Since Count II of plaintiff’s complaint sought recovery for economic loss only, it should have been dismissed. []

The order dismissing Count I of the plaintiff’s complaint is reversed, and the case is remanded for trial on the merits of Count I. The judgment entered in favor of the defendant on Count II of the plaintiff’s complaint is affirmed.

BISTLINE, J., concurs.

McFADDEN, J., concurs in Parts I, Ill and IV.

SHEPARD, C.J., AND DONALDSON, J., concur in Part IV, but dissent from Parts I, II and Ill.

NOTES

(1) Why was there no duty in tort? What rationale does the court offer to support its conclusion that "pure" economic loss is not an interest protected in negligence?

(2) Special relationships: What exceptions to the general rule against recovering economic loss in tort actions does the court acknowledge? What is a "special relationship"? The "special relationship" rubric will appear again. It is generally used to limit liability.

(3) "Unique circumstances": The other exception noted by the court is where "unique circumstances requir[e] a different allocation of risk." What does this suggest? The only discussion of the exception is in *Blahd v. Richard B. Smith, Inc*.:

> Although this Court has recognized the existence of the unique circumstances exception to the economic loss rule, it has never applied the exception. *Just's Inc. v. Arrington Constr. Co*., []. In Just's Inc., the lessee of a business in a local improvement district brought an action against a contractor engaged in renovating the district, for negligent diversion of the lessee's prospective customers. After explaining the economic loss rule, this Court stated the unique circumstances exception involves "unique circumstances requiring a different allocation of risk." Just's Inc., []. This Court then stated the exception did not apply. *Id*. The exception was also mentioned in *Duffin*:
>
> > Economic loss might also be recovered in tort where the occurrence of a unique circumstance requires a different allocation of the risk. [Citations omitted]. However, the certification of seed potatoes is not a "unique circumstance" requiring a re-allocation of the risk, and the Duffins do not so contend. Therefore, this exception is ... not implicated.
>
> *Duffin*, [] The purchase of a residential house is an everyday occurrence and does not create the type of unique circumstances required to justify a different allocation of risk, particularly where it appears there may be other defendants available to respond in contract damages.

*Blahd v. Richard B. Smith, Inc*., 141 Idaho 296, 108 P.3d 996 (2005).

### C. Contracts for the Sale of Goods: One Cell in the Matrix

NOTES

**(1)** ***Taylor v. Herbold*****:** Plaintiff was a potato grower/seller who brought a breach of contract action against a purchaser of some of his potatoes. Defendant had contracted to purchase 7000 cwt. of potatoes out of an undifferentiated pile of some 10.300cwt. Defendant never took delivery of any potatoes covered by the contract. In addition to alleging a breach of contract, he also claimed "tortious damages arising from said breach of contract." Plaintiff argued that, because defendant never took delivery of his portion of the potatoes, no other buyer was willing to buy the remainder since there was a risk that the new buyer was purchasing a lawsuit.

Plaintiff instituted this action for the value of the 7,000 cwt. potatoes covered by the contract (the breach of contract action) and for the value of the 3,300 cwt. potatoes remaining unsold and not covered by the contract (the tortious damages claim). The plaintiff appeals the trial court's grant of defendants' motion for judgment notwithstanding the verdict on the second count. The supreme court affirmed:

> The law governing the ability to obtain remedies for breach of contract, as well as tortious behavior, is confusing, with few, if any, court decisions on the subject. Ordinarily, a breach of contract is not a tort. A contract may, however, create a state of things which furnishes the occasion for a tort. [] If the relation of the plaintiff and the defendants is such that a duty to take due care arises therefrom irrespective of contract and the defendant is negligent, then the action is one of tort. To find an action in tort, there must be a breach of duty apart from the nonperformance of a contract. [] ....

> The United States Supreme Court in the case of *Atlantic & P. Rwy. v. Laird*, 164 U.S. 393 (1896), quoting *Kelley v. Rwy. Co*., 1Q.B. 944 (1895), stated:
>
> > The distinction is this: If the cause of complaint be for an act of omission or nonfeasance, which, without proof of a contract to do what has been left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists), then the action is founded upon contract, and not upon tort. [If, on the other hand, the relation of the plaintiff to the defendants be such that a duty arises from that relationship irrespective of contract, to take due care, and the defendants are negligent, then the action is one in tort.]
> >
> > An exception to the rules above stated appears to be those situations in which misfeasance rather than nonfeasance was the issue. The authorities cited by plaintiff fall into such category and therefore are not applicable to the case at bar. While there are certain other exceptions, primarily involving cases in which one of the parties was engaged in a public calling or public transportation, those exceptions are not applicable to the facts in the case at bar.
>
> *Taylor v. Herbold*, 94 Idaho 133,483 P.2d 664 (1971).

Which of the rationales offered by Just's and Clark is applicable to Taylor?

What exceptions to the no liability rule does the court cite?

**(2)** Other sale-of-goods cases include:

**(a)** ***Tusch Enters. v. Coffin*****:** negligence claim for shoddily constructed rental housing units did not state a cause of action because plaintiff suffered only economic loss. *Tusch Enters. v. Coffin*, 113 Idaho 37,40-41, 740 P.2d 1022, 1025-26 (1987).

**(b)** ***Adkison Corp. v. American Bldg. Co***.: plaintiff cannot rely upon negligence in seeking to recover for the construction of a prefabricated building when the negligence caused neither personal injury nor property damage. *Adkison Corp. v. American Bldg. Co*., 107 Idaho 406, 411, 690 P.2d 341,346 (1984).

**(c)** ***G & M Faims v. Funk Irrigation Co.*****:** an irrigation system that failed to provide sufficient water volume because of an allegedly negligent design was not actionable intort. *G & M Fanns v. Funk Irrigation Co*., 119 Idaho 514, 527, 808 P.2d 851, 864 (1991).

**(d)** ***State v. Mitchell Construction Co*****.:** the cost of repairing or replacing an allegedly defective roof on a new building could not be recovered in negligence or strict liability. *State v. Mitchell Construction Co*., 108 Idaho 335, 336, 699 P.2d 1349, 1350 (1984).

(3) The court has reached the same no-duty conclusion when the purchaser of goods sues a remote manufacturer alleging pure economic loss. Given the complexity of the distribution chain for most products, this is a common category of cases. Purchasers are unlikely to be in privity of contract with the actual manufacturer or assembler of a product.

For example, Ronald Corrado contracted with Adkison Corporation (a building contractor) to construct a building to house his aircraft mechanic business. Adkison in tum contracted with Rural Systems, Inc. (RSI), the dealer for American Building Company (ABC), to provide a cut-to-order metal building. ln placing the order with ABC, RSI made a mistake and the building was not what Corrado needed. Corrado and Adkison eventually sued ABC in both contract and tort for the economic losses they suffered.

Noting that "it is the view of this Court that the law of contracts should control actions for purely economic losses and not the law of torts," the court summarily affirmed a directed verdict for defendant on the negligence claim:

> Plaintiffs contend that ABC should be held liable for plaintiffs' economic losses based on ABC's negligence. We have previously denied recovery in negligence for purely economic losses from the manufacturer of a defective product. *Clark v. International Harvester Co*., [99 Idaho 326, 581 P.2d 784 (1978)]. The district court correctly ruled that a negligence claim for economic damages was not proper and, accordingly, we affirm the order of the district court in directing a verdict on this count.

*Adkison Corp. v. American Building Co*., 107 Idaho 406, 690 P.2d 341 (1984).

### ii. Exceptions to the Economic Loss Rule

A recurrent legal pattern is a general rule and its exceptions. The supreme court in Brian and Christie based its decision on the inapplicability of the "economic loss rule" because the property that was damaged was not "transactional property." The decision also discussed two cases- Clark and Just's- that provided rationales for barring recovery of pure economic losses in negligence and product liability cases. These cases in turn indicated that there are exceptions: most significantly, when there is a "special relationship" between the parties.

What is a "special relationship"? As you work through the following cases, construct a list of recurring factual elements of the relationship.

### A Contracts for the Sale of Services

NOTES

(1) Just as shoddy products can cause economic loss, so can poor service. Furthermore, service contracts present factual patterns that are superficially very similar to those in the sale of shoddy goods: plaintiff and defendant have a contract; defendant breaches the contract; plaintiff seeks to recover not (or not only) in contract but (also) in tort. Again, this is a situation in which the boundary between tort and contract is at issue: the relationship between the parties has its origin in contract and the losses suffered are exclusively economic.

Despite the seeming similarities, the differences between sales and service contracts are significant. Most fundamentally, the difference between the sale/purchase of a product and the sale/purchase of a service is the difference between the mass-produced and the personal. The purchaser of a product seldom obtains it directly from the manufacturer; the purchaser of a service, on the other hand, is quite likely to deal directly with the provider. While the personal element in service contracts is declining with the rise of the service economy- and a concomitant increasing scale of service providers that is approaching something akin to mass-production - nonetheless, service contracts remain more personal and idiosyncratic: even taking a mass-produced VCR into the franchised warranty service provider requires a level of personal interaction that the purchaser of a product seldom has with its manufacturer.

These differences - as imprecise as they are - appear to lie at the core of the court's differing treatment of sales and service contracts - a difference that the court has often stated as a conclusion that service contracts can form the basis for a relationship between the parties that is sufficiently "special" to give rise to a tort duty to act with care in providing the service.

## 1. Public Callings

### STRONG v. WESTERN UNION TELEGRAPH CO.

Supreme Court of Idaho
18 Idaho 389, 109 P. 910 (1910)

SULLIVAN, C.J. -This action was brought by the appellants, as plaintiffs, to recover damages in the sum of $581.17, alleged to have been sustained by reason of an error in the transmission of a telegraphic message delivered by appellants to respondents at the town of Soda Springs, Idaho, on or about March 6, 1907, to be transmitted to parties in Denver, Colo.

The principal issue made by the pleadings was whether the defendant was liable because of a mistake made in the transmission of said telegram. The action was tried by the court and a jury, and at the close of plaintiffs' evidence, counsel for defendant moved for a nonsuit, which motion was granted by the court and judgment of dismissal was entered. The appeal is from said order and the judgment.

The following facts, among others, appear from the record: [The message plaintiff sent to the buyer was written on a blank form provided by defendant. The form contained a lengthy disclaimer of liability for mistakes or delays in transmission of messages unless the sender paid an additional fee to have the message retransmitted from the receiving station. Plaintiff did not choose to have the message retransmitted for verification.

[The message was:

"Soda Springs, Idaho, March 6th, 1907.
"To Colorado Live Stock & Commission Co.,
Denver Stock Yards, Denver, Colorado.
"Will you honor draft of W.L. White on you in payment of 84 head of steers at three ninety-five per hundred two per cent shrink weighed here.
"STRONG & STARK"

The telegram as delivered to the Colorado Live Stock & Commission Company quoted a price of $3.25 per hundred weight. The Company replied by telegraph:

"Denver, Colorado, 3, 6, 1907. "To Strong & Stark, Soda Springs, Idaho.
"Will honor draft as per telegram if cattle are billed to us.
"COLORADO LIVESTOCK & COMMISSION C0."

Following this exchange, plaintiff shipped the steers to the company which paid for them at the rate of $3.25 per hundred-weight and refused to pay $3.95 per hundred.] Upon that state of facts, the question is presented whether the telegraph company is liable for the difference of seventy cents per hundred-weight.

The respondent does not deny that a mistake was made, but contends that it is not liable, for the reason that the telegraph blank contained a certain printed stipulation to the effect that the telegraph company should not be liable for a mistake or delay in transmission or delivery of the message....

There appears to be considerable conflict in the various decisions upon the question of the validity of the printed stipulation upon a telegram blank limiting the liability of the company for mistakes and delays in transmission of messages. In some of the decisions it is held that such stipulations are valid, and in others, that they are not valid and are contrary to public policy.

Counsel [for defendant] cites *Camp v. Western Union Tel. Co*., 1Met (Ky.) 164, where it was held that a person desiring to send a message is admonished by the notice printed across said message that to guard against a mistake in transmission it should be repeated. The court said: "He is also notified that if a mistake occurs, the company will not be responsible for it unless the message be repeated. There is nothing unreasonable in this condition."

Counsel also cites *Western Union Tel. Co. v. Carew*, 15Mich. 525. The court there holds that it would be extremely unjust, considering the small amount of compensation for sending a message, and would effectually put an end to this method of correspondence, to hold them liable for the entire correctness of all messages transmitted or to hold them responsible for all damages which may accrue from an error, especially when only a single transmission, without repeating, is relied upon or paid for; or to deny them all power to make rules and regulations to limit their liability even in the case of repeat messages, and the court says it would be equally unreasonable to require them to repeat a message when they are paid only for a single transmission. Some of the courts have based their decisions on the rule laid down in those cases.

The last two decisions were rendered, one in 1858 and the other in 1867, when telegraphy was in its infancy and in a very imperfect, uncertain condition, and messages could not be sent or received with the correctness and accuracy with which they are sent in the present day with the improved telegraphic machinery and appliances and greater expertness of operators. The court in the latter case refers to the small amount paid for the transmission of a message, and it was evidently in the mind of the court that telegraph companies were poor, struggling corporations; but experience and history now bears out the statement that telegraph companies have become immensely rich on the "small stipend" charged for sending messages, which would indicate that they are charging a great deal more than it actually costs to transmit such messages and to give them a fair return upon the capital invested in the business. The Michigan court, it seems, was mistaken when it suggested that to hold them liable "would effectually put an end to this method of correspondence," as it is shown that a number of states have held telegraph companies liable and it has not "effectually put an end to this method of correspondence," as it used a great deal more at the present time than it ever was before, regardless of the courts holding it liable for damages arising because of its negligence.

Telegraphy has been so perfected with its improved machinery, instruments, equipment and appliances that with competent and careful operators' telegrams may be sent with accuracy. That being true, telegraph companies should be held to a higher degree of care, fidelity and diligence than could reasonably have been required of them at the dates when the last above cited opinions were rendered, and they should be held to a higher degree of care in sending and delivering telegrams that involve the property rights of either the sender or receiver than perhaps they would be in social telegrams, or telegrams that do not involve property rights and others of particular interest to the sender or receiver. While under the decision of the United States Supreme Court above cited, a telegraph company is held not to be a common carrier, it is, however, a corporation doing business for the public, and must be held liable for damages arising from its own carelessness and negligence or the carelessness and negligence of its agents. While it may make rules and regulations in regard to the conduct of its business, the reasonableness or unreasonableness of such rules must be determined with reference to public policy, precisely as in the case of common carriers. Public policy is that principle of law under which freedom of contract or private dealing is restricted by law for the good of the community- the public good. [] A stipulation in a contract which exempts the corporation from damages for its own negligence is void when applied to a telegraph company as well as when applied to a common carrier.

Owing to the fact that many of the decisions which hold that the stipulation under consideration is valid and binding are based upon the decisions of *Camp v. Western Union Tel. Co*., decided in 1858, and *Western Union Tel. Co. v. Carew*, which was decided in 1867, and long before telegraphy had reached its present state of efficiency and accuracy, this court is not inclined to follow that line of decisions. Since telegraph companies are public agents, exercising a quasi-public employment, carefulness and fidelity are essentials to its character as a public servant, and public policy forbids that it should be released by its own rules or regulations from damages occasioned by its carelessness and negligence. It is chartered for public purposes: it has the power of eminent domain; the public are compelled to rely absolutely on

the care and diligence of the company in the transmission of messages, and by reason of those powers and the relation it sustains to the public, it is obligated to perform the duties it is chartered to perform with the care, skill and diligence that a prudent man would, under like circumstances, exercise in his own affairs, and if it fails to do so, it is liable in damages for such failure, and cannot restrict its liability by rule or regulation which attempts to excuse it for its own negligence. It is a public servant, and must serve the people impartially, carefully and in good faith. We do not hold that the company is an insurer against mistakes or delays arising from causes beyond its own control, but it is liable for damages arising from the use of defective instruments of want of skill or care on the part of operators. A stipulation exempting it from liability for its own negligence would be contrary to public policy.

.... Where a telegraph company fails to transmit a message correctly, the proof of that fact is prima facie evidence of the company's negligence; so proof by the plaintiff of the contract, which may be implied by the delivery of the message to be transmitted and its acceptance by the defendant's agent, and of the breach, makes out a prima facie case, and the plaintiff need not go further and show any further negligence or omission of the defendant. [] If the failure was not the result of negligence, the means of showing that fact is almost invariably within the exclusive possession of the company, and for the courts to require the sender to prove the negligence, after showing the mistake, would be in many cases to require an impossibility, not infrequently resulting in enabling the company to evade a just liability. []

We conclude that when the sender delivers a message to the agent of a telegraph company for transmission and it is received by him for transmission, it is clearly implied and understood that the message must be correctly sent, and upon proof that it was not correctly sent, a prima facie case is made. Then if the mistake was not occasioned by incompetent operators or defective instruments and was occasioned by the elements or some matter or thing over which the company had no control, it devolves upon the company to prove that as a matter of defense. Therefore, when the plaintiff proved that said message was delivered to the agents of the company for transmission and that they accepted it and made a mistake in its transmission, the plaintiff had made a prima facie case and the court erred in granting a nonsuit and entering a judgment of dismissal.

The judgment is reserved, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

STEWART &AILSHIE, JJ., concur.

NOTES

(1) What was the source of the duty? What was the scope of the duty? What interest was invaded by defendant's conduct?

(2) Why was plaintiff not left to his contractual rights? Plaintiff received precisely what he had contracted for: an unrepeated and, therefore, unguaranteed message. Is it fair to allow plaintiff to pay a lower charge for an unrepeated message and then - by suing in tort - to recover as though he had paid the higher fee for a repeated message?

(3) Public callings: If the breach of a contract is not generally a tort, what distinguishes *Strong* from *Taylor* or *Just's*? Note the court's language in Strong:

> telegraph companies are public agents, exercising a quasi-public employment, carefulness and fidelity are essentials to its character as a public servant, .... It is chartered for public purposes: it has the power of eminent domain; the public are compelled to rely absolutely on the care and diligence of the company in the transmission of messages, and by reason of those powers and the relation it sustains to the public, it is obligated to perform the duties it is chartered to perform with the care, skill and diligence [of] a prudent man.

One of the earliest sources of duty extending beyond contract involved the so-called "public callings." At the common law, common carriers, innkeepers, and the like had tort duties of due care imposed on them beyond any duties they may have assumed in contract. The "public calling" category - businesses in which there is a "duty of public service" - is not completely closed. An historical examination concluded:

> The duty to serve was the first distinguishing characteristic of the class of businesses known today as "public callings." The classification was made, not upon some inherent characteristic of the business itself, but upon a factor outside the business which varied as times changed .... This factor was economic conditions, which determined those upon whom the duty to serve was placed, or in other words, the importance of the business to the public.

Norman Arterburn, The Origin and First Test of Public Callings, 75 U. PA. L. REV. 411 (1927).

Public callings include several categories of businesses that hold themselves out to the public- such as the common carriers (*Clark v. Taff*) and innkeepers (*McGill v. Frasure*). Are there others?

**(4)** ***Lee v. Sun Valley****:* Plaintiff was thrown from a rented horse when his saddle slipped, and the horse reared. The primary issue was the effect of an exculpatory clause releasing defendant from liability to a guest for the outfitter's negligence. In determining whether the clause should be given effect, the court noted

> The general rule that "express agreements exempting one of the parties for negligence are to be sustained" is subject to exceptions where: "(1) one party is at an obvious disadvantage in bargaining power; (2) a public duty is involved (public utility companies, common carriers)." *Rawlings v. Layne & Bowler Pump Co*. Plaintiff concedes that he had no disadvantage in bargaining power but argues that the second exception applies on the theory that the statutes regulating outfitters and guides impose a public duty upon Sun Valley. Utilities and carriers were named in the Rawlings case as obvious examples of parties owing a public duty, but there may be others who also owe a public duty in Idaho. The idea of a public duty is closely related to the idea of public policy and it is within the domain of the legislature, elected by the public, to determine such duties and policies.
>
> Conceding that outfitters are subject to state licensing requirements, the court concluded that licensing in itself was insufficient to create a public duty:
>
> > We do not attempt to articulate a general rule applicable to all statutes. However, we do hold that where the legislature has addressed the rights and duties pertaining to personal injuries arising out of the relationship between two groups, i.e., employers/employees, outfitters and guides/participants, and has granted limited liability to one group in exchange for adherence to specific duties, then such duties become a "public duty" within the exception to the general rule validating exculpatory contracts. Therefore, while the agreement between Sun Valley and plaintiff does absolve Sun Valley from common law liabilities, it does not absolve Sun Valley from liability for possible violation of the public duty imposed by I.C. § 6-1204.

*Lee v. Sun Valley Co*., 107 Idaho 976, 695 P.2d 361 (1984)

**(5)** ***Lane v. Oregon Short Line R.R***.: Plaintiff shipped lambs with defendant railroad. The contract provided that plaintiff would, "at his own risk and expense, load, unload, care for, feed and water the stock until delivery." En route to their destination, the lambs were unloaded for feeding into pens defendant provided. Plaintiff left the lambs unattended over night in the pens. The following morning 38 lambs were missing. Noting that "the gates were found closed and in the same condition in which they had been left the night before," the court began its analysis with the statement that

> [i]t is the duty of a carrier transporting livestock to furnish reasonable and proper facilities and opportunities for feeding, watering and resting them. []

> It is claimed that the failure to provide the gates with patented locks was negligence. No inference of negligence can be drawn from such failure, unless there was a showing of such circumstances that a prudent person would have provided locks, as, for example, that others in the community locked their pens and corrals in which livestock was kept at night, or that sheep or other livestock had escaped from the pens previously, or that it was customary for railroad stockyards to be provided with lock. []

The court therefore reversed a jury verdict for plaintiff, noting that "the carrier is not an insurer, and its duty is performed when it furnishes suitable yards in proper condition and reasonably secure." *Lane v. Oregon Short Une R.R*., 34 Idaho 37, 198 P.671 (1921).

### 2. Professional Service Providers

### McALVAIN v. GENERAL INSURANCE CO.

Supreme Court of Idaho
97 Idaho 777,554 P.2d 955 (1976)

BAKES, J.-Adams County Abstract Company, a corporation, appeals from a judgment on a jury verdict finding it liable for its negligent failure to issue sufficient insurance to plaintiff Douglas McAlvain on the inventory at his retail store, the Council Electric Furniture and Appliance Store. It contends that it owed no duty to McAlvain which would subject it to liability in tort for its negligence. We affirm the judgment of the trial court.

In the summer of 1969, McAlvain purchased Council Electric as an ongoing business, entering into a real estate contract with the seller which required that the property involved be adequately insured. The purchase price was contingent on the results of a final inventory of the business which was to be taken in July 1969; the inventory when completed disclosed that at the time of the sale the store contained $45,000.00 in inventory.

The Adams County Abstract Company acted as real estate agent in this transaction, through its president and principal real estate officer, Ferd Muller. Adams County Abstract Company is a small, closely-held corporation of which Muller is controlling shareholder, dealing in real estate and insurance business in the Council area. It is the local agent for General Insurance Company of America (SAFECO), which held the existing contract for insurance on the inventory at Council Electric at the time of sale. Thus, Adams County Abstract handled both the real estate transfer and the transfer of insurance to the plaintiff McAlvain in 1969. The existing policy had a $30,000.00 coverage on inventory. Shortly after taking over the business, McAlvain metwith the principal insurance agent for Adams County Abstract, Rosemary Kilborn, to negotiate a package insurance plan for Council Electric. He requested sufficient insurance to fully cover the business, including the inventory. Although the results of the final inventory had been delivered to Adams County Abstract so that Muller could complete the paper work on the real estate transfer, thus giving Adams County Abstract the information that the inventory at Council Electric was valued at $45,000.00 at that time, the three-year insurance policy written by Kilborn covered inventory only to the extent of $30,000.00.

In November 1970, during the second year of the policy, McAlvain was in the Adams County Abstract office on an unrelated matter when he first became aware that his inventory was underinsured. He testified that he told Muller that the present level was grossly inadequate and that his inventory insurance should be around $50,000.00. Adams County Abstract did not immediately increase McAlvain's inventory coverage, and the reason for its failure to do so was a matter of dispute in this lawsuit. McAlvain claimed that as of that date Adams County Abstract had committed itself by an oral binder to insure his inventory to $50,000.00. Adams County Abstract countered that there was no agreement at that time, but that McAlvain would return at a later date to order increased coverage.

On December 10, 1970, the Council Electric store was gutted by fire, and the inventory almost totally destroyed. An inventory taken shortly thereafter based on invoices and the discernible remains of the furniture and appliances, etc., was $43,625.00, but as of the night of the fire the inventory at Council Electric was only insured to $30,000.00.

McAlvain sued both Adams County Abstract and the General Insurance Company on the following alternative theories. In his third cause of action McAlvain claimed that Adams County Abstract Company had been negligent in its initial failure, in August 1969, to provide the plaintiff with adequate insurance coverage of the inventory at Council Electric and he claimed as damages the difference between $43,625.00 and $30,000.00, less $4,071.00 salvage (or $9,554.00). In his fourth cause of action, against General Insurance Company, he claimed that the conversation with Muller in early November 1970, constituted an oral binder contract to insure for $50,000.00 which would be binding on General Insurance Company.

The jury found in favor of the plaintiff and against Adams County Abstract Company on McAlvain's third cause of action that the Adams County Abstract Company had acted negligently in failing to initially issue sufficient insurance to cover the full inventory of the Council Electric store. However, the jury found against the plaintiff on his claim against General lnsurance Company that an oral binder to insure the inventory to $50,000.00 resulted from the conversation between McAlvain and Muller in November of 1970.

Adams County Abstract Company contends that it cannot be held liable in tort for its failure to issue sufficient insurance to McAlvain because the only duties it owed to McAlvain were contractual. It argues that the mere failure to carry out contractual duties does not give rise to an action in tort, *Taylor v. Herbold*, 94 Idaho 133,483 P.2d 664 {1971}, and that under our holding in *Benner v. Farm Bureau Mutual Ins. Co*., 96 Idaho 31,528 P.2d 193{1974}, McAlvain cannot obtain a judgment against the insurance agent. We disagree.

The plaintiff urged two alternative theories of liability to the jury, each of which centered upon a separate incident in his dealings with Adams County Abstract Company. The third cause of action was based upon his claim against the insurance agency for its alleged negligence in 1969 when his insurance policy was originally written. The fourth cause of action was his claim that the agency had bound the insurer, General Insurance Company, by an oral contract to increase his insurance based upon McAlvain's conversations with Muller in November 1970.The plaintiff phrased these claims in the alternative and the jury verdict forms instructed the jury, erroneously we believe, that if it found liability under plaintiffs' tort theory, it could not reach the issue contained in plaintiff's fourth cause of action against General Insurance Company. The reason for this approach was apparently to avoid the possibility of a double recovery, although it is possible that the jury could have found in McAlvain's favor on both theories, i.e., that the insurance agency was negligent in August 1969 and also that it had bound the insurer, General Insurance Company, in November 1970. Nevertheless, because of the manner in which these issues were submitted to the jury, and the jury's finding against McAlvain on Count 4 from which he has not appealed, we do not consider issues of liability arising out of the November 1970, incident. Our sole concern in this appeal is whether an insurance agency which is requested to provide complete coverage and knows or should have known the amount of insurance necessary to effect complete coverage, but thereafter under-insures its insured, can be held liable intort for its negligence. We think that it can.

We must first consider appellant's argument that McAlvain's causes of action must be grounded, if at all, in contract rather than tort. The weight of authority is that the insured may recover under either theory. []

A person in the business of selling insurance holds himself out to the public as being experienced and knowledgeable in this complicated and specialized field. The interest of the state that competent persons become insurance agents is demonstrated by the requirement that they be licensed by the state, I.C. § 41-1030; pass an examination administered by the state, I.C. § A1-1038; and meet certain

qualifications, I.C. § 41-1034. An insurance agent performs a personal service for his client, in advising him about the kinds and extent of desired coverage and in choosing the appropriate insurance contract for the insured. Ordinarily, an insured will look to his insurance agent, relying, not unreasonably, on his expertise in placing his insurance problems in the agent's hands. [] When an insurance agent performs his services negligently, to the insured's injury, he should be held liable for that negligence just as would an attorney, architect, engineer, physician or any other professional who negligently performs personal services.

Our holding in *Taylor v. Herbold*, does not mandate a contrary result. In that case, the wrong complained of was non-performance by the defendant of a contract in which the defendant agreed to buy plaintiff's potatoes and remove them from plaintiff's potato cellar. The plaintiff had attempted to take advantage of the broad damages rules of tort law by arguing that the non-performance of this contract was a tort, but we rejected that argument and limited the plaintiff's remedy to breach of contract. That case did not involve the rendering of personal services by one with specialized knowledge and experience, nor did it involve issues of negligence in the performance of contractual duties.

In *Wallace v. Hartford Fire Insurance Co*., 32 Idaho 481, 174 P. 1009 {1918}, a case in which an insurance agent agreed to obtain insurance coverage for the plaintiff but subsequently failed to do so, this Court affirmed a finding that the insurance company and its agent were liable in tort for the agent's negligence:

> Where the only relation between the parties is contractual, the liability of one to the other in an action of tort for negligence must be based upon some positive duty, which the law imposes because of the relationship, or because of the negligent manner in which some act which the contract provides for is done.

... The jury found that Adams County Abstract Company through its employees was negligent in failing to initially procure sufficient insurance in July of 1969 to cover McAlvain's inventory (apparently concluding that the plaintiff himself was not guilty of any negligence, which would have barred recovery) .....Thus, Adams County Abstract Company is liable to McAlvain for damages resulting from its tortious conduct.

Affirmed.

McFADDEN, C.J., AND DONALDSON, SHEPARD, & BISTLINE, JJ., CONCUR.

NOTES

{1) What was the source of the duty? What was the scope of the duty? What interest is protected by the duty? Is the duty based upon the interest invaded by defendant's conduct? Is it based upon the status of the defendant? If the duty is status-based, what is defendant's status that justifies the creation of a tort duty?

{2) Why is plaintiff allowed to sue in tort rather than being left to his contractual remedies? Shouldn't people be allowed to make contracts on whatever terms they choose? Once individuals have contracted shouldn't courts restrict their role to enforcing the contracts as written?

{3) An early English legal treatise stated that:

> if a Smith prick my horse with a nail, &c. I shall have my action of the Case against him, without any warranty by the smith to do it well. ...For it is the duty of every Artificer to exercise his art right, &c. truly as he ought.

ANTHONY FITZ-HERBERT, THE NEW NATURA BREVIUM 94d (London: corrected & rev'd ed. 1666).

**{4}** ***Wallace v. Hartford Fire Insurance Co****.:* In another failure-to-insure case, the court stated the substance of the action was that the defendant "agreed to insure respondent's property; that the[respondent/plaintiff] relied upon their agreement and did not procure insurance; ˙ that his property was destroyed by fire, and that, by reason of the negligence of appellants, in that they failed to issue the policy and insure the property, he has been damaged." The court affirmed a judgment for the plaintiff. *Wallace v. Hartford Fire Insurance Co*., 31 Idaho 481, 174 P. 1009 (1918). Cf. *Hillock .v. Idaho Title & Trust Co*., 22 Idaho 440, 126 P. 612 (1912) (negligent preparation of an abstract of title to real property is a tort); *Anderson v. Title Insurance Co*., 103 Idaho 875, 655 P.2d 82 (1982) (plaintiff who purchased title insurance for real property did not have an action intort where the title insurer failed to discover that part of the land had already been sold to a third party); *Brown's Tie & Lumber Co. v. Chicago Title Co*., 115 Idaho 56, 764 P.2d423 (1988) (plaintiff who purchased title insurance for real property did not have an action intort where the title insurer failed to discover that the land had been encumbered as security for loan).

**{5}** ***White v. Unigard Insurance Co.:*** Defendant refused to settle an insurance claim, contending that plaintiff had been responsible for the fire. The federal district court certified the following question to the Idaho Supreme Court: does Idaho recognize a tort action, distinct from an action on the contract, for an insurer's bad faith in settling the first party claims of its insured?

Justice Bistline began by noting that there is a duty of good faith and fair dealing inherent in every contract; the question, therefore, is not whether a duty of "good faith" exists, but rather whether a breach of this duty will give rise to an independent action in tort. While noting that, "ordinarily [the] mere breach of contract [is] not a tort," the court concluded that "the contract between insurer and insured is no 'ordinary' contract, and breach of the duty of good faith and fair dealing is no 'mere' breach."

> An action in tort provides a remedy for harm done to insureds though no breach of an express contractual covenant has occurred and where contract damages fail to adequately compensate insureds.... [T]he requirement that contract damages be foreseeable at the time of contracting, [], in some cases would bar recovery for damages proximately caused by the insurer's bad faith. The measurement of recoverable damages intort is not limited to those foreseeable at the time of the tortious act; rather they include "[a] reasonable amount which will compensate plaintiff for all actual detriment proximately caused by the defendant's wrongful conduct." []... Thus, an insured person whose business goes bust as a result of an insurer's bad faith would be able to recover whether the bust was foreseeable or not. For example, an insured who takes out a second mortgage on her business property after purchasing her policy, and who could not make her combined payments when the insurer delayed settlement, would recover at tort, but not at contract. To deny an action in tort would deny such recovery and consequently encourage insurers to delay settlement. In contrast, an action in tort will provide necessary compensation for insureds and incentive for insurers to settle valid claims. See IDAHO CONST., art. 1, § 18 f'[A] speedy remedy s] afforded for every injury. ***")....

The court held that "imposition of liability in tort for bad faith breach of an insurance contract is further warranted when one considers the special relationship which exists between insurer and insured. 'The insurance contract has long been recognized as giving rise to a special relationship between insurer and insured [] which requires that the parties deal with each other fairly, honestly, and in good faith [].'" Justice Bakes dissented, arguing that:

> [i]t has long been the law in this state that non-performance of contractual obligations does not give rise to an action in tort.... It is readily apparent that the sine qua non of plaintiff’s claim against Unigard is the non-performance of a contractual obligation, i.e., failure to pay benefits allegedly due under the contract for which plaintiff has paid premiums. While it has been said that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement," [], such a duty does not exist independent of the contract itself. The duty of "good faith and fair dealing" acquires meaning only when considered in the context of the underlying contract. The duty arises only in the performance and enforcement of a contract.

> Thus, any breach of this duty, which is nothing more than a breach of an implied contractual covenant, gives rise to an action on the contract. It does not give rise to an action in tort.

*White v. Unigard Insurance Co.,* 112 Idaho 94,730 P.2d 1014 (1986). Is White distinguishable from McAlvain?

**(6)** ***Jones v. Runft, Leroy, Coffin & Matthews, Chartered***: In the spring of 1983, John Runft contacted Aaron Jones, a former client, concerning a potential investment in a business venture- the North Idaho Jockey Club (NIJC)- of two other clients, Richard Sigismonti and John Kundrat. After a meeting between Runft, Jones, and Sigismonti, Jones indicated that he was willing to loan NIJC $420,000 if the loan was adequately secured and "if Runft thought it would fly." Runft put together a loan proposal that included an assignment for security purposes of Sigismonti's and Kundrat's partnership interests in Pinecrest Hospital. Jones agreed to the proposal. Subsequently, Runft directed Jones to send him a check for the loan and stated that Runft would place "all" documents in trust with the escrow company pending closing of the deal. Runft was present at the closing and the escrow company disbursed the funds despite the fact that the partnership interests in the hospital had never been assigned as security. NIJC eventually defaulted on the loan, Sigismonti and Kundrat declared bankruptcy, and Jones brought suit against Runft and his law firm. Plaintiff alleged that "Runft breached an assumed duty to act in Jones's best interests by modifying portions of the escrow instructions to allow release of the loan proceeds without the Pinecrest assignment." The trial court granted defendants summary judgment and plaintiff appealed. The Idaho Supreme Court began by noting that plaintiff's complaint

> refers to a breach of an "assumed duty or contract." A claim for breach of an assumed duty is a negligence action where the duty of care arises from a voluntary undertaking. *Bowling v. Jack B. Parsons Companies*, 117 Idaho 1030, 793 P.2d 703 (1990). A voluntary duty is distinct from any other duty the party may have as a result of another undertaking or relationship. The law firm argues that there are no facts to support a determination that the law firm assumed any duty towards Jones. In support of this assertion, the law firm submitted evidence that Jones [was] aware that Runft was acting as NIJC's attorney and that [he] knew Runft was not acting as [his] attorney. Runft's status as NIJC's attorney, however, does not entitle the law firm to summary judgment on a claim for breach of an assumed duty, if there is a genuine issue of fact whether Runft undertook a separate duty on the behalf of Jones. We conclude that there is a genuine issue of material fact concerning this claim.
>
> Jones argues that Runft assumed a duty to act on behalf of Jones "contractually or otherwise." The August 5 letter [which instructed Runft to handle the transaction in Jones's best interests] and Runft's failure to repudiate the direction in this letter for Runft to act in Jones's best interest create a genuine issue of material fact whether Runft contractually assumed a duty.
>
> The statement in the August 5 letter can be viewed as an offer for Runft to enter a unilateral contract. Although the breach of an assumed duty claim sounds in tort, evidence to support the existence of an assumed duty can be contractual in nature. A contract may ...create a state of things which furnishes the occasion for a tort. If the relation of the plaintiff and the defendants is such that a duty to take due care arises therefrom irrespective of contract and the defendant is negligent, then the action is one of tort.

*Taylor v. Herbold*, 94 Idaho 133, 138 483 P.2d 664, 669 (1971).
*Jones v. Runft, Leroy, Coffin, & Matthews, Chartered*, 125 Idaho 607, 873 P.2d 861 (1994).

(7) McAlvain has been described as "emphasiz[ing] the fact that an insurance agent holds himself out to the public as having expertise regarding a specialized function, and that, by so doing, the agent induces reliance on his superior knowledge and skill." This rationale is generally applicable to professionals and the court has consistently applied tort standards of liability to a broad range of professionals -accountants, *Mack Financial Corp. v. Smith*, 111 Idaho 8, 720 P.2d 191 (1986); *Streib v. Veigel*, 109 Idaho 174,706 P.2d 63 (1985); *Owyhee County v. Rite*, 100 Idaho 91, 593 P.2d 995 (1979); architects, *Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill*, 103 Idaho 19,644 P.2d 341 (1982); attorneys,

E.g., *Thompson v. Pike*, 122 Idaho 690, 838 P.2d 293 (1992); *Fitzgerald v. Walker*, 113 Idaho 730, 747 P.2d 752 (1987), following remand, 121 Idaho 589, 826 P.2d 1301 (1992); *Marias v. Marano*, 120 Idaho 11, 813 P.2d 350 (1991); *Zumwalt v. Stephan, Balleism, & Slavin*, 113 Idaho 822, 748 P.2d 406 (Ct. App. 1987); surveyors, *Williams v. Blakely*, 114 Idaho 323, 757 P.2d 186 (1988); notary publics, *Osborn v. Mrens*, 116 Idaho 14,773 P.2d282 (1989); and title companies, *Merrill v. Fremont Abstract Co*., 39 Idaho 238, 227 P. 34 (1924); *Hillock v. Idaho Title & Trust Co*., 22 Idaho 440, 126 P. 612 (1912) -despite the contractual source of the relationship between the parties and the fact that the loss is purely economic. In such cases, the contract forms the basis of the relationship.

(8) Not all white-collar or professional services give rise to special relationships. For example, in *Black Canyon Racquetball Club, Inc. v. Idaho First National Bank*, plaintiff sought loans from the bank to expand and remodel its business. Following protracted negotiations, the bank refused to make the loans plaintiff sought. Plaintiff responded by filing suit alleging that defendant had made an oral contract to loan the funds and that it had also breached several tort duties. After concluding that there was no contract, the court turned to plaintiff's tort claims which were partially predicated upon the argument that the relationship between the bank and a customer was analogous to that between an insurer and an insured. The court disagreed. The relationship between a bank and its customers was not a special relationship because it lacked the "personal" and "non-commercial" nature that characterized the relationship between insurer and insured; "[r]ather, the transaction here was a commercial one, which would have created a debtor-creditor relationship." The lack of the "personal" element was fatal to the claim. *Black Canyon Racquetball Club, Inc. v. ldaho First National Bank*, 119 Idaho 171,804 P.2d 900 (1991). See also *Eliopulos v. Knox*, 123 Idaho 400, 848 P.2d 984 (Ct. App. 1992) (review denied (1993)); *Idaho First National Bank v. Bliss Valley Foods, Inc.,* 121 Idaho 266, 824 P.2d 841 (1991).

### *3. Non-Professional Service Providers*

NOTES

(1) Although the court has stated that "[t]he 'special relationship' exception generally pertains to claims against professionals who perform personal services, such as physicians, attorneys, architects, engineers and insurance agents," *Eliopulos v. Knox*, 123 Idaho 400, 408, 848 P.2d 984, 992 (Ct.App. 1992) (citations omitted) (review denied (1993)), the court's application of the "special relationship" category has been broader than the traditional meaning of the term "professionals." The court has found a special relationship not only when physicians, attorneys, architects, engineers and insurance agents are involved, but also when the service provider is a well driller, *Knoblock v. Arguena*, 85 Idaho 503, 380 P.2d 898 (1963) but see *Stapleton v. Jack Cushman Drilling & Pump Co*., 153 Idaho 735, 291 P.3d 418 (2012); a pump repairer, *Chenery v. Agri-UnesCorp*., 106 Idaho 687, 682 P.2d640(Ct.App. 1984)(review denied); an automobile repairer, *Dick v. Reese*, 90 Idaho 447, 412 P.2d 815 (1966); see also *Beare v. Stowes' Builders Supply, Inc*., 104 Idaho 317,658 P.2d 988 (Ct. App. 1983); a boiler repairer*, S.H. Kress & Co. v. Godman*, 95 Idaho 614,515 P.2d 561 (1973); a water-heater installer, *Galbraith v. Vangas, Inc*., 103 Idaho 912,655 P.2d 119 (Ct. App. 1982); an aircraft mechanic, *Hoffman v. Simplat Aviation, Inc*., 97 Idaho 32, 539 P.2d 584 (1975); a plumber, *Mica Mobile Sales & Leasing, Inc. v. Skyline Corp*., 97 Idaho 408, 415, 546 P.2d 54, 61 (1975); and a title company., *Hillock v.*
*Idaho Title & Trust Co*., 22 Idaho 440, 126 P. 612 (1912).

### B. Service vs. Misrepresentation

### DUFFIN v. IDAHO CROP IMPROVEMENT ASSOCIATION

Supreme Court of Idaho
126 Idaho 1002,895 P.2d 1195 (1995)

TROUT, J.- The action giving rise to this appeal was initiated by the appellants, Eric and Melanie Duffin, and involves the sale of certified seed potatoes.

#### I. BACKGROUND

The sale of certified seed in Idaho is subject to statutory regulation. The responsibility for administering the certification program is granted to the University of Idaho (UI). I.C. § 22425. Ul has, pursuant to I.C. § 22-429, delegated the day-to-day management of the program to the Idaho Crop Improvement Association (ICIA), a private, non-profit corporation organized under the Cooperative Marketing Act (I.C. §§ 22-2601 to -2628). ICIA is granted responsibility for conducting the program in accordance with regulations (the Rules of Certification) adopted by Ul to govern the certification process. ICIA has also engaged in marketing activities, promoting the purchase of certified seed for the benefit of its members.

The goal of the certification program is to maintain genetic purity of commercial seed and to help ensure that the seed certified is free of the presence of certain diseases and insects within established tolerances. The process for the certification of potato seed entails two visual field inspections, a "winter grow-out" test where seed is taken to California during the winter months and actually planted, an inspection of storage conditions, and a shipping point inspection conducted by the State of Idaho, Department of Agriculture, Federal-State Inspection Service (FSIS).

The Duffins own and operate a farm near Aberdeen, Idaho. Willard Bell, the president and principal shareholder of Crater Farms, Inc. (CFI), approached the Duffins with an offer to sell seed potatoes for the crop year 1988.The Duffins agreed verbally to purchase seed from CFI so long as it was certified. The seed in question was grown on a 270-acre lot as part of CFI's 1987 crop. This lot was designated by ICIA as "lot 87-803" and was listed in the ICIA Grower Directory as being eligible for certification.

In late March of 1988, CFI began delivery of seed to the Duffins. This seed was inspected by the FSIS and found to be within tolerances for the absence of disease. FSIS inspectors, therefore, placed tags on the trucks delivering the seed which designated that seed as "certified." The Duffins finished planting the seed around May 6, 1988.

On April 29, 1988, approximately three weeks after the Duffins received their last load of CFI seed, an FSIS inspector discovered the presence of what proved to be bacterial ring rot (BRR) in one of the remaining seed potatoes from lot 87-803. ICIA notified CFI that no further shipments from the lot could be sold as "certified" seed. At this time, 61,000 cwt. of seed from the lot had already been sold. Neither CFI nor ICIA made an effort to notify the Duffins of the problem.

Potatoes grown by the Duffins from CFI seed were tested and found to be infected with BRR. The Duffins claim the seed was infected when they received it and, as a result, they suffered substantial losses. The losses claimed consist of (1) the excess of the price paid for the seed because it was "certified;" (2) lost revenues which resulted from reduced yields; and (3) lost revenues which resulted from having to sell the crop immediately upon harvest, rather than by way of more lucrative contracts the Duffins had already negotiated, or by waiting until the open market prices were higher.

The Duffins seek to recover damages from CFI for breach of express and implied warranties arising from the contract for the sale of certified seed potatoes, and from ICIA and FSIS for negligence and negligent misrepresentation in the inspection and certification of the seed.

## II. PROCEDURAL HISTORY

[FSIS and ICIA moved for summary judgment on the ground that their claims were barred because the losses claimed were purely economic. The district court agreed, holding that recovery was not permitted under a negligence theory.

[CFI's motion for summary judgment was denied.]

## III. THE ECONOMIC LOSS ISSUE

The first issue is whether the district court erred in its application of the so-called "economic loss rule." ICIA and FSIS both moved for summary judgment on the ground that the Duffins' negligence claims were barred because purely economic loss cannot be recovered intort. The district court agreed and granted both motions. The Duffins now contend that the district court erred.

In *Clark v. International Harvester Co*., 99 Idaho 326, 581 P.2d 784 (1978), a case involving claims for breach of implied and express warranties and for negligence, we addressed "the very narrow question [of] whether the purchaser of a defective product who has ... only suffered economic losses, can recover those losses in a negligence action against the manufacturer." [] We answered the question in the negative, reasoning that a contrary holding would undermine the comprehensive structure of the Uniform Commercial Code, and that the economic expectations of parties have traditionally not been protected by tort law. []

In *Just's, Inc. v. Arrington Construction Co*., 99 Idaho 462, 583 P.2d 997 (1978), the plaintiff sought to recover economic losses by way of claims for breach of contract and for negligent interference with prospective economic advantage. With regard to the tort claim, we held that economic loss was not recoverable under a negligence theory. The foundation for that holding was that the defendant's conduct did not invade an interest of the plaintiff to which the law of negligence extends its protection. Further, allowing the recovery of economic loss would "impose too heavy and unpredictable a burden on [a] defendant's conduct." []

Following Justs, this Court has adhered to a general rule prohibiting the recovery of purely economic losses in all negligence actions. See, e.g., *Tusch Enterprises v. Coffin*, 113 Idaho 37, 41,740 P.2d 1022, 1026 (1987) (defending the rule that "purely economic losses are not recoverable in negligence"). Based solely on the application of this general rule, the district court's analysis regarding the recovery of economic loss intort would be correct; ordinarily a party would owe no duty to exercise due care to prevent the type of loss suffered by the Duffins. However, there are exceptions to the general rule of non-recovery.

First, economic loss is recoverable in tort as a loss parasitic to an injury to person or property. E.g., Just's at 468, 583 P.2d at 1003. We have defined "economic loss" as including "costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use." *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co*., 97 Idaho 348, 351, 544 P.2d 306, 309 (1975) (citations omitted), rev'd on other grounds. Conversely, "property loss" encompasses "damage to property other than that which is the subject of the transaction." *Id*. *See also Tusch Enterprises v. Coffin*, 113 Idaho 37, 41, 740 P.2d 1022, 1026 (1987); *State v. Mitchell Construction Co*., 108 Idaho 335, 336, 699 P.2d 1349, 1350 (1984); *Clark v. International Harvester Co*., 99 Idaho 326, 332, 581 P.2d 784, 790 (1978). Since the losses claimed here are purely economic, this exception is inapplicable.[11]

[11] In *Oppenheimer Industries, Inc. v. Johnson Cattle Co*., 112 Idaho 423, 732 P.2d 661 (1986),the plaintiff claimed that negligence on the part of the State Brand Board resulted in the theft of its cattle. This Court took a literal view of the term "property loss" and allowed the plaintiff to recover. In distinguishing Clark, the Court held that, "[u]nlike the plaintiff in Clark Oppenheimer is not still in possession of defective goods. Rather, Oppenheimer has suffered the loss of its property (i.e. the cattle).." [] emphasis in original). Thus, "property loss" was equated with a loss of phys1cal possession of ones property, even If that property was the subject of the transaction.

Economic loss might also be recovered in tort where the occurrence of a unique circumstance requires a different allocation of the risk. See Just's at470,583 P.2dat 1005 (citing *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974)). However, the certification of seed potatoes is not a "unique circumstance" requiring a re-allocation of the risk, and the Duffins do not so contend. Therefore, this exception is also not implicated.

Finally, an exception to the economic loss rule is applicable incases involving a "special relationship" between the parties. Just's at 470, 583 P.2d at 1005 (citing *McAlvain v. General Insurance Co*.,97 Idaho m,554 P.2d955 (1976)). The Duffins contend that such a relationship exists between themselves and both ICIA and FSIS. With regard to the relationship between the Duffins and ICIA, we agree.

We recognized the existence of a "special relationship" exception to the economic loss rule in Just's. However, in that case we were not required to define the parameters of that exception; this is a task we undertake today. We have held that a party generally owes no duty to exercise due care to avoid purely economic loss. E.g., Clark at 336, 581 P.2dat 794.The term "special relationship, therefore, refers to those situations where the relationship between the parties is such that it would be equitable to impose such a duty. In other words, there is an extremely limited group of cases where the law of negligence extends its protections to a party's economic interest.

In *McAlvain v. General Insurance Co*., cited by this Court in Just's, we held that the relationship between an insurance agent and his insured is such that the agent should be liable when he performs his function negligently to the injury of the insured. [] In reaching this conclusion, we emphasized the fact that an insurance agent holds himself out to the public as having expertise regarding a specialized function, and that, by so doing, the agent induces reliance on his superior knowledge and skill. []

Although McAlvain dealt with the existence of a professional or quasi-professional relationship, we do not limit the "special relationship" exception exclusively to such cases. ICIA has held itself out as having expertise in the performance of a specialized function; it is the only entity which can certify seed potatoes in the state of Idaho. ICIA knows that seed is sold at a higher price based on the fact that it is certified. Indeed, it has engaged in a marketing campaign, for the benefit of its members, the very purpose of which is to induce reliance by purchasers on the fact that seed has been certified. Under such circumstances, ICIA occupies a special relationship with those whose reliance it has knowingly induced. *See also Glanzer v. Shepard*, 135N.E. 275 (N.Y. 1922) (where public weighers held themselves out as having special skill and undertook the performance of their function with the purpose of shaping the conduct of purchasers of beans, they had a duty to perform their function carefully).

Because a special relationship existed between ICIA and the Duffins, if ICIA was in fact negligent in the performance of its function, it should be liable for any injury proximately caused by that negligence. Therefore, the order of the district court granting ICIA's motion for summary judgment on this issue is reversed.

With regard to the FSIS, there is no evidence in the record from which we can conclude that it has actively sought to induce reliance on the part of purchasers of certified seed. Therefore, unlike ICIA, it does not occupy a special relationship vis-a-vis those purchasers. Accordingly, the Duffins' negligence claim against it is precluded because the damages sought are purely economic and there is no applicable exception to the operation of the economic loss rule. The order of the district court granting summary judgment to FSIS on this issue is affirmed.

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. Oppenheimer distinguishable from the facts of this case. The Duffins, like the plaintiff in Clark, inremained in possessiion of the defective or damaged property, that is, the defective seed. It was only the product of that defective seed which they sold and from which they suffered a loss of profits, not property. Althou.gh the existence of BRR in the seed may have resulted in a reduced crop y1eld, terming this loss a property loss" would be the same as saying that the plaintiff in Clark suffered a property loss because the use of his defective tractor also resulted in reduced crop yields. *See also G & M Farms v. Funk Irrigation Co*., 119 Idaho 514, 527, 808 P.2d 851,864 (1991) (a reduced crop yield resulting from the use of an inadequate irrigation system is not a property loss).

McDEVITT, C.J., JOHNSON AND SILAK, JJ., AND SCHILLING, J., PROTEM., concur.

NOTES

(1) What is the source of the duty? What is the scope of the duty? What interest is protected by the duty? When should pure economic loss - economic loss unaccompanied by either personal injury or property damage - be protected in tort?

Did the Duffins have a contractual relationship with ICIA or FSIS? Was there any evidence that either ICIA or FSIS was aware of the existence of the Duffins? Is there any limit to the potential liability of FSIS and ICIA under the court's analysis?

How would you describe the conduct that was negligent? Did the defendant do something that created a risk that befell plaintiff? That is, is the conduct analogous to driving a car? Is the conduct that caused harm actually a representation?

(2) The court states that it undertakes the task of defining the parameters of the "special relationship." Does its definition provide guidance for the future? Does its definition take into consideration the cases that were excerpted above in the materials on duties arising from defendant's relationship to plaintiff and to third parties?

(3) Note footnote 5 and its importance to the court's discussion of the crucial distinction between "property loss" and "pure economic loss." *Oppenheimer* is excerpted above. Would the case be better understood as a different exception to the no-recovery-for-economic-loss rule? For example, when a statute imposes a duty on one person to act affirmatively to protect another person's interests, should it matter whether those interests are personal injuries, property damage, or economic loss?

(4) *Blahd v. Richard B. Smith, Inc*: Plaintiffs toured the house that the Gyslings had constructed on a lot purchased from the various Smith entities who had developed the land for a subdivision. During the tour, they noted that there was a crack in the concrete slab in the basement of the house. The Blahds hired Briggs to conduct a visual inspection of the crack. Briggs concluded that the crack was a shrinkage crack and that slab was in a stable condition.

The Blahds subsequently purchased the house. The cracking became worse and a subsequent inspection by a new engineering form concluded that the house was sinking because the .30-feet of fill on which the house had been built was improperly compacted by the Smiith entities.

The supreme court affirmed summary judgments for defendants, because "[u]nless an exception applies, the economic loss rule prohibits recovery of purely economic losses is a negligence action because there is no duty to prevent economic loss to another." The exception that the court examined was for "special relationships," which

> refers to those situations where the relationship between the parties is such that it would be equitable to impose such a duty. In other words, there is an extremely limited group of cases where the law of negligence extends its protections to a party's economic interest. *Duffin*, []. There are only two situations in which this Court has found the relationship exception applies. One situation is where a professional or quasi-professional performs personal services. *McAlvain v. General Ins. Co*., 97 Idaho 777,780,554 P.2d 955,958 (1976) ...
>
> The other situation involving a special relationship is where an entity holds itself out to the public as having expertise regarding a specialized function, and by so doing, knowingly induces reliance on its performance of that function. *Duffin*, [] In *Duffin*, the Idaho Crop Improvement Association was the only entity in Idaho authorized to certify seed potatoes. The Association held itself out to the public as having expertise in seed certification and induced reliance on that expertise. The Federal-State Inspection Service also inspected seed for

> diseases. A farmer relied on the Association's expertise and bought the certified seed. Later, it was discovered the seed was defective and the farmer suffered economic losses. This Court held a special relationship existed between the farmer and the certifying Association because the Association had "engaged in a marketing campaign ...to induce reliance by purchasers on the fact that seed ha[d] been certified."

*Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 108 P.3d 996 (2005). Is the court's description of the holding in Duffin accurate? Doesn't every advertising campaign seek "to induce reliance by purchasers" on the product being sold?

***(5) Nelson v. Anderson Lumber Co.:*** Plaintiffs owned a parcel of land on which they intended to build a house. After meeting building contractor (Steinbruegge) at a fair, they contracted with him to design and to obtain the materials to build the house. The contractor ordered panels from building materials designer and fabricator (IBP), which retained engineer and owner of wholesaler of building materials (Wicher) to review the plans. Steinbruegge purchased additional materials from a building materials supplier (Anderson), which delivered the materials to plaintiff's parcel. Plaintiffs submitted an application for a building permit and a copy of the plans to Freemont County, which issued a permit indicating that the county's building inspector had reviewed the plans. After plaintiffs completed the house, the building inspector informed them that the house did not meet snow-load requirements. Plaintiffs were required to employ an engineer and reinforce the house. The landowners sued all of the other participants. The trial court granted summary judgment to all defendants. The court of appeals affirmed.

Since plaintiffs' losses were pure economic loss, they can recover only if they fall within an exception to the general rule that such losses cannot be recovered in negligence. There are, the court noted, "two exceptions to this general rule are where a special relationship exists, and the occurrence of a unique circumstance requires a different allocation of risk." To avoid application of the rule, plaintiffs argued that they had a special relationship Wicher and IBP. The court disagreed:

> .... A special relationship may exist where a party holds itself out to the public as performing a specialized function and induces reliance on superior knowledge and skill. *Duffin*, 126 Idaho at 1008, 895 P.2d at 1201.
>
> In *Duffin*, the Idaho Supreme Court held that a special relationship existed between an entity which certified seed potatoes and a farmer who bought seed which was certified but defective. The seed certification entity was the only such entity in the state. The entity held itself out to the public as having expertise in seed certification and induced reliance on that expertise. Furthermore, the farmer was obligated to utilize the entity. Due to this specialization and induced reliance on the seed certification entity's expertise, the Supreme Court gave the farmer the ability to recover for pure economic loss based upon a special relationship. However, the Supreme Court explained in its holding that this principle only applies to an "extremely limited group of cases" in which it is equitable to impose a duty to exercise due care to avoid the pure economic loss of another. *Id*.
>
> The Nelsons asserted at the hearing on the motions for summary judgment that they relied upon the expertise of Anderson, Wicher, and IBP for the production of the engineered blueprints. The district court held that a special relationship did not exist between the Nelson and Anderson because Anderson only sold lumber and building materials to Steinbruegge. The district court also concluded that a special relationship did not exist between the Nelsons and Wicher and IBP because IBP only sold a wall panel system to Steinbruegge and Wicher only reviewed the wall panel designs.
>
> While IBP did sell a blueprint for the wall panel system to Steinbruegge and Anderson did provide a draft of a flooring system to Steinbruegge, this is insufficient to establish the existence of a special relationship with the Nelsons. Unlike the facts in *Duffin*, the Nelsons were not obligated to use the services of IBP or Anderson. Moreover, the Nelsons did not engage in any

negotiations with IBP or Anderson. Steinbruegge completed the negotiations and purchasing of the materials and subsequently sold the materials to the Nelsons.

Additionally, if IBP had induced reliance on the expertise of the blueprints, it induced reliance only upon the designs and construction of the wall panel system. A disclaimer on the blueprints unequivocally states that the designs are for purposes of IBP's wall panel system only and that other aspects of the cabin, including the foundation, floor system, interior walls, and roof system are to be supplied by others. The Nelsons do not allege that the failure of the cabin's structure to meet the snow load requirements was caused by defective designs regarding the wall panel system. Therefore, if IBP induced reliance upon its expertise, it was for its expertise of the wall panel system and not for any other defect which may have caused the cabin structure to not meet the snow load requirement-the basis for the Nelsons' negligence claim.

With respect to Wicher, at no time did the Nelsons or Steinbruegge have any contact with Wicher. Wicher, a licensed engineer, was hired by IBP to review the Nelson's cabin plans. There was no relationship at all between Wicher and the Nelsons. Thus, there is no special relationship between Wicher and the Nelsons similar to that found in Duffin. With consideration of the Idaho Supreme Court's holding in Duffin that a special relationship only applies to an extremely limited group of cases, we decline the invitation to expand that principle to the facts of this case.

*Nelson v. Anderson Lumber Co*., 140 Idaho 702, 99 P.3d 1092 (Ct.App. 2004). Is Nelson as different from Duffin as the court of appeals argues? Did the Duffins negotiate with ICIA? Did the Duffins have any contact with ICIA?

**IDAHO BANK & TRUST CO. v. FIRST BANCORP**

Supreme Court of Idaho
115 Idaho 1082, n2 P.2d 720 (1989)

SHEPARD, C.J. --This case presents the question of the liability of a certified public accounting firm to a person not a party to the auditing contract. Main Hurdman contracted with First Bank & Trust to examine and give an opinion on the financial statements of First Bank & Trust. That audit was completed, and an opinion provided to First Bank & Trust. At a later time, as a result of a buy out, Bancorp gamed control over First Bank &Trust. In connection with that transaction, Bancorp obtained a loan from Idaho Bank & Trust. In connection with that loan, Bancorp provided Idaho Bank & Trust With the aforesaid audit report prepared by Main Hurdman.

Thereafter, First Bank & Trust was placed in receivership, and Bancorp defaulted upon its loan payments to Idaho Bank & Trust. The present action was brought by Idaho Bank & Trust against Bancorp and Main Hurdman. Upon motion, Main Hurdman was dismissed as a party: that order of dismissal was certified for appeal, and the only matter before this Court is the liability, if any, of Main Hurdman to Idaho Bank & Trust.

The decision of the district court may be viewed as presenting other bases for its decision, but nevertheless, the issue here is stated by the appellant as "[s]hould an independent accountant, who certifies an audit of an entity, be liable to those who detrimentally rely upon the audit?" Thus, we are presented with a question which falls within a classic pattern, and presents the question originally treated in *Ultramares Corp. v. Touche,* 255N.Y.170, 174N.E.441 (1931). In *Ultramares* a certified public accountant examined and audited the financial statements of a customer and failed to discover that an account receivable exhibited on those statements was nonexistent. The certified statements indicated the customer's net worth of over one million dollars, when in fact the customer was insolvent. The plaintiff, relying on that statement, loaned money to the firm. The firm later filed for bankruptcy. The New York court refused to hold the auditor liable to all persons who foreseeably would rely on the negligently audited financial statements, reasoning:

> If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of the business conducted on these terms are so extreme as to enkindle doubt whether a flaw may nor exist in the implication of a duty that exposes to these consequences.
>
> The rule as stated in Ultramares, has been applied by other courts. [] Other jurisdictions have departed from the doctrine of Ultramares, holding that public accountants may be liable to third parties, not always precisely identifiable, but who belong to a limited class of persons whose reliance on the accountants' representations is specifically foreseen. *White v. Guarantee*, 43 N.Y.2d 356 (1977).

More recently the New York court, in *Credit Alliance v. Arthur Andersen & Co*.,65 N.Y.2d 536,493 N.Y.S.2d435, 483 N.E.2d 110(1985), has reaffirmed the basic principles articulated in Ultramares, but has interpreted the Ultramares doctrine to include noncontractual parties when certain other prerequisites are satisfied, i.e.,

> 1. the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes;
> 2. in the furtherance of which a known party or parties was intended to rely; and
> 3. there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance. []

Hence, the New York court has expanded its traditional rule set forth in Ultramares. We agree and adopt the extension of the traditional rule as expounded in Credit Alliance. Plaintiff urges this Court to adopt the imposition of liability in accordance with the Restatement and Restatement (and) of Torts. Section 552 of the Restatement (Second) of Torts limits the liability of a professional who has made a negligent misrepresentation for loss suffered:

> 2(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

When applied to an audit, the Restatement thus limits the person or persons to whom the auditor owes a duty to intended identifiable beneficiaries and to any unidentified member of the intended class of beneficiaries. *Rosenblum v. Adler*, 93 N.J. 324, 461 A.2d 138 (1983). We decline to adopt the Restatement standard. []

Insofar as we have been advised by the parties, the instant case is one of first impression before this Court. Hence, in the instant case the district court was not aware of the standards which would be applied by this Court in a case of accounting malpractice, i.e., the previous set forth standards of Credit Alliance. Hence, we remand to the district court to apply the standards of Credit Alliance, and in its discretion permit the submission of additional facts necessary to such complication.

The cause is remanded to the district court.

BAKES, BISTLINE, HUNTLEY AND JOHNSON, JJ., concur.

## NOTES

(1) Why was there no duty in tort? Is *Idaho Bank & Trust* consistent with *Just's* and *Taylor*?

**(2)** ***Merrill v. Fremont Abstract Co.:*** Plaintiff purchased real property after defendant prepared an abstract of title on the property. The abstract failed to disclose a recorded mortgage. Plaintiff sold the

property to a third party by warranty deed. When the outstanding mortgage was discovered, plaintiff was required to remove the encumbrance. Plaintiff brought an action against the abstract company when it refused to reimburse him for the loss. On appeal from a jury verdict for plaintiff, defendant argued that plaintiff had no cause of action because it had prepared the abstract for the person who sold the property to plaintiff. Since there was no privity of contract between plaintiff and defendant, defendant had no contractual liability to plaintiff; "neither can the action be converted into an action intort since the duty to make the abstract correctly was created solely by contract and its breach is therefore merely a breach of contract." The court began by acknowledging that the "general rule would seem to be that the liability of an abstracter *** depends upon the privity of contract so that the abstracter furnishing an abstract to one person is not held liable to another using the same, for omissions or negligence, where the abstracter had no notice or knowledge that the abstract was for anyone other than the person ordering it." In the instant case, however, the court held that an Idaho statute requiring abstracters to post bond "for the payment *** of *** all damages that may accrue to any party *** by reason of any error*** in any abstract" imposed liability upon the abstracter to anyone who purchases property in reliance upon the abstract if the abstract contains errors "attributable to a lack of proper care." *Merrill v. Fremont Abstract Co*., 39 Idaho 238, 227 P. 34 (1924).

**(3)** ***Estate of Becker v. Callahan****:* Decedent inherited three parcels from her parents, including a parcel on which the family home was located. Defendant, an attorney, was asked to prepare a will for decedent (who was near death) by the decedents sister who was a tenant in common on one of the parcels (not the home parcel). Plaintiff (decedents husband), defendant, and decedents sister met to review the will; the decedent was too sick to attend. Defendant subsequently took the will to decedent's home to be signed. When questioned, decedent said that she wanted her daughter to inherit the home parcel. Decedent signed the will. She died two days later. Under the will, plaintiff received a life estate in the home parcel. After plaintiff suffered a nervous breakdown, decedent's sister became the personal representative. The parties agreed to set aside the will and to distribute the assets in accordance with a settlement agreement. Plaintiff appealed the district court's summary judgment for defendant on plaintiff's negligence claim. The supreme court affirmed:

> Mr. Becker urges the extension of a duty to a surviving spouse by the attorney who drafted the deceased spouse's will. We have recently ruled upon the issue of whether a direct attorney-client relationship is required to exist in order for the intended beneficiary of testamentary instruments to sue the attorney who drafted the instruments for malpractice. *Harrigfeld v. Hancock*, 140 Idaho 134, 90 P.3d 884, 886 (2004). In that case we addressed the issue of whether, or in what circumstances, a person who was not a client of the defendant attorney could have a malpractice claim against the attorney.

*Id*. This Court held:

> A direct attorney-client relationship is required to exist between the plaintiff and the attorney-defendant in a legal malpractice action except in this very narrow circumstance. An attorney preparing testamentary instruments owes a duty to the beneficiaries named or identified therein to prepare such instruments, and if requested by the testator to have them properly executed, so as to effectuate the testator's intent as expressed in the testamentary instruments. If, as a proximate result of the attorney's professional negligence, the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized, the attorney would be liable to the beneficiary harmed even though the attorney did not have a direct attorney-client relationship with that beneficiary.

*Id*. "The attorney has no duty to ensure that persons who would normally be the objects of the testator's affection are included as beneficiaries in the testamentary instruments ...The attorney likewise has no duty to see that the testator distributes his or her property among the named beneficiaries in any particular manner." *Id*. This Court further stated that an attorney could not be held liable to beneficiaries for the preparation and execution of documents that revoke or amend testamentary instruments based upon the beneficiaries' claim that the testator would not have intended to revoke the testamentary instruments. *Id*.

> In the present case, that of suing an attorney regarding his drafting of a will, Mr. Becker has no independent cause of action for negligence outside that of professional negligence. Here Callahan's duty was with his client, Ms. Becker. That duty is not extended to non-clients except in the narrow circumstance described above in Harrigfeld. Callahan had absolutely no duty to Mr. Becker with regard to what share, if any, he received from his wife's estate, except to properly draft and execute the testamentary instrument(s) so as to effectuate the testator's intent as expressed in the testamentary instruments. Callahan prepared Ms. Becker swill according to the instructions relayed to him on her behalf by Williams. He reviewed the document with Williams and with Mr. Becker. He confirmed with Ms. Becker that she wanted her property to go to her daughter Charliann prior to Ms. Becker signing the will, in the presence of Mr. Becker, Williams, and the witnesses. He fulfilled any duty to the beneficiaries in giving effect to Ms. Becker's intent as expressed in the will. He owed no further duty to Mr. Becker.

*Estate of Becker v. Callahan*, 140 Idaho 522, 96 P.3d 623 (2004).

Was the husband foreseeably at risk if the attorney mis drafted the will? Why did the attorney not owe a duty to act with care given the foreseeability of harm?

**(4)** ***Hudson v. Cobbs***: Defendant obtained a loan to finance the construction of an office building. The loan agreement required pre-leasing of a minimum amount of the building. Defendant entered into contract to sell the land and building to plaintiff that required defendant to satisfy the pre-leasing requirements. Defendant entered into sham leases with a third party to meet the pre-leasing requirements. Plaintiff's knowledge of the nature of the leases was disputed. Defendant managed the premises for plaintiff. When it failed to make payments, plaintiff sued. The jury found for plaintiff on the negligent misrepresentation claim. The trial court granted a judgment on the ground that Idaho did not recognize negligent misrepresentation. The Idaho Supreme Court began its analysis by noting that in Idaho Bank & Trust Co. the court had recognized negligent misrepresentation in the context of an accountant's liability to a third party. Here, the trial court held that defendant's only duty to plaintiff arose from the contract and the proper cause of action therefore was contract rather than tort. The court concluded that this was correct:

> the facts of this case were not sufficient to show the duty necessary to make out a prima facie case for negligent misrepresentation. The duty of Cobbs and Kennevick allegedly breached was a duty created by contract. In *Carroll v. United Steelworkers of America*, 107 Idaho 717, 692 P.2d 361 (1984), the Idaho Supreme Court stated that it is well settled that:
>
> > an alleged failure to perform a contractual obligation is not actionable in tort .... "To find an action in tort, there must be a breach of duty apart from non-performance of a contract." [Quoting *Taylor v. Herbold*, 94 Idaho 133,483 P.2d 664 (1971)] ***Mere nonfeasance, even if it amounts to a willful neglect to perform the contract, is insufficient to establish a duty in tort.
>
> [] See also *Steiner Corp. v. American District Telegraph*, 106 Idaho 787, 683 P.2d 435 (1984); *Browns Tie & Lumber Co. v. Chicago Title Co*., 115 Idaho 56, 764 P.2d 423 (1988).
>
> As noted by the district court, neither *Cobbs* nor *Kennevick*, nor the *Cobbs/Kennevick* partnership had any affirmative duty to Hudson other than the d ty created by their lease agreement. Thus, while Hudson could have sued *Cobbs/Kennevick* in contract for breach of their lease agreement, he had no cause of action in tort.

*Hudson v. Cobbs*, 118 Idaho 474, 797 P.2d 1322 (1990).

**(5)** ***Duffin v. Idaho Crop Improvement Association (redux***: In addition to their negligence claim, the Duffins also included a negligent misrepresentation claim in their action against the Idaho Crop Improvement Association. The court rejected the misrepresentation claim:

> We need not reach any of the Duffins' arguments, as this Court has strictly limited the cause of action for negligent misrepresentation and it is not viable in this case. In *Hudson v. Cobbs*, 118 Idaho 474, 797 P.2d 1322 (1990), we stated that negligent misrepresentation as recognized in *Idaho Bank & Trust Co. v. First Bancorp of Idaho*, 115 Idaho 1082, 772 P.2d 720 (1989), is not a viable cause of action. [] To further clarify the matter, we expressly hold that, except in the narrow confines of a professional relationship involving an accountant, the tort of negligent misrepresentation is not recognized in Idaho. Accordingly, the Duffins may not maintain a cause of action for negligent misrepresentation against ICIA ....

*Duffin v. Idaho Crop Improvement Association*, 126 Idaho 1002, 1010, 895 P.2d 1195, 1203 (1995).

What was the allegedly negligent conduct in *Duffin*? Is the court correct in characterizing ICIA's conduct as something other than a misrepresentation?

### C. Breach of a Tort Duty Owed to a Third Party Resulting in Economic Loss to Plaintiff

NOTES

(1) A day at the races: In mid-October 1907, Norman Vollmer took the family greyhound to the annual fair at Lewiston. Among the events was a series of horse races. Vollmer failed to maintain sufficient control of the dog which decided to join the race with a decidedly unpleasant result for Benjamin McClain. McClain sued both Vollmer and the Lewiston Interstate Fair & Racing Association for his injuries. A jury verdict for plaintiff- including recovery for lost future wages was affirmed by the supreme court on appeal. *McClain v. Lewiston Interstate Fair & Racing Association*, 17 Idaho 63, 104 P. 1015 (1909).

McClain was only an apprentice jockey. Under the contract of apprenticeship, agreed to provide McClain with room, board, medical care, and transportation and to pay his father $15 per month for the first year and $20 per month for the second and third years. McClain's master, William Cain, also brought suit for the profits he lost as a result of injuries to his apprentice. The court affirmed a verdict for defendants, emphasizing the distinction between the master's action for lost profits and the jockey's action for personal injury and loss of earning capacity:

> In this case the one seeking damages is a race-horse man -- one who follows the races and enters his horses and ... depends on making his money by winning prizes in the various races. That there is a wide difference between the nature and character of damages asked in each of these cases cannot escape the attention of anyone. The one is direct; the other is proximate and dependent upon innumerable secondary and intervening causes. The jockey earned a salary and certain sums for "outside mounts" whether he won the race or not. This was his earning capacity. On the other hand, the jockey alone cannot win the race; he must have a fleet horse ... and upon the whole these imaginative profits may dwindle into real losses.
>
> The profits it is claimed appellant would have realized depend on so many intervening circumstances and contingencies, the unfavorable happening of any of which dissipate these prospective gains. We are fully satisfied that prospective profits to a race-horse man for races that have never been run and race meets and associations that have never been held and against all contestants, is entirely too remote, uncertain and indeterminable to be allowed.

*Cain v. Vollmer*, 19 Idaho 163, 112 P. 686 (1910).

Does this mean that the defendant did not owe the plaintiff a duty of due care? That the interest asserted by defendant was not protected in tort? See also *H.J. Woods v. Jevons*, 88 Idaho 3n, 400 P.2d 287 (1965).

Are the difficulties in determining the income of a horse racing-man significantly greater than those involved in computing the lost earnings of a first-year law student wrongfully killed in an automobile accident? Are there other distinguishing factors?

(2) When a person is killed or injured in an automobile accident, the decedent's business partners may well suffer economic loss as a result of the death or injury. Such economic interests generally are not recoverable in tort. In *Everett v. Trunnell*, for example, the court summarily rejected such a claim, noting that "a partnership has no right to recover for the negligent injury to a partner." *Everett v. Trunnell*, 105 Idaho 787, 673 P.2d 387 (1983). Cf. *Zaleha v. Rosholt, Robertson, & Tucker, Chartered*, 131 Idaho 254,953 P.2d 1363 (1998) (plaintiff cannot recover for her collateral claims for injuries allegedly done to her husband).

## SOME FINAL NOTES

(1) Economic loss is a rapidly evolving area of tort law in Idaho. Are the cases on economic loss consistent? What role did the plaintiff's apparent reliance upon the defendant's expertise play in the creation of the duty in *McAlvain*? What role did the defendant's status as a "professional" play in the decision? What role did defendant's status play in the creation of the duty in strong? Why do contracts such as those in *Knoblock* give rise to a tort duty while those in *Clark* do not?

(2) Note the shift that has occurred: in the paradigm negligence action for personal injuries, the duty issue turns upon whether the defendant was engaged in affirmative conduct that gave rise to a predictable risk of harm. When the loss is solely economic, however, Just's demonstrates that affirmative conduct alone is insufficient to create a duty of due care no matter how predictable the harm. When the loss is solely economic, something more is required. What is that "something" more in *McAlvain*? In *Strong*? In *Knoblock*?

(3) Are the courts variously saying simply that it is the source of the duty which distinguishes tort and contract? That a contract duty is created by and (largely) limited by the parties' consensual agreements while a tort duty is created by the law which imposes a communitarian obligation independent of any voluntary consent? Why was this dividing line-between situation in which the court will impose a duty intort and those in which it will respect the agreement of the parties as to the allocation of losses - chosen? Since negligence reflects community values - reasonableness under the circumstances - does the different treatment accorded personal injuries and property damage on the one hand and economic losses on the other suggest differing perceptions on what is acceptable behavior in each area?

**(4) Policies and rationales:** The caselaw can be viewed as reflecting two dominant policy concerns. On the one hand, the court has sought to preserve contract against the encroachment of tort. The prohibition against recovering pure economic loss in tort serves this goal:

> The law of negligence requires the defendant to exercise due care to build a tractor that does not harm person or property. If the defendant fails to exercise such due care, it is of course liable for the resulting injury to person or property as well as other losses which naturally follow from that injury. However, the law of negligence does not impose on International Harvester a duty to build a tractor that plows fast enough and breaks down infrequently enough for Clark to make profit in his custom farming business.

*Clark v. International Harvester Co*., 99 Idaho 326, 337, 581 P.2d 784, 795 (1978).

On the other hand, the court has also expressed repeated concern over the potential for unlimited liability inherent in pure economic loss situations. Again, the prohibition against recovering pure economic loss in tort serves this policy goal:

> [A] rule, which would allow compensation for losses of economic advantage caused by the defendant's negligence, would impose too heavy and unpredictable a burden on the

> defendant's conduct.... In contrast to the recognized liability for personal injury and property damage, with its inherent limitations of size, parties and time, liability for all the economic repercussions of a negligent act would be virtually open-ended.

*Just's, Inc. v. Arrington Construction Co.*, 99 Idaho 462, 470, 583 P.2d 997, 1005 (1978) (citations omitted).

The sometimes-conflicting, sometimes-reinforcing interaction of these phases on the underlying rationales for tort and contract liability accounts for at least part of the court's apparent scatter-shot approach to pure economic loss cases.

How do these policies interact in the cases involving shoddy goods? In the cases involving shoddy services.

## [B] NONFEASANCE AND ITS EXCEPTIONS

### 1. NONFEASANCE: ACTS AND RISKS

**FAGUNDES v. STATE**

Court of Appeals of Idaho
116 Idaho 173, 774 P.2d 343 (1989)

HART, JUDGE PRO TEM: This is a wrongful death case. Frank Fagundes died shortly after a helicopter he had been piloting crashed. Fagundes was an employee of Pinebelt Helicopters, Inc. The State of Idaho had hired Pinebelt to fly state employees over wilderness areas so that the state employees could count game animals. There are two issues presented in this case. The first is whether the state owed a duty of care to Fagundes, an employee of independent contractor Pinebelt, due to the control the state exercised over the work to be performed.... The district court held that the state did not owe a duty to Fagundes and granted summary judgment in favor of the state. For the reasons explained below, we affirm the judgment of the district court.

[The state hired Pinebelt Helicopters, Inc. to fly state employees over wilderness areas so that the state employees could count wildlife. On April 17, 1987, the helicopter carrying Fagundes and two state employees crashed in a wilderness area. The crash occurred at approximately 7:00p.m. in a steep mountainous canyon. Fagundes was severely injured in the crash. He died in the early hours of the day after the crash. The crash was caused by equipment malfunction; there was no pilot error. The helicopter did not have a homing beacon. If a homing beacon had been on board, rescuers might have been able to locate the downed machine earlier than they did. Although the helicopter had a radio and the state employees had a hand-held radio, the crash survivors were unable to communicate with anyone beyond the canyon in which they had fallen. This inability to initiate long distance communication hampered rescue efforts. The helicopter did not carry medical supplies. If medical supplies had been available at the crash site it is possible that Fagundes' life could have been saved. A third state employee stayed at the helicopter's base camp. This third employee attempted to contact the helicopter for several hours after the crash, without success. The next day this third employee initiated the rescue that eventually saved the two surviving men. If the rescue attempt had begun on the day of the crash, it is possible Fagundes could have been saved.]

Fagundes' survivors filed suit alleging the state was negligent in not requiring that the helicopter contain a homing beacon, in not requiring that radio communications be workable in the event of a crash, in not providing adequate medical supplies to save Fagundes and m not starting the rescue operations earlier. Fagundes' survivors did not allege that the state was responsible for the equipment malfunction that caused the crash. The district court granted summary judgment in favor of the state....

Fugundes' survivors contend that the state's negligent conduct consisted of failures to act rather than acts. The Restatement § 284(b) recognizes that "[n]egligent conduct may be ... a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do." However, Restatement § 314 states that "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." According to the Restatement then, even if the state realized or should have realized that it was necessary for the state to require that Pinebelt's helicopters contain homing beacons, powerful radio transmitters, and medical supplies for the aid or protection of Fagundes, it was not therefore under a duty to require such equipment. Similarly, even if the state realized or should have realized that Fagundes needed to be rescued on the day of the crash, it was not therefore under a duty to rescue him.

Accordingly, the summary judgment of the district court in favor of the state is affirmed.

SWANSTROM, J., CONCURS.

WALTERS, CHIEF JUDGE, CONCURRING AND DISSENTING (ON ANOTHER ISSUE].

NOTES

(1) When can one person be required to act to confer a benefit on another person? Fagundes states the traditional common-law rule: harm resulting from inactivity would not support a suit intort; the defendant must act to be liable. Although socially undesirable activity can be the basis for civil liability, equally undesirable inactivity is usually not deemed tortious. The continued reliance upon the rule-even in such extreme instances as *Buch v. Amory Mfg. Co*., 69 N.H.257, 44 A. 809 (1897) (eight-year old had his hand mangled in machinery while his brother was demonstrating how the machinery worked. The Court denied recovery, stating: "There is a wide difference - a broad gulf - both in reason and in law, between causing and preventing an injury.... The duty to do not wrong is a legal duty. The duty to protect against wrong is, generally speaking ... a moral obligation only.) or *Handiboe v. McCarthy*, 114 Ga. App. 541, 151 S.E.2d 905(1966) (noliabilityforfailuretorescuefour-yearoldfromswimmingpoolcontainingonlythree feet of water) -suggests that it reflects fundamental policies. What are these policies? What is the "broad gulf"? .

**(2)** ***LeDeau v. Northern Pacific Ry*.:** Plaintiff was injured when a rock came through the window of the train in which he was riding. The Idaho Supreme Court concluded that defendant was not liable:

> It is clear, therefore, that the accident did not occur by reason of anything which the appellant or its agents or employees did, nor did it occur through any defect in the appliances which appellant was using, or the instrumentalities it was employing as a common carrier. The only theory on which appellant could be held for the results of this accident would be that it owed to respondent, and to all of its passengers, an active duty to employ such means as were necessary and sufficient to either clear the mountain-side of loose and overhanging rock and stone, or else to construct along its right of way such retaining walls or barriers as would be likely to prevent rock and stone form rolling down the mountainside onto its track. To require such an active duty ... would be imposing upon the company a duty that would be burdensome and might sometimes prove prohibitive ....

*LeDeau v. Northern Pacific Ry*., 19 Idaho 711, 115 P. 502 (1911). Why wasn't the act of constructing the railroad a sufficient act to take the case out of the nonfeasance category?

**(3)** ***Peone v. Regulus Stud Mills, Inc.:*** Regulus was a sawmill operator and owner of timber rights. It employed Haynes Logging to cut the timber. Peone, an employee of Haynes, was injured when he was struck by a snag. Peone sued Regulus, claiming that it had negligently employed an incompetent contractor. On appeal from summary judgment for defendant, the supreme court held that Regulus owed no duty to Peone. It began its analysis by noting that the was a diversity of opinion among jurisdictions over the question of whether a landowner was liable to an employee of an independent contractor. After examining several of the conflicting opinions, the court focused on the knowledge of the parties about the risks:

> Regulus is a sawmill operator. Haynes logging is a logging contractor .... The logging contractor is in a better position that the sawmill operator to assess this risk [of a falling snag]. The logging contractor, when removing timber will most always be faced with problems if dead and diseased trees which create a danger to anyone working in the area. The contractor is able to consider these risks and the necessary costs to insure against them when negotiating a contract price. A sawmill operator, simply by having timber rights on someone else's land, does not have special knowledge about the risks of falling snags on that land.
>
> The Nevada Supreme Court, in reaching the conclusion that no duty is owed by the third-party owner to the employee of an independent contractor stated:

> ... the rationale [for liability is] most soundly based on issues of knowledge and secondary or indirect costs of avoiding accidents. The decision to place liability on one group of potential defendants stems from the recognition that, because of greater knowledge about or ability to reduce safety risks, the placement of liability on this group will keep the number and costs of accidents, both in economic and human terms at a minimum. [] We conclude that Haynes Logging is in a better position to reduce the risks of injury from falling snags....

*Peone v. Regulus Stud Mill, Inc.,* 113 Idaho 374,379,744 P.2d 102, 107 (1987).

Do differences in knowledge explain Fagundes?

To what extent should abstract concerns such as cost minimization play a role in determining duty issues? To the extent that economics is relevant, does Haynes have a significant incentive to guard against risks- given the presence of workers compensation which shields the company from liability for its negligence?

(4) § 37 No Duty of Care with Respect to Risks Not Created by Actor
An actor whose conduct has not created a risk of physical harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in §§38-44 is applicable.

Comment:

c. Misfeasance and nonfeasance: Misfeasance and nonfeasance have a long history of concepts that explain the distinction between affirmatively creating risk and merely failing to prevent harm. However, this distinction can be misleading. The proper question is not whether an actor's specific failure to exercise reasonable care is an error or commission or omission. Instead, it is whether the actor's entire conduct create a risk of physical harm. For example, a failure to employ an automobile's brakes or a far lure to warn about a latent danger in one's product is not a misfeasance governed by the rules in this Chapter [§§ 37-44], because in those cases the entirety of the actor's conduct (driving an automobile or selling a product) created a risk of harm. This is so even though the specific conduct alleged to be a breach of the duty of reasonable care was itself an omission.

e. Rationale. Several justifications have been offered for the no-duty rule provided in this Section. The most common relies on the distinction between placing limits on conduct and requiring affirmative conduct. This distinction inturn relies on the liberal tradition of individual freedom and autonomy. Liberalism is wary of laws that regulate conduct that does not infringe the freedom of others. Some commentators have argued that mandating a duty to rescue might cheapen acts of Good Samaritans. !n addition, it might be difficult to limit an affirmative duty to aid others in peril from becoming a general duty of self-sacrifice. Sometimes there may be many potential rescuers and no basis for choosing one on whom to place a rescue duty. In addition, one may doubt that a duty of easy rescue would have any significant impact on the incidence of such rescues given the effect of nonlegal influences to engage in such rescues. Finally, factual causation tends to be more difficult when the tortious act entails a failure to prevent harm from occurring.

On the other hand, by not imposing a duty to rescue, the Jaw may be understood to convey a message that it condones an actor's failure to assist others in mortal peril when the actor could do so at little or no cost, a proposition that is morally repugnant. The tension between the no-duty rule and these values about humanitarian conduct is reflected in exceptions to the no-duty rule that are addressed in §§ 38-44.

RESTATEMENT (THIRD)OF TORTS § 37 (Proposed Final Draft No.1, Apr. 6, 2005).

**TURPEN v. GRANIERI**

Supreme Court of Idaho
133 Idaho 244, 985 P.2d 669 (1999)

TROUT, C.J.: Valrena Turpen (Valrena) appeals from the trial court's ruling granting Douglas Pecha's (Pecha) motion for summary judgment on her claim for the wrongful death of her son, John Turpen (Turpen).

## I. FACTUAL AND PROCEDURAL HISTORY

[In November 1994, Turpen died of alcohol poisoning while a guest at a home owned by Pecha but leased to two North Idaho College (NJC) students, Matt Paulsen and Christian LaRese. Because Pecha lived out of state, his father, a wrestling coach at NJC, managed the property for him. Paulsen, LaRese, and Turpen were all members of the NIC wrestling team. Turpen, who was of legal age, was attending a party at the house when he died.

[Affidavits filed in the case revealed that neighbors had complained about parties at the home. A neighbor, Hana Oldham, asserted that she had complained to Pecha about loud, all night parties prior to the time Paulsen and LaRese became tenants. According to Odham, Pecha responded that there was nothing he could do and that the tenants were his friends. Other neighbors, June Browning and Sheila Goeke also witnessed parties being held at the house. Browning stated that at one point she complained directly to Pecha and, on the night in question, called the Coeur d'Alene police two or three times. Goeke claims to have called the police, the city attorney, the president of NIC, and the NJC wrestling coach to try to stop the parties. Neither Browning or Goeke, however, stated that they had complained directly to Pecha specifically about Paulsen and LaRese.]

In November 1996, Valrena brought a wrongful death suit claiming that Pecha, knowing that the residence had a reputation as a party house, negligently rented the home to college students and negligently failed to monitor and control his tenants' and their guests' activities, thus, causing Turpen's death. Pecha filed a motion for summary judgment asserting that he had neither the ability nor the duty to control the activities of his tenants. Ruling from the bench, the trial court granted Pecha's motion and Valrena appeals.

## III. DISCUSSION

### A. General Duty to Exercise Ordinary Care

Valrena argues that Pecha breached his duty of ordinary care by renting the home to Paulsen and LaRese. She argues that Pecha knew the home had gained a reputation as a party house for NIC students, NIC wrestlers in particular, and that "dangerous" parties had been held there in the past. Valrena contends that Pecha, nonetheless, rented the home to NIC student wrestlers, Paulsen and LaRese, and in doing so, breached his duty of care causing Turpen's death.

.... Every person, in the conduct of his business, has a duty to exercise ordinary care to "prevent unreasonable, foreseeable risks of harm to others." *Sharp v. WH. Moore Inc*., 118 Idaho 297, 300, 796 P.2d 506, 509 (1990). In determining whether a duty will arise in a particular context, the Court has identified several factors to consider.

> The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

*Rife v. Long*, 127 Idaho 841, 846, 908 P.2d 143, 148 (1995) (quoting *Isaacs v. Huntington Memorial Hospital*, 211 Cal. Rptr. 356, 695 P.2d 653, 658 (1985)).

The Court, in *Sharp*, outlined the role of foreseeability in determining whether a duty exists in a particular case.

> Foreseeability is a flexible concept which varies with the circumstances of each case. Where the degree of result or harm is great, but preventing it is not difficult, a relatively low degree of foreseeability is required. Conversely, where the threatened injury is minor but the burden of preventing such injury is high, a higher degree of foreseeability may be required. Thus, foreseeability is not to be measured by just what is more probable than not, but also includes whatever result is likely enough in the setting of modem life that a reasonable prudent person would take such into account in guiding reasonable conduct.

*Sharp*, 118 Idaho at 300-01, 796 P.2d at 509-10. Moreover, foreseeability relates to the general risk of harm rather than "the specific mechanism of injury." *Id*. at 301, 796 P.2d at 510. 'We only engage in a balancing of the harm in those rare situations when we are called upon to extend a duty beyond the scope previously imposed, or when a duty has not previously been recognized." *Rife*, 127 Idaho at 846, 908 P.2dat 148.While we have previously recognized that a landlord may have responsibilities for assuring that the rented premises are safe, we have imposed that duty only as to the physical premises. Here, we are asked to impose a responsibility for activities taking place on the rented property which in no way implicate the physical condition of the house or surrounding property.

Pecha stated in his affidavit that he had received no complaints about the existing lessees, Paulsen and LaRese, or their guests. Valrena does not contradict this. While he had in the past been told of some parties at the home involving alcohol, all Pecha can be charged with knowing is that neighbors had complained about parties held by prior tenants who were NIC students and that Paulsen and LaRese were also NIC students. Under the facts presented here, there is no indication that Pecha could foresee that by renting to Paulsen and LaRese a social guest would be killed by virtue of the guest's own lawful actions.

While the harm to Turpen was undoubtedly great, Pecha's only ability to prevent the harm would be by refusing to rent the premises at all. In examining the other policy considerations relating to the imposition of a duty, we find no basis for imposing a duty on Pecha to thoroughly screen tenants or refuse to rent the premises to college students. Therefore, we hold that Pecha had no duty under the very limited facts presented here.

For the above reasons, we affirm the decision of the district judge granting Pecha's motion for summary judgment.

JUSTICES SILAK, SCHROEDER, WALTERS AND KIDWELL, CONCUR.

NOTES

(1) What is the source of the defendant's alleged duty? why did the court hoi that defendant did not have a duty to the decedent? How does *Turpen* differ from *Wilson, McKinley*, and *Gibson*? What is missing? Did the landlord fail to act? That is, if the court had held that the landlord had a duty, would he have been liable for failing to act or for acting Jess than reasonably carefully? Did the landlord create the risk?

(2) What is the role of the *Rife* factors in guiding the court's decision to create a duty? What role did they play in this case?

(4) ***Bromley v. Garey*:** Bromley and Sholder went hunting with a shotgun Sholder had borrowed from Garey. Sholder dropped the shotgun, which discharged and struck Bromley. The shotgun misfired and sometimes fired late. The trial court granted Garey's motion for summary judgment.

The supreme court reversed. Garey, the court held, had "a duty to disclose any information regarding a dangerous malfunction.... [I]f Garey knew that the shotgun he loaned to Sholder had a tendency to misfire, fire late, and fire when smacked on the butt, he had a duty to Sholder and other foreseeable users to disclose this information." As the court subsequently stated: "This case implicates the duty to disclose information about a hidden defect that would make the gun far more dangerous than would be expected from a property functioning shotgun. The fact that Sholder and Bromley eventually discovered, by using the gun, that it malfunctioned does not discharge Garey's duty.... Garey's duty must be judged at the time that he loaned the gun to Bromley; the duty existed and was breached at that point, or not at all." *Bromley v. Garey*, 132 Idaho 807, 814, 979 P.2d 1165, 1172 (1999).

(5)

Can Bromley be distinguished from *Turpen*?

**(4)** ***Boots exrei. Boots v. Winters***: A renter owned two dogs, a white one and a brown one. As the juvenile plaintiff and his brother were walking to school, they noticed that the white dog was in the alley. When they returnedthe dogto the backyard, plaintiff was attacked by the brown dog. The brother ran to get the mother who was then attacked by the brown dog. They sued the renter and his landlord. The court of appeals affirmed summary judgment for the landlord. The court began with the recognition that a landlord may have a duty in negligence to third parties.

In determining whether a duty will arise in a particular context, our Supreme Court has identified several factors to consider. *Turpen*, 133 Idaho at 247, 985 P.2dat672.The factors include the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. *Id*.; *Rife v. Long*, 127 Idaho 841,846,908 P.2d 143, 148 (1995). Where the degree or result of harm is great, but preventing it is not difficult, a relatively low degree of foreseeability is required. *Turpen*, 133 Idaho at 248, 985 P.2dat 673; *Sharp {v. WH. Moore, Inc*.,] 118 Idaho [297,] 300-01, 796 P.2d [506,] 509-10 [(1990)]. Conversely, where the threatened injury is minor but the burden of preventing such injury is high, a higher degree of foreseeability may be required. *Turpen*, 133 ldaho at 248, 985 P.2d at673; Sharp, 118 ldaho at 301, 796 P.2dat 510.We engage in a balancing of the harm only in those rare situations when we are called upon to extend a duty beyond the scope previously imposed or when a duty has not previously been recognized. *Turpen*, 133 Idaho at 248, 985 P.2d at 673.

We again find *Turpen* instructive. As noted above, the family of a decedent in that case, contended that the decedent's landlord was negligent with respect to known partying activities of his renters and their guests. The decedent was a college student who died of alcohol poisoning while a social guest at a home the landlord had leased to two other college students. The landlord had been told of some parties held at the house by past tenants who had been students at the college. The landlord, however, had received no complaints about the existing lessees or their guests. The Supreme Court concluded that, although the harm to the social guest was undoubtedly great, the landlord's only ability to prevent the harm was by refusing to rent the premises at all. *Id*. at 248, 985 P.2d at 673. The Court held that there was no basis for imposing a duty on the landlord to thoroughly screen tenants or refuse to rent the premises to college students. *Id*. The Court further held that the landlord therefore had no duty under the very limited facts presented. *Id*.

In the present case, we are aware of no Idaho authority imposing a duty on a landlord to protect third persons from a tenant's dog and, therefore, we must determine whether a duty should be recognized on the facts presented. Based on Jack Winters' affidavit and Martinez's deposition testimony, Martinez never informed the Winterses of any dangerous propensities of the brown dog. Martinez asserted during the deposition that the fence between the backyard and the alley was in good repair at the time of the attack. Additionally, the police officer's affidavit

> indicates that Jason Boots provoked the brown dog by kicking the fence and swinging his jacket at the dog. The dog attacked Landon Boots only after he climbed over the fence to retrieve Jason's jacket, which the dog had pulled into the backyard. Carolyn Boots also climbed over the fence prior to being attacked in the backyard. The harm suffered by Landon and Carolyn appears to have been great. The degree of foreseeability, however, was very low because the Winterses had no knowledge of any dangerous propensities of the brown dog, the initial attack on Landon appears to have been provoked, and both attacks occurred only after the victims climbed the fence which confined the dog to the rented property. Furthermore, requiring landlords to investigate whether a lessee's pet is dangerous prior to allowing the lessee to keep the pet on the rented premises would impose a heavy burden on landlords and impede the ability of tenants to own pets. We decline the Bootses' invitation to adopt such a requirement as the public policy of the State of Idaho. On the facts presented at summary judgment, we hold that the Winterses did not owe a general duty to protect the Bootses from Martinez's brown dog.

*Boots ex ref. Boots v. Winters*, 145 Idaho 389, 179 P.3d 352 (Ct. App. 2008).

If the court of appeals had held that the landlord had a duty, would the landlord have been liable for not acting? For acting less than reasonably careful under the circumstances? Did the landlord. create the risk?

## 2. LAND ENTRANTS AND OCCUPIERS: BOTH THIS AND THAT

### KELLER v. HOLIDAY INNS, INC.

Court of Appeals
105 Idaho 649, 671 P.2d 112 (1983)
affirmed on other grounds,
107 Idaho 593, 691 P.2d 1208 (1984)

BURNETT, J.- We are asked to decide whether a property owner who rents space in a building to a business lessee Lessee, and who authorizes the lessee to bring unsafe appliances upon property, may be liable to the lessee's employees for harm caused by the appliances. The principal parties claiming injury are Gil Keller and her sister, Joan Keller Burman. When the alleged injuries occurred, the Keller Sisters were employed by the proprietor of a gift shop located upon leased space within the Holiday Inn of Boise. The appliances in question were large iron security gat s fabricated and placed on the premises by the gift shop proprietor. The gates surrounded the gift shop when it was closed; but when the gift shop was open, the gates were folded, moved on wheels, and stored elsewhere in the motel. The gates were known to be unstable and prone to collapse. Each of the Keller sisters has alleged that she was physically injured by the security gates while attempting to move them to or from their place of storage.

The Keller sisters sued Holiday Inns, Inc., and certain affiliated entities. The Holiday Inn group moved for summary judgment against the sisters' claims. The group contended that the motel, as a lessor, owed no duty of care to the lessee's employees; and that, even if such a duty were owed, it would not extend to the known risk presented by the unsafe security gates. The district court granted the motion. We reverse.

Part I of this opinion contains an overview of negligence liability. We identify the elements of negligence liability and the general grounds upon which one person may be said to owe a duty of care to another. In Part II we examine the duties imposed upon land possessors to protect entrants upon the property from dangerous conditions and from the harmful activities of third persons. We adopt the modem view that a land possessor's duty is not entirely excused, but liability may be limited, when an invitee encounters a known risk on the property. In Part Ill, we apply this view to the instant case, focusing upon the known danger and the upon motel's status as a lessor. We conclude that Holiday Inn owed the Keller

sisters a duty of care and that the extent of liability, if any, flowing from alleged breach of this duty must be resolved at trial upon remand.

The elements of a cause of action for negligence are familiar. They consist of a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; a breach of the duty; a causal connection between the defendant's conduct and the plaintiffs injuries; and actual loss or damage flowing from those injuries. E.g., *Brizendine v. Nampa & Meridian Irrigation District*, 97 Idaho 580, 583, 548 P.2d 80, 83 (1976). When these elements are established, the defendant is subject to liability. Actual liability will be imposed if the defendant has no defense to the plaintiffs' cause of action. []

Our initial focus is upon the question of duty. Duty is a requirement that one conduct himself in a particular manner with respect to a risk of harm. [] The scope of the duty is defined by the nature of the risk and by the persons endangered by it. A risk may arise from a number of sources, including the actor's own conduct, the conduct of others, or a condition on the actor's property.

Every actor has a general duty to use due care not to injure others by his own conduct. E.g., *Harper v. Hoffman*, 95 Idaho 933, 523 P.2d 536 (1974). In such cases the actor's conduct has brought him into close contact with the risk and the persons endangered. However, an actor's duty to protect others from the conduct of third parties or from conditions on property is more limited. The scope of duty in such cases is measured by the knowledge which the actor had or should have had concerning the risk, and the control which the actor should or could have exercised over the source of the risk and the persons endangered. Where the risk is created by the conduct of third parties, the criterion of control is emphasized. [] In such cases, the courts customarily inquire into the existence of a special relationship between the actor and the third party or between the actor and the persons endangered. E.g., *Joyner v. Jones*, 97 Idaho 647, 551 P.2d 602 (1976); *Davis v. Potter*, 51 Idaho 81, 2 P.2d 318 (1931). Conversely, in cases involving conditions on land, the knowledge criterion often is emphasized. [] The courts have treated a land possessor's superior knowledge of dangerous conditions on his property as the basis for imposing upon him a duty to protect others entering the property. E.g., *Tommerup v. Albertson's, Inc*., 101 Idaho 1, 607 P.2d 1055 (1980).

The criteria of knowledge and control often are closely related. ln a case involving unsafe conduct of a third party, one's special relationship to the third party or to the persons endangered may provide both superior knowledge of the potential harm and a way to control it. Similarly, in a case involving conditions on land, the landowner's possession of the property may afford him superior knowledge of a danger as well as the ability to control it. However, the question of duty becomes more nettlesome when the criteria of knowledge and the control are not coextensive. The courts confront this problem when the landowner could control the unsafe conduct of a third party on his land, or an unsafe condition on the land, but the landowner's knowledge of the danger is not superior to that of other persons entering the land. We now examine the landowner's duty in those circumstances.

**II**

We recognize at the outset that there is no single duty owed by a land possessor to all persons entering his land. The law traditionally has imposed varying duties, depending upon the nature of the visit and the entrants' expectations of what they will encounter on the property.

**A**

A person who enters the property of another with passive permission or as a mere social guest traditionally has been held to understand that he must take the land as the possessor uses it. This entrant, classified by the law as a licensee, is expected to be alert and to protect himself from the risks he encounters. Accordingly, the duty owed to a licensee with respect to such risks is narrowly restricted. The possessor is required simply to share his knowledge of dangerous conditions or dangerous activities with the licensee. When such a warning has been given, the possessor's knowledge is no longer superior to that of the licensee, and the possessor's duty extends no farther. [ 1 Of course, the possessor must avoid willful and wanton injury to the licensee. But ordinarily negligence allowing an unsafe condition or activity

on the property is insufficient, by itself, to impose liability to a licensee. *Wilson v. Bogert*, 81 Idaho 535, 347 P.2d 341 (1959).

However, the law has adopted a more protective view toward an invitee. An invitee is a person who enters upon the land for a purpose connected with the business conducted there, or for a visit which reasonably may be said to confer or to anticipate a tangible benefit to the possessor. *Wilson v. Bogert*, supra. The invitee is not required simply to take the property as the possessor uses it. Rather, the invitee is entitled to assume that the property has been made safe for him to enter. Accordingly, the possessor has not only a duty to disclose dangerous conditions, but also the duty to exercise reasonable affirmative care to keep the premises safe for an invitee. *Feeny v. Hanson*, 84 Idaho 236, 371 P.2d 15 (1962).

We acknowledge that this traditional distinction between the duties owed to licensees and invitees has been the subject of persistent criticism. [] A few jurisdictions have abandoned or limited the rigid distinctions among duties owed to different categories of entrants upon land. E.g., *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968); []. However, our Supreme Court on several recent occasions has declined invitations to do so. *Huyck v. Hecla Mining Co*., 101 Idaho 299, 612 P.2d 142 (1980); *Springer v. Pearson*, 96 Idaho 477, 531 P.2d 567 (1975); *Mooney v. Robinson*, 93 Idaho 676,471 P.2d 63 (1970).

Consequently, we deem ourselves constrained to accept the distinction between a licensee and an invitee, and to identify the relevant category in this case. Holiday Inn rented space in its building to the gift shop proprietor for a business purpose. The employment of personnel by the gift shop proprietor clearly was within the purpose. Consequently, we hold that these employees were invitees. Our inquiry is narrowed to the duty owed by the land possessor to an invitee.

**B**

The broad duty owed an invitee has not always been fully understood. ln many cases, an invitee's voluntary encounter with a known danger has been characterized not only as a defense to the possessor's liability for breach of a duty owed to the invitee, but also as an exception to the duty itself. Thus, in *Splinter v. City of Nampa*, 70 Idaho 287, 215 P.2d 999 (1950), the Idaho Supreme Court upheld judgment against an invitee injured by an obvious risk which he had voluntarily encountered. The Court did not specify whether the property owner's nonliability was due to absence of a duty to protect the invitee, or to the presence of a defense against breach of that duty. ln *Alsup v. Saratoga Hotel, Inc*., 71 Idaho 229,229 P.2d 985 (1951), the Supreme Court held both that an invitee assumes ordinary risks of harm upon the property, and that the owner owes the invitee no duty to obviate dangers from known or obvious risks. The Supreme Court reiterated in later cases that an owner has no duty to protect an invitee from open and obvious dangers. *Baker v. Barlow*, 94 Idaho 712,496 P.2d 949 (1972); *Tafoya v. Fleming*, 94 Idaho 3, 479 P.2d 483 (1971). Cf. *Mann v. Safeway Stores*, Inc., 95 Idaho 732, 518 P.2d 1194 (1974), and *Giles v. Montgomery Ward Co*., 94 Idaho 484, 491 P.2d 1256 (1971) (owner need warn only against hidden or concealed dangers). The original Restatement of Torts (1934) ... took a similar approach.... The notion expressed in the First Restatement and in Idaho cases cited above, that an invitee's knowledge of a risk entirely excuses the land possessor's duty of care, has been severely disapproved by legal scholars. [] This notion also has come under fire from two perspectives by other courts. First, it has been criticized for blurring the distinction between a land possessor's duty of care and a defense which may limit his liability for breach of that duty. []

Secondly, the courts have observed that, in some circumstances, an invitee might reasonably encounter a risk which was obvious. An example is furnished in *Offs v. Brough*, 90 Idaho 124, 409 P.2d95 (1965). There, our Supreme Court recited the traditional rule, that a possessor owed no duty to an invitee with respect to an obvious danger; but the Court said that a jury question remained as to whether the invitee's conduct was reasonable because his attention to the danger may have been distracted by other activity on the premises.

Thus, the traditional rule, that a land possessor's duty is entirely excused by a known or obvious danger has become discredited. The Second Restatement now contains enumerations of duty which do not make express exceptions for known or obvious dangers. These duties are stated with respect to risks

created by third persons on the property and to risks posed by conditions on the property. Both forms of duty are germane to the instant case. The unsafe security gates may be viewed either as the products of an unsafe activity conducted on the motel premises by the gift shop proprietor, or as an unsafe condition on the motel property itself.

**C**

In deciding the scope of duty applicable to the present case, we must choose between the traditional notion, that a known or obvious danger excuses a land possessor's duty, and the modem view that knowledge or obviousness of a danger does not excuse duty but may limit liability. This choice is framed by two recent decisions of our Supreme Court. In one case, the Court adopted the Second Restatements formulation of limited liability for a known or obvious risk, and the exception where the land possessor "should anticipate the harm despite such knowledge or obviousness." See *Ryals v. Broadbent* Development Co., 98 Idaho 392, 565 P.2d 982 (1977) (plurality opinion), overruled on other grounds, *Seppi v. Betty*, 99 Idaho 186,579 P.2d 683 (1978). In *Ryals* the Court upheld a jury instruction taken almost verbatim from 343A, noting that this section "has been widely accepted since its adoption ... and we find no error." (] However, the Second Restatement and *Ryals* were not mentioned by the Court's subsequent opinion in *Tommerup v. Albertson's, Inc.,* 101 Idaho 1,607 P.2d 1055 (1980).in Tommerup the Court, upholding a judgment against a grocery store customer who had been injured on the premises, reverted without explanation to the traditional rule. The Court said that a proprietor's duty to keep premises safe for an invitee did not extend to dangers known to the invitee or which, by the exercise of ordinary care, should have been observed by the invitee. []

In our view, a known or obvious danger should be treated as a limitation upon liability, rather than as an excuse of duty. This view recognizes the difference between existence of a duty on one hand and the availability of a defense for breach of that duty, on the other hand. Our view also brings the land possessor's duty toward invitees into greater conformity with the scope of his knowledge and the extent of his control over the danger. Under this view, a duty to protect mVJtees anses when the possessor knows or should know about a danger posed on his land by a condition or a third party within his control. The duty is not restricted to situations where the land possessor's knowledge is superior to that of his invitees.

There is also a statutory reason in Idaho to treat an invitee's knowledge or the obviousness of a danger as a limitation of liability rather than as an excuse of duty. Since 1971, Idaho has been a comparative negligence state. I.C. § 6-801 provides that the plaintiffs contributory negligence does not bar recovery in a negligence action, so long as his negligence is not as great as the negligence of the person against whom recovery is sought. Rather, any damages awarded to the plaintiff are reduced in proportion to the amount of causal negligence attributable to him.

Prior to the advent of comparative negligence, contributory negligence was an absolute bar to recovery. Thus, it made little difference whether a known or obvious condition excused a land possessor's duty to an invitee, or simply insulated the possessor from liability for any breach of such duty. In either event, the injured invitee could not recover. But under the comparative negligence system, the difference is profound. If duty is not excused by a known or obvious danger, the injured invitee might recover, albeit in a diminished amount, if his negligence in encountering the risk is found to be less than the land possessor's negligence in allowing the dangerous condition or activity on his property. In contrast, if the invitee's voluntary encounter with a known or obvious danger were deemed to excuse the landowner's duty, then there would be no negligence to compare- and, therefore, no recovery. The effect would be to resurrect contributory negligence as an absolute bar to recovery in cases involving a land possessor's liability to invitees.

The Oregon Court of Appeals recently expressed a similar view concerning the comparative negligence laws of that state. In *Woolston v. Wells*, 663 P.2d408 (Or. App. 1983), the court held that an invitee's negligence in confronting a known danger must be weighed against the owner's negligence in maintaining the danger on his premises.

Accordingly, we adopt the modem view. We hold that the obviousness, or an invitee's knowledge, of a dangerous activity or condition does not excuse the land possessor's duty of care toward the invitee. Such knowledge or the obviousness of the danger may be considered in evaluating the sufficiency of protective measures undertaken by the possessor; and it may be considered in evaluating a defense of contributory negligence, which may limit the land possessor's liability. If this defense is raised, the invitee's negligence in encountering the danger should be compared to the land possessor's negligence in failing to protect the invitee against it.

**D**

As noted, Second Restatement § 343A limits the liability of a land possessor for a breach of duty to protect an invitee from unsafe conduct of third persons or unsafe conditions, on the land. The section is itself subject to a limitation where the land possessor "should anticipate the harm despite such knowledge or obviousness." Comment f to § 343A explains that a possessor may have "reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." Illustration 5 to comment f suggests that this limitation may arise from the invitee's employment:

> A owns an office building, in which he rents an office for business purposes to B. The only approach to the office is over a slippery waxed stairway, whose condition is visible and quite obvious. C, employed by Bin the office, uses the stairway on her way to work, slips on it, and is injured. Her only alternative to taking the risk was to forgo her employment.

A is subject to liability to C.

This employment limitation has been recognized by the courts... Just as a known or obvious danger does not entirely excuse a land possessor's duty to an m tee, neither does the employment limitation to §343A wholly excuse the invitee's duty to exercise reasonable caution for his own safety. Rather, the invitee's employment may be considered in weighing the reasonableness of his voluntary encounter with the risk....

**III**

We now return to the instant case. This is an appeal from a summary judgment.

The facts framing the question of duty are not in dispute.... We believe the trier of fact in this case reasonably could infer Holiday's knowledge of the following: that the Keller sisters were employed at the gift shop, that their duties included moving the security gates, and that the gates were unsafe. In addition, the trier of fact reasonably could infer that Holiday was in a position to control the movement and storage of the gates, and to control the month-to-month existence of the gift shop itself.

These undisputed facts, and the reasonable inferences which might be drawn from them, are sufficient to make a prima facie showing that Holiday owed a duty of care to the Keller sisters as invitees. This duty may be recognized regardless of whether the gates are viewed as products of an activity by the former employer, or as conditions on the motel premises. If the gates are treated as products of a third party's conduct, a trier of fact, applying Second Restatement § 318, [], reasonably could find that Holiday's management was "present" on the motel premises, that Holiday knew or had reason to know that it could control the gift shop proprietor's use of the security gates, and that Holiday knew or should have known that exercise of such control was necessary to prevent harm to invitees on the premises. Conversely, if the gates are viewed as a condition on the property, the duty arises under Second Restatement § 343, []. A trier of fact applying this section reasonably could find that Holiday knew of the danger posed to invitees by the gates; that the risk of harm was unreasonable; and that the Keller sisters would not protect themselves against the risk because their jobs required them to move the gates.

Assuming the existence of a duty, the next question is whether a limitation of liability has been demonstrated as a matter of law. To establish contributory negligence by the Keller sisters, it must appear

that the sisters acted unreasonably by encountering the known risk. We believe a genuine issue exists on this point. Moreover, even if contributory negligence were deemed established, such negligence would not necessarily preclude recovery but would be weighed against any negligence by Holiday. The process of comparing negligence turns closely upon the facts developed at trial, and ordinarily is inappropriate for summary judgment. E.g., *Robinson v. Westover*, 101 Idaho 766, 620 P.2d 1096 (1980); *McKinley v. Fanning*, 100 Idaho 189, 595 P.2d 1084 (1979).

Of course, this weighing process might be obviated if a plaintiff's negligence so dominated a case, and was so unforeseeable, that as a matter of law it severed the proximate, causal link between the defendant's alleged negligence and the injury claimed. See, e.g., *Joyner v. Jones*, 97 Idaho 647, 551 P.2d 602 (1976). However, we believe a trier of fact reasonably could find that the Keller sisters' conduct in this case was foreseeable. We conclude that Holiday should not have been granted summary judgment on the ground that the risk was known or obvious.....

WALTERS, C.J., AND SWANSTROM, J., concur.

NOTES

(1) What is the source of the duty? Did defendant create the risk of harm? Is the case more analogous to *McKinley v. Fanning* or to *Turpen*? What is the scope of the duty? What interest is protected by the duty? Are the court's statements in paragraph 31 consistent with its earlier statements in paragraphs 19-20? If plaintiffs conduct should be treated as a limitation on liability in regard to duty, why should it not also be treated as a limitation on liability in regard to scope of liability issues?

(2) *Keller v. Holiday Inns, Inc.* (pt. 2): Following the court of appeals' decision, the Idaho Supreme Court accepted review. While the supreme court also reversed the trial court's summary judgment, it did so on much narrower grounds. After examining the decision in *Ryals v. Broadbent Development Co*., 98 Idaho 392, 565 P.2d 982 (1977), the court stated:

> The common theme in Ryals and the present case is the difficult position of an employee when directed by the employer to perform work which involves a dangerous condition or activity on the landowner's premises. In these cases, the landowner has reason to expect that the employee will proceed to encounter the dangerous condition in order to keep his or her job. Since the employer is shielded by the workman's compensation laws, the e cases will necessarily involve the employee/invitee and the landowner. We hold that m these situations, a landowner is not relieved of the duty of reasonable care which the landowner owes to the employee/invitee for his or her protection even _though e dangerous condition is known and obvious to the employee. Therefore, Holiday Inn did owe a duty of reasonable care to plaintiffs.

*Keller v. Holiday Inns, Inc.,* 107 Idaho 593, 691 P.2d 1208 (1984).

**(3} Knowledge and control**: Is the court's discussion of the. relevance of control and knowledge to the imposition of duty helpful? Control, the court writes, is most apparently relevant to situations involving risks created by the conduct of a third party and courts are, therefore, generally required a special relationship between the defendant and the third party before imposing a duty on the defendant. Knowledge, the court notes, is more relevant in the land entrant/land occupier situations. In Keller, did the land entrant or the land occupier have more knowledge of the risk? In general, however, would a land entrant be likely to have more knowledge about the condition of the premises than the entrant? Should rules - such as the different degrees of care owed the entrant depending upon her status - be based upon assumptions about probabilities?

(4} ***Harrison v. Taylor*** (open and obvious danger}: The Idaho Supreme Court finally abolished the open and obvious danger rule in *Harrison v. Taylor*. Plaintiff and her husband made a business visit to Gloria's House in Bloom, operated by defendant, to pickup a floral arrangement. The sidewalks were dry that day. While approaching Gloria's House in Bloom, Ms. Harrison encountered what she described as a hole: a slab had been removed and gravel remained. Ms. Harrison stated in her deposition that she

successfully negotiated the hole when entering the floral shop by stepping into the middle of it. When leaving plaintiff saw the hole and stepped over it with her right foot. Her left foot, however, caught the lip of the hole and she fell, breaking both arms. The trial judge granted defendants' motion for summary judgment based on the open and obvious doctrine. The supreme court reversed, following the court of appeals' earlier rationale:

> Although it is apparent that Section 343A of the Restatement (Second) of Torts was adopted and applied in Ryals and Keller, we base our decision today on a broader reading of our cases and of the legislative intent derived in Idaho's comparative negligence statute. We do not today simply extend the Ryals/Keller employee exception from the open and obvious danger doctrine to the facts of this case. Instead, as explained below, we simplify the standard of care applicable to both owners and occupiers of land, and to the invitees who come upon the premises. Fundamental to our decision is the legislative mandate that comparative negligence shall apply in all negligence actions. I.C. § 6-801.

*Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321 (1989).

(5} Retaining the common-law entrant classifications: As the court of appeals noted in Keller, the Idaho Supreme Court has consistently refused to reconsider the wisdom of the tripartite entrant classifications. See *Huyck v. Hecla Mining Co*., 101 Idaho 299, 612 P.2d 142 (1980); *Springer v. Pearson*, 96 Idaho 477, 531 P.2d567 (1975); *Mooney v. Robinson*, 93 Idaho 676,471 P.2d 63 (1970).

(6} ***Rehwalt v. American Falls Reservoir District# 2***: While the court was unwilling to reject the tripartite entrant classifications, it has also refused to extend them into related areas of property law. In Rehwalt, the question before the court was the proper standard of care owed by the owner of an easement to the owner of the servient estate:

> While this Court has recently refused to abolish the legal categories of licensee, invitee and trespasser, in favor of a general negligence standard, ...we do not favor an expansion of the use and application of the licensee-invitee-trespasser categories, originally developed to protect and immunize the land owner or occupier, to measure the standard of care owed by an easement owner to the owner of a servient estate. In their critique of the licensee-invitee-trespasser categorization, Harper & James note that the rationale for his limited immunity was originally based on lack of foreseeability. They state that it would be consistent with this rationale to extend the protection to easement owners. However, they then argue that since the common justification for granting limited immunity to owners is unsatisfactory it should not be so extended.
>
> And if immunity originated in an overzealous desire to safeguard the right of ownership as it was regarded under a system of landed estates, then there seems to be no reason for extending special tenderness beyond the scope required by precedent, or for enlarging the class of defendants exempted from the duty generally owed all men to use reasonable care towards everyone likely to be hurt by their carelessness." 2 Harper & James 1434.We agree with the conclusions of Harper &James and decline to expand the use of the licensee-invitee-trespasser categories. Rather, we hold that American Falls is to be held to the general standard to use ordinary care in the management of the easement property.

*Rehwalt v. American Falls Reservoir District# 2*, 97 Idaho 634, 550 P.2d 137 (1976). If the traditional rules represent "an overzealous desire to safeguard the right of ownership" as it existed in the medieval period and if this should not be expanded, why should the rule as applied to land occupiers be allowed to stand?

(7) When land occupier is sued by a land entrant, the primary duty issue is the scope of the duty owed to the entrant. Under the traditional common-law analysis, the scope of the duty varies with the status of the entrant: for example, more care is owed to an entrant classified as an invitee than to an entrant who is a licensee.

As the supreme court has commented: "The distinction between trespassers, licensees, and invitees is the controlling test in determining determining the scope and extent of the duty of care owed by

landowners to entrants. See *Huyck v. Hecla Mining Co*., 101 Idaho 299, 612 P.2d 142{1980)." *O'Guin v. Bingham County*, 139 Idaho 9, 72 P.3d 849 (2003). The remaining materials in this section will examine (1) the definition of the three land entrant classifications and (2) the scope of duty owed to each of the three traditional classifications. Do any of the scope standards correspond to the general, reasonable-person-under-the-circumstances standard? Can a land occupier even be liable to a trespasser in negligence?

**a. Trespassers**

NOTES

(1) Definition of "trespasser"': "Anyone who goes upon the private property of another without lawful authority or without permission or invitation, express or implied, is a trespasser to whom the landowner owes no legal duty until his presence is discovered." *Bicandi v. Boise Payette Lumber Co*., 55 Idaho 543,44 P.2d 1103 (1935).

IDJI 3.19.1 defines "trespasser" as

> A trespasser is a person who goes or remains upon the premises of another without permission, invitation or lawful authority. Permission or invitation may be express or implied.

(2) Definition of "trespasser"' (pt. 2): When is a trespasser not a "trespasser"?

(a) *Keim v. Gilmore & Pittsburgh R.R*.: Recall that in Keim, plaintiff was taking a shortcut across defendant's land when he was struck by a protrusion from a car being pulled down the track. The Idaho Supreme Court concluded:

> It has been argued that the respondent was a trespasser on appellant's station grounds and that the company owed him no such duty as it owes to those who are invited to its station on business with the company. It is well settled that a railroad company is not under the same duty to look out and take precautions for the care and safety of a trespasser that it is under to those whom it invites to its stations and grounds for business purposes. It is settled, however, in this state that they are liable to a trespasser for reasonable care and precaution even before their negligence reaches the stage where it may be designated as wanton or willful negligence. [] They have no right to injure or kill a trespasser. To our minds, the care and precaution which the company took in this case in operating this car could not be termed ordinary care.... The evidence discloses that Keim was at least a licensee on these premises. Witnesses testify that there was a path from Junction to the markets at Leadore that had been traveled at least ever since the railroad was constructed, and that the course Keim was taking on this occasion was along the course of that path, and that this had been traveled continuously by pedestrians between the two towns ever since the construction of the road. It is well settled that where such a custom or practice prevails, the railroad company is chargeable with notice that licensees or trespasses, if you please, may be on or along the track at such places. [] It should be remembered that respondent was at a place where the appellant might always expect licensees and employees, and where it was the duty of the company to maintain a lookout for persons who might rightfully be on the premises, and even though the respondent were himself a trespasser at that place, the appellant, on the other hand, would be chargeable with a greater duty even to him at that place than it would have been at some remote or isolated place where it was not chargeable with the duty of looking out for those it might expect upon its premises and about its tracks.

*Keim v. Gilmore & Pittsburgh R.R*., 23 Idaho 511, 131 P. 656 (1913). See also *Reardon v. Union Pacific R.R.*, 93 Idaho 833, 475 P.2d 370 (1970) (it is unnecessary to determine the status of plaintiff who injured while crossing defendant's tracks). *Denbeigh v. Oregon-Washington R.R. &Navigation Co*., 23 Idaho 663, 132 P. 112 (1913) (the operators of a train have a duty to sound a warning where a person is walking along a railroad track in an area where the company tolerates such use of its tracks). *Fleenor v. Oregon*

*Short Une R.R*., 16 Idaho 781, 102 P. 897 (1909) (the court is "not going to examine into the location very ...minutely to determine whether he was in fact a trespasser or traveling at a place where he had a right ... to go. The duty of the railroad company would be substantially the same in either event, because it could not, within a distance of eight feet, materially change its attitude with reference to diligence in operating its locomotive.... In other words, the necessary diligence and precaution that would have saved the ...decedent on the F Street crossing would have ...saved ...him at a distance of eight feet farther ahead."). *Anderson v. Great Northern Ry*., 15 Idaho 513, 99 P. 91 (1908) (while the majority rule is that a trespasser is owed no duty other than to avoid "willful or wanton injury," a "better considered line of authority" rejects status as determination and instead imposes a duty "to exercise special care and watchfulness at any point upon its track where people may be expected").

> (b*)* *Ellis v. Ashton & St. Anthony Power Co*. was subsequently described by the court:
> In *Ellis v. Ashton & St. Anthony Power Co*., 41 Idaho 106,238 P. 517 (1925), this Court held that the evidence showed what the Court referred to as "wanton negligence." There a nine-year old girl was instantly killed by coming in contact with a high-tension transmission line that had been constructed on the bank of a canal that was private property. The wire with which the child came in contact was only five feet four inches from the ground. There were no warnings, barriers, fences or other obstructions to protect the public from the line. There were piles of loose dirt on the canal bank that were "above the level of the surrounding country and would necessarily be somewhat prominent and afforded a view for quite a distance." [] The power company "knew of the dangerous construction of the secondary line and the condition of the country, and in general, the adjacent population, the number of school children and that the road ***upon which the children traveled to school, extended immediately by the spoil bank upon which the line was constructed." [] The deceased girl trespassed on the canal bank and was electrocuted by the sagging power line. The jury awarded the parents of the deceased girl $10,000 for her death. In affirming the judgment this Court approved an instruction that "stated that if the defendants maintained a dangerous agency and knew that children or others were accustomed to frequent or go on the ground, then if the dangerous appliance were unprotected, and if by reason of defendants' negligence injury resulted, the defendants would be liable." [] The Court concluded that this instruction was evidently framed for the purpose of further indicating the jury what conditions should necessarily obtain before the defendants would be guilty of wanton negligence. []

*Jacobsen v. City of Rathdrurn*, 115 Idaho 266, 766 P.2d 736 (1988). See also *Pittman v. Sather*, 68 Idaho 29, 188 P.2d 600 (1947) ("they were lulled into security in entering [the almost-completed-but-not-formally-opened highway] by the appearance of the way and the l ck of barricades or other warnings .... Therefore, they cannot, under their evidence, be considered trespassers."); *Lindquist v. Albertson's, Inc*., 113 Idaho 830, 748 P.2d 41 (Ct. App. 1987) ("there was no showing of ... frequent or general entry into the abandoned freight-loading are of the premises where Lindquist was injured" and he thus was a trespasser); *Peterson v. Romine*. 131 Idaho 537, 541, 960 P.2d 1266, 1270 (1998) ("The fact that the Landowners were trying to promote their business does not create an inference that customers for other downtown businesses were invited to park in a parking lot specifically marked for the use of the respondents' customers.").

> **(c) IDJI3.17 --Duty once presence is discovered**
>
> Once an [owner] [occupant] discovers a visitor of any status proceeding on a co rse, which probably will result in harm because of a dangerous condition of the premises, which is known to the [owner] [occupant] but not known to the visitor, the [owner] [occupant] owes a duty to use reasonable means to warn the visitor of the dangerous condition. The failure to do so amounts to reckless conduct.

Would this instruction have been appropriate in *Keim v. Gilmore & Pittsburgh R.R*.? In *Ellis v. Ashton & St. Anthony Power Co.*?

(3) **Definition of "trespasser" (pt 3): attractive nuisance**: One recurrent defense to the classification of a child as a trespasser is the attractive nuisance doctrine.

(a) ***York v. Pacific Northern Ry***.: Plaintiffs brought a wrongful death action for the death of their four-year-old son who was crushed in a railroad turntable. The railroad appealed a jury verdict, arguing in part that the decedent was a trespasser. The Idaho Supreme Court rejected the argument, noting that

> It is not shown that there was any reason for anyone to think that it was a trespass to go upon this turntable any more than to walk upon the track of appellant. It is shown that there were no obstructions to anyone going upon the turntable, and that there were no signs warning people of danger. It is also shown that people were in the habit of going upon the turntable and using it as a merry-go-round, and that it was an attractive place for children.

Therefore, "[i]t is clearly the duty of appellant or any other corporation or individual to protect life and property in all reasonable ways." *York v. Pacific Northern Ry*., 8 Idaho 574, 69 P.2d 1042 (1902). The court has subsequently cited York as adopting the attractive nuisance doctrine. E.g., *Bass v. Quinn-Robbins Co*., 70 Idaho 308, 216 P.2d 944 (1950). Given the court's emphasis on "people" rather than "children," it is at least arguable that the court in York did not actually intend to adopt such a limited exception.

(b) ***Davis v. McDougall***: Plaintiff, a three-year-old tenant in defendant's apartment house, was injured when her hand was caught in the wringer of a washing machine. The trial court granted the: landlord a summary judgment after concluding that a washing machine could not be an attractive nuisance. The Idaho Supreme Court disagreed:

> The attractive nuisance doctrine has been recognized in this jurisdiction for well over six decades. See *York v. Pacific & Northern Ry*., 8 Idaho 574, 69 P. 1042 (1902). Under this doctrine iit has been held that the object or condition must be of an unusual nature and character so as to render it peculiarly attractive and alluring to children. *Anneker v. Quinn-Robbins Co*., 80 Idaho 1, 323 P.2d 1073 (1958); *Bass v. Quinn Robbins Co*., 70 Idaho 308, 216 P.2d 944 (1950). While this is still the rule in Idaho where the alluring quality of the injuring agency can be shown the "attractive nuisance': doctrine does not satisfactorily conclude the inquiry in this case.
>
> In most states, the attractive nuisance doctrine has either been replaced by, or has evolved into, a set of criteria which in essence are within the consideration of negligence generally. []
>
> . . .
>
> An inflexible rule that a common household item such as a washing machine cannot be an attractive nuisance, such as the trial court announced here, ignores reality and the reason for having a special rule for injured children originally. This approach fails to account for the greater lack of judgment among younger children and does not allow for the practical fact that very young children have only scant understanding of the most common articles even if highly dangerous. The more rational solution is to consider both the injuring mechanism and the age and sophistication of the child .... Whether a child three and on-half years old should or does understand dangers attendant to a washing machine is a question which should have been considered by the jury.

*Davis v. McDougall*, 94 Idaho 61, 480 P.2d 907 (1971).

(c) *Hughes v. Union Pacific R.R*.: Plaintiff, a thirteen-year-old boy, was injured when his foot was caught in a coupler as he crossed through defendant's switching yard. Relying upon *Bass v. Quinn-Robbins Co*., the Idaho Supreme Court held:

> To render the owner liable the structure or condition maintained or permitted on his property, must be [1] peculiarly or unusually attractive to children; [2] the injured child must have been attracted by such condition or structure; [3] the owner must know, or the facts be such as to charge him with knowledge, of the condition, and that children are likely to trespass and be injured; [4] the structure or condition must be dangerous and of such a character that the danger is not apparent to immature minds.

The court affirmed the trial court's holding that plaintiff was aware of the risk. *Hughes v. Union Pacific R.R.*, 114 Idaho 466, 757 P.2d 1185 (1988). Should plaintiff's awareness of the risk remain a relevant issue after *Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321 (1989)? Is it, in short, simply a disguised application of the open and obvious danger doctrine?

Other Idaho cases applying the doctrine include: *Jacobsen v. City of Rathdrum*, 115 Idaho 266, 768 P.2d 736 (1988); *Daniels v. Byington*, 109 Idaho 365, 707 P.2d 476 (Ct. App. 1985); *Bicandi v. Boise Payette Lumber Co*., 55 Idaho 543,44 P.2d 1103 (1935).

(d) *O'Guin v. Bingham County*: Three children who were enrolled in summer school took a shortcut home by crossing a county landfill, which they entered through an unlocked gate. The two younger children dallied despite warnings by the older brother. They were found lifeless at the bottom of the pit; they had been crushed when a wall gave way.

> The [plaintiffs] argue that the opening in the fence on Ridge Street at the canal was an open and obvious access point, which was not restricted. This argument, however, which suggests an "implied invitation" to enter into the property, does not alter the boys' status as trespassers but may be relevant to the landowners' duty to the children. See *United Zinc & Chemical Co. v. Britt*, 258 U.S. 268 (1922} (an invitation to children may be implied from knowingly exposing something which attracts them on the land, but the principle, if accepted, must be very cautiously applied). Therefore, the facts before the district court support the court's conclusion that the boys were trespassing at the time of the accident.
>
> The attractive nuisance doctrine under Idaho law applies only to children who were attracted onto the defendant's premises by a dangerous object or condition. *Ambrose v. Buhl Joint School Distr.*, 126 Idaho 581, 585,887 P.2d 1088, 1092 (Ct. App. 1994). A plaintiff asserting attractive nuisance must prove:
>
> > (1) a structure/condition on the defendant's premises which the defendant knew or should have known in the exercise of due care, involved a reasonable risk of attraction and harm to children; (2) the structure or condition maintained or permitted on the property was peculiarly or unusually attractive to children; (3)the structure/condition was such that the danger was not apparent to immature minds; and (4) the plaintiff was attracted onto the premises by such structure/condition.
>
> *Bass v. Quinn-Robbins Co.,* 70 Idaho 308, 216 P.2d 944 (1950). If any one of these elements IS not established, a claim of attractive nuisance fails. *Nelson By and Through Nelson v. City of Rupert*, 128 Idaho 199,911 P.2d 1111 (1996).
>
> The evidence in the record indicates that the boys first entered the County property as a shortcut to the school. Once on the premises, the boys were attracted into the area of the landfill pit, specifically the slopes of the pit, when they saw other boys throwing rocks to undermine the slopes and dislodge gravel and dirt. The O'Guin boys descended into the pit to get into the shade provided by the slope and started to dig into the slope, which collapsed on them. The district court determined that the plaintiffs had not established that the boys were attracted onto the landfill property by the open pit or the piles of debris. The district court was not persuaded to distinguish the boys' entry into the two, arguably distinct sections of the County property. We agree with the district court's conclusion that the dangerous condition that caused harm to the boys was only discovered after they had entered the property. Accordingly, we affirm the dismissal of the attractive nuisance claim.

*O'Guin v. Bingham County*, 139 Idaho 9, 72 P.3d 849 (2003).

(e) Defense or theory of recovery? Traditionally, the attractive nuisance doctrine has been treated as an exception to the limited duty owed to a trespasser: a child attracted into the property by a dangerous condition is not required to prove that the land occupant acted with recklessness. She will be able to recover if she can prove conduct approaching a lack of due care. The doctrine thus is something

akin to a theory of recovery. Note the final sentence in the excerpt from *O'Guin*: "we affirm the dismissal of the attractive nuisance claim."

A five-year-old girl and an eight-year-old boy were lured into a city shed by a fourteen? year-old boy, who taped them to chairs and sexually assaulted the girl. The supreme court affirmed the dismissal of the children's action for attractive nuisance.

> The district court ruled from the bench that the claim failed because the shed itself was not dangerous and did not cause the injury. The district court was correct in its analysis. The shed was not dangerous; it did not cause the injury. The children were not attracted to the premises by the condition or the structure. They were lured there by Wetherell.

*Doe v. City of Elk River*, 144 Idaho 337, 160 P.3d 1272 (2007).

(f) IDJI 3.20 is applicable when a plaintiff asserts the attractive nuisance doctrine: The plaintiff has the burden of proof on each of the following propositions:

> 1. A structure or condition existed on the defendant's premises that was peculiarly or unusually attractive to children;
> 2. The structure or condition on the property was such that it presented a reasonably foreseeable risk of injury to any children who might go onto or into the premises;
> 3. The structure _or condition on the property was such that the danger or risk of harm it presented to children would not be readily apparent to a child of the age, experience and maturity of the plaintiff;
> 4. The defendant was aware, or in the exercise of ordinary care should have been aware, of the attractiveness of the premises to children and of the risks of harm to children that it presented; The plaintiff was attracted onto the defendant's property by such structure or condition;
> 6. The plaintiff was injured;
> 7. The structure or condition was a proximate cause of the injury; and
> 8. The nature and extent of the injuries, the elements of damage, and the amount thereof.
>
> You will be asked the following question on the jury verdict form:
>
> > Was the defendant negligent in maintaining or permitting an attractive nuisance on his property, which negligence was the proximate cause of plaintiff's injuries?
>
> . . . If you find from your consideration of all the evidence that each of the propositions in this instruction has been proved, then you should answer the question "yes". If you find from your consideration of all the evidence that any of these propositions has not been proved, then you should answer the question "no."

(4) Scope of the duty owed a trespasser: As the court noted in *Bicandi*, "the landowner owes no legal duty until [the trespasser's] presence is discovered." After that, "the duty of the defendants, as owners or tenants, was to refrain from willful or wanton acts which might cause injuries." Huyck v. Hecla Mining Co., 101 Idaho 299,612 P.2d 142 (1980). What is "willful and wanton"?

(a) IDJI 3.19 defines the duty owed to a trespasser:

> The [owner] [occupant] owes no duty to a trespasser whose presence on the premises is unknown or could not reasonably have been anticipated. But, if the presence of the trespasser becomes known or reasonably could have been anticipated, the [owner] [occupant] has a duty not to injure the trespasser by any intentional or reckless act.

A comment states: "'Reckless' appears to be the equivalent of 'willful and wanton,' and is more understandable."

(b) *Gallup v. Bliss*: Plaintiff was injured when the vehicle in which he was riding struck fence posts that defendant had placed on land that the public had long used as a street. Defendant argued that she was entitled to fence her property. The Idaho Supreme Court agreed - but with an important caveat:

> Conceding that the territory so used as a thoroughfare was her private property and that all travel there over was a trespass, she was invested with no right to place thereon an instrumentality that might injure the trespasser without notice. While the landowner may resist a trespasser with all necessary force, he may not lay a trap or pitfall for him. Much less can he lay a trap for one unconscious of trespassing. The defendant knew that this strip was being commonly traveled; that at night there was nothing to apprise the traveler of her private rights; and she should have known that a collision with the unlighted posts would be sooner or later inevitable. Knowing such facts, her duty was unquestionable.

Thus, "[d]efendant's right to resist the city's encroachment could not relieve her of her duty to the traveling public." *Gallup v. Bliss*, 44 Idaho 756, 262 P.154 (1927)

(c) Recall the discussion of recklessness in the introductory chapter.

(5) Trespassing cows: The standard applicable to human trespassers is also applicable to trespassing cattle:

> [T]he owner of unenclosed land is not liable for injury to the livestock of another, ranging on his premises, resulting from the condition of the premises or some dangerous agency thereon, unless the injury is caused willfully or recklessly. []
>
> . . We conclude that respondents would not be liable unless they willfully and io intentionally caused the death of the cow or, actually seeing her, recklessly felled the tree in disregard of her safety. Whether the evidence shows any negligence on the part of respondents in felling the tree may be a debatable question, but it entirely fails to show that the death of the cow was caused by any willful, intentional or reckless act of respondents.

*Gould v. Reed*, 34 Idaho 618, 203 P. 284 (1921). See also *Strong v. Brown* 26 Idaho 1140 p 773 (1914).

**b. Licensees**

NOTES

( ) . Definition of "licensee": The most satisfactory definition is to distinguish "licensee" and "Invitee":

(a) *Wilson v. Bogert*:

> [A social guest, though specifically invited, stands in the legal relationship to his host of a licensee, to whom the host owes the duty of reasonable and ordinary care only.... The fact that the guest may be rendering a minor, incidental service to the host does not change the relationship....
>
> Nor is the relationship changed by the fact that the guest and the host may have a mutual or common interest m the purpose of the visit, such as the service of a church, lodge, or political purpose, or an intangible social benefit to the host.... Where a person enters upon the premises of another for a purpose connected with the business there conducted, or the visit may reasonably be said to confer or anticipate a business, commercial, monetary or other tangible benefit to the occupant, the visitor is held to be an invitee. In the case before us no monetary, material or tangible benefit was conferred or intended to be conferred upon the defendants by the presence and participation of the plaintiff in the shower given in their home. The benefits, if any, conferred or intended to be conferred, were purely social.

*Wilson v. Bogert*, 81 Idaho 535, 347 P.2d 341 (1959).

(b) *Mooney v. Robinson*: The distinction may not always be apparent. In Mooney, plaintiff was injured when she fell down an unlighted stairway whale spending the night at the defendant's house. Although the purpose of the visit was to deliver a poodle - which the defendant had purchased from the plaintiff at a "substantial" price-the court concluded that the plaintiff was a social guest since "[t]he rendition by a social guest of an incidental economic benefit will not change the licensee's status to that of an invitee." *Mooney v. Robinson*, 93 Idaho 676, 471 P.2d 63 (1970).

(c) IDJ13.15.1-Definitionof"licensee":

A licensee is a person who goes upon the premises of another m pursuit of the visitor's purpose, with the consent of the [owner] [occupant]. The consent of the [owner] [occupant] may be implied from the circumstances under which the visitor enters the premises.

(d) IDJI3.15.2- Licensee- social guest:

A social guest is a licensee upon the premises of his host. Where the purpose of the visit is social, rendering minor incidental services or economic benefit does not change the relationship.

(2) Scope of the duty owed a licensee:

(a) *Gowen v. Davis*: "The legal status of the plaintiff was that of a licensee only, as to whom the defendant owed no duty other than to avoid willfully or wantonly injuring him, and to refrain from knowingly exposing him to dangerous hazards or instrumentalities on the premises, and which were unknown to the plaintiff." *Gowen v. Davis*, 85 Idaho 221,377 P.2d 950 (1963).

(b) *Holzheimer v. Johannesen*: "The duty owed to a licensee is narrow. A landowner is only required to share with the licensee knowledge of dangerous conditions or activities on the land." *Holzheimer v. Johannesen*, 125 Idaho 397, 871 P.2d 814 (1994).

(c) IDJI3.15- Duty to warn a licensee:

The [owner] [occupant] owes a duty to warn a licensee only of dangerous existing hazards on the land that were known to the [owner] [occupant] and unknown to and not reasonably discoverable by the licensee.

(3) The "fireman's rule": What is the status of an entrant such as a fireman who is on the premises in an emergency capacity an invitee? Presumably preventing the destruction of the premises confers a tangible benefit on the land occupier.

(a) *Pincock v. McCoy*: Plaintiff, a deputy sheriff, was injured when he fell into an open hatch while making an arrest. Although plaintiff argued "with much force and earnestness" that as a police officer "he was not only invited but commanded by the state to go upon the premises" and that the plaintiff, "being a part and portion of the state and interested as any other citizen in the preservation of its peace and dignity, united in that direction and command," the court concluded that the plaintiff was only a licensee because "[o]ne on the premises by invitation, express or implied, is an invitee, whereas one who is there merely by permission or toleration is a mere licensee." *Pincock v. McCoy*, 48 Idaho 227, 281 P.2d 371 (1929). This holding- the so-called fireman's rule- has been rejected recently by some courts. See, e.g., *Christensen v. Murphy*, 296 Or. 610,678 P.2d 1210 (1984).

(b) *Winn v. Frasher*: The Idaho Supreme Court has expanded the doctrine beyond the land entrant/land occupier context, holding that, because "[t]he very nature of police work and fire fighting is to confront danger," the rule applied to police and fire fighters who responded to a toxic chemical spill on a public highway. The court inexplicably concluded, nonetheless, that the adoption of the doctrine did not necessarily preclude plaintiffs' recovery. The opinion, authored by Johnson, was joined by Shepard and Huntley. McDermott- sitting pro tern. -: dissented _on the ground that, "[g]iven the significant ramifications

to policemen and firemen ...public policy demands such a rule be implemented, ...the proper body to enact such a rule would be the Idaho State Legislature." *Winn v. Frasher*, 116 Idaho 500, n7 P.2d 722 (1989).

Do the rationales for limiting the scope of the duty owed by land occupiers apply to transporters of hazardous chemicals? In other words, is the doctrine a land-based theory?

(c) *Nichols v. Sonneman*: The court in Winn made no mention of an earlier Idaho that seemingly reaches the opposite conclusion. In *Nichols v. Sonneman*, 91 Idaho 199,418 P.2d 562 (1966), plaintiff was an Idaho Falls police officer. He was making measurements at the scene of an earlier automobile accident when he was struck by an automobile driven by defendant. Defendant argued that plaintiff had been contributorily negligent because he had been in the street at the time he was struck. The supreme court rejected this contention:

> [D]efendants contention that plaintiff was contributorily negligent as a matter of law, the record establishes that plaintiff's presence upon the street was required by the dutres of his office as a city policeman. The measurements he was taking were for the purpose of fixing the location of the point of impact in the prior collision. This he was required to do. Surrounding conditions were such that it became reasonably necessary for plaintiff to go to the point on the highway where he was struck, in order to locate by measurement, the point of impact sought. While so doing it was his duty to exercise reasonable care for his own safety. However, his position is not to be compared to that of a pedestrian jay-walking or loitering on the street.

The court approved a jury instruction that stated:

> You are instructed that at the time and place in question the plaintiff, Ronald J. Nichols, was a policeman engaged in his official capacity as such inworking upon a highway in the process of investigating an accident, and that as such, his conduct must be judged by a more liberal standard than an ordinary pedestrian in that such an officer is not required to use the same degree of care in looking for approaching vehicles as an ordinary pedestrian, and he is entitled to assume that an oncoming motorist will observe him and avoid running him down without warning. He may assume that motorists will use reasonable care for the safety of those working in the street proportionate to the danger of the situation. He is not required to keep a constant lookout for approaching motorists, but he has the duty to use reasonable care under the circumstances to avoid being run over; that is, such care and caution as are dictated by the exigencies of the particular situation, and that might be expected of an officer engaged in similar duties. In short, he has the duty of exercising such care as a reasonably prudent or careful person would exercise under the same circumstances.

*Nichols v. Sonneman*, 91 Idaho 199, 418 P.2d 562 (1966).

Can the decision in *Winn* be squared with the decision in *Nichols*? Which is the preferable result?

(d) ***Ruffing v. Ada County Paramedics***: Plaintiff, a fireman and defendant's employee, a paramedic, were stationed at the same fire station. Both fire fighters and medics responded to a call. After medical assistance to the patient, she was loaded onto an ambulance. Plaintiff was assisting defendant's employee in backing the ambulance; the employee hit a parked vehicle, pinning plaintiffs leg between the ambulance and the car. Ada County argued that fireman's rule precluded plaintiffs claim. The supreme court reversed:

> As _stated in Winn, neither a firefighter nor a police officer may recover in tort when his injuries are caused by the same conduct that required his official presence. See Winn, ]. Although the EMT units and firefighters were clearly involved in a joint safety operation, the particular conduct that caused Ruffing's injury falls outside the ambit of the rule stated in Winn. It was a call to respond jointly to a medical emergency which required both Ruffing's and McPherson's presence on the scene. However, the conduct that required Ruffing's presence was the medical emergency

> of a woman in Chili's restroom. McPherson's backing of the ambulance, which caused Ruffing's alleged injury, was not the "same conduct" that required his official presence. In order for the fireman's rule to reach the circumstances here, we would have to expand the rule stated in Winn, and we are not inclined to do so. Therefore, we find the fireman's rule does not bar Ruffing s claim here. The decision of the district court to the contrary is overruled.

*Ruffing v. Ada County Paramedics*, 14 Idaho. 3, _188 P.3 85 (208).

Is the court persuasive? What IS the distinction that it is drawing?

(c) IDJI3.15.7- Licensees- police officers and firemen:

Police officers and firemen are licensees upon the premises of the owner/occupant.

**c. Invitee**

NOTES

{1) Definition of "invitee":

(a) *Carr v. Wallace Laundry*." A person who s] invite[d] to come upon his premises upon a business in which both are concerned." *Carr v. Wallace Laundry*, 31 Idaho 266, 170 P. 107 (1918).

(b) *Curtis v. DeAtley*: A business customer is the most common example of an invitee. What is the status of an employee? "The plaintiff was employed [as a housekeeper], and because she conferred a material or tangible benefit upon the occupants, she would be considered an invitee." *Curtis v. DeAtley*, 104 Idaho 787, 791, 663 P.2d 1089, 1093 (1983).

(c) What is the status of a person on the premises as an employee of an independent contractor? In both *Carr v. Wallace Laundry Co*., 31 Idaho 266, 170 P. 107 (1918), and *Gagnon v. St. Maries Light & Power Co*., 26 Idaho 87, 141 P. 88 (1914), the plaintiff was an employee of a contractor hired to paint the defendant's building. The court in both cases concluded that the painters were invitees of the land occupier.

(d) IDJI3.13- Definition of "invitee":

> An invitee is a person who enters upon the premises of another for a purpose connected with business there conducted, or whose visit may reasonably be said to confer or anticipate a business, commercial, monetary or other tangible benefit to the [owner] [occupant].

(2) The Grays (pt. 1): Recently, the court seems to be somewhat inconsistent in the standard it employs to determine whether an entrant is an invitee or a licensee:

(a) *Holzheimer v. Johannesen*: Holzheimer and Johannesen were orchardists in Emmett. It was the practice among the industry to provide fruit boxes to a grower who was short on the assumption that they would be able to expect the same in return. Holzheimer was injured when he was at Johannesen's to pick up boxes. He argued that "he was an invitee because he was visiting the Johannesen fruit farm for the purpose of acquiring boxes, which is a business purpose connected with the Johannesen's fruit farm business, and that his visit to the Johannesen farm rendered a benefit to Johannesen." The court disagreed:

> Holzheimer's argument that he was an invitee simply because he was purchasing or borrowing fruit boxes, which is arguably connected with the Johannesen fruit farm business, is not conclusive as to his status on the property....

> Evidence was adduced at trial that was sufficient to warrant the district court instructing the jury on licensee status and the standard of care owed to a licensee. Both Johannesen and Holzheimer, as well as two other witnesses engaged in the fruit business, testified that loaning or selling boxes at cost to neighboring fruit farmers in the Emmett area was customary. The farmers loaned boxes to one another in the spirit of cooperation, and in hopes that favors would be returned when needed. Johannesen testified that he expected Holzheimer to either purchase the boxes at cost or replace them. Johannesen testified that he made no profit on the sale of boxes and in fact the sale may have cost him money once the cost of labor unloading the boxes and breaking up a pallet of boxes was included. The testimony reflected that this was in actuality more of a benefit to Holzheimer since he would have either had to buy an entire pallet, which he didn't need, or pay more than Johannesen's cost to buy a partial pallet. Arguably there was a business transaction between Johannesen and Holzheimer. Equally supportable is the assertion that the transaction between Johannesen and Holzheimer was the minimal type of service between a landowner and visitor referred to in *Wilson [v. Bogert*, supra b.(1)(a)], which does not alter their relationship a landowner and licensee.
>
> There was sufficient evidence adduced at trial from which the jury could reasonably conclude that Holzheimer was a licensee … Thus, we find no error in the court's decision to instruct the jury both as to the status of licensee and invitee.

*Holzheimer v. Johannesen*, 125 Idaho 397, 871 P.2d 814 (1994).

(b) *Tomich v. City of Pocatello*: In Tomich, on the other hand, the court appears to have relaxed the requirement that the entrant confer a material or tangible benefit upon the occupant." In *Tomich v. City of Pocatello*, plaintiff kept his plane at a municipal airport. When the plane was destroyed, the landowner argued that the pilot was a licensee rather than an invitee because the plane was used solely for recreation. The court disagreed:

> Tomich used the airport to fly his plane, which is the "business there conducted" at an airport, and therefore Tomich was an invitee. The fact that an individual has a personal or recreational reason for entering the premises of another is irrelevant to whether that individual meets the definition of an invitee. The relevant inquiry is whether the individual enters the premises for a purpose connected with the business conducted on those premises. Tomich used the airport in exactly the manner for which it was intended, designed, and commonly used, thereby benefiting the city. Therefore, Tomich was an invitee.

*Tomich v. City of Pocatello*, 127 Idaho 394, 901 P.2d 501 (1995). Since Tomich did not rent the tie-down space from the city, what was the benefit he conferred?

Can Holzheimer and Tomich be reconciled?

(3) The Grays {pt. 2): Scope of the duty owed to an invitee:

(a) *Otts v. Brough*: "Owners or persons in charge of property owe to an invitee or business visitor the duty to keep the premises in a reasonably safe condition, or to warn the invitee of hidden or concealed dangers of which the owner or one in charge knows or should know by exercise of reasonable care, in order that the invitee be not unnecessarily or unreasonably exposed to danger." *Otts v. Brough*, 90 Idaho 124,409 P.2d 95 (1965).

(b) *Tommerup v. Albertson's, Inc*.: "The law is well settled in this state that, to hold an owner or possessor of land liable for injuries to an invitee caused by a dangerous condition existing on the land, it must be shown that the owner knew, or by the exercise of reasonable care should have known, of the existence of the dangerous condition.... '*The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going on the property.*'" *Tommerup v. Albertson's, Inc*., 101 Idaho 1, 607 P.2d 1055 (1980).

(c) *Harrison v. Taylor*: "Henceforward, owners and occupiers of land will be under a duty of ordinary care under the circumstances towards invitees who come upon their premises." *Harrison v. Taylor*, 115 Idaho 588,595,768 P.2d 1321, 1328 (1989).

(d) *Morgan v. State Department of Public Works*: "The State cites *Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321 (1989), for the proposition that the standard of care which landowners owe to invitees is ...simply one of reasonable care under the circumstances. [Thus, t]he State contends that ... it is erroneous to instruct the a jury that landowners have a duty to warn invitees of concealed defects on their property. We reject the state's assertion, noting that seven months after Harrison, the Court issued *Walton v. Potlatch Corp.,* 116 Idaho 892,781 P.2d 229 (1989), which reconfirmed the rule that'[u]nder Idaho law a landowner owes an invitee a duty to keep its premises in a reasonable safe condition and to warn of hidden or concealed dangers which the owner knows or should know of by exercise of reasonable care." *Morgan v. State Department of Public Works*, 124 Idaho 658,664,862 P.2d 1080, 1086 (1993).

(e) *Johnson v. K-Mart Corp*.: "It is well settled in Idaho that owners and occupiers of land owe a duty of ordinary care under the circumstances toward invitees who come upon their premises. *Harrison v. Taylor*, 115 Idaho 588,596, 768 P.2d 1321, 1329 (1989); *Otts v. Brough*, 90 Idaho 124, 131,409P.2d95, 102(1965)." *Johnson v. K-Mart Corp*., 126 Idaho 316, 882 Idaho 971 (Ct. App. 1994).

(f) *Cates v. Albertson's, Inc*.: "Cates was a business invitee on land owned and occupied by Albertson's. As the owner/occupier of that land, Albertson's owed Cates a duty of due care." Cates v. Albertson's, Inc., 126 Idaho 1030, 1034, 895 P.2d 1223, 1227 (1995).

(g) *Ball v. City of Blackfoot* "Beginning with *Harrison*, we thus established that owners and occupiers of land will be under a duty of ordinary care under the circumstances toward invitees who come upon their premises.' ... [Invitees owe a duty of ordinary care under the circumstances." *Ball v. City of Blackfoot*, 152 Idaho 673, 273 P.3d 1266 (2012).

(h) IDJI 3.09 - Duty to invitee:

> An [owner] [occupant] owes a duty of ordinary care under all the circumstances towards invitees who come upon the premises. This duty extends to all portions of the premises to which an invitee may reasonably be expected to go.

The comment to the instruction stated: "*Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321 (1989). This case seems to suggest that specific instructions pertaining to duty to warn, duty to inspect, duty to remedy, etc., are all subsumed within this instruction. Further reference to specific duties within the instructions become unnecessary. Counsel may argue such in the application of this instruction. But cf., *Walton v. Potlatch*, 116 Idaho 892,781 P.2d229 (1989), where Court held that instruction on numerous separate duties was proper."

(i) IDJI 3.11 - Specific duty- duty to inspect:
(ii)
The [owner] [occupant] owes a duty to exercise ordinary care in inspection of the premises for the purpose of discovering dangerous conditions.

Are these various statements consistent?

(3) Physical limitations on invitee status:

(a) *Feeny v. Hanson*: The duty imposed upon a land occupier "to keep the premises safe for an invitee extends to all portions of the premises which it is necessary and convenient for the invitee to visit or use in pursuing the course of business for which the invitation was extended and at which his presence should reasonably be anticipated or to which he is allowed to go." *Feeny v. Hanson,* 371 P.2d 15 (1962). See also *Williamson v. Neitzel*, 45 Idaho 39,260 P. 689 (1927).

(b) **IDJI3.13.1 -Invitee- scope of invitation**:

A visitor may bean invitee for limited purpose or the invitation may be restricted in scope. If the visitor enters any part of the premises or makes any use of it beyond the scope of the invitation or remains on the premises after the expiration of the time within which to accomplish the purpose of the invitation, the visitor's status as an invitee may end and the visitor may become a licensee or trespasser as is defined in other instructions.

**d. Miscellaneous Land-Based Relationships**

**FORBUSH V. SAGECREST MULTI FAMILY PROP OWNERS' ASS'N**

Supreme Court of Idaho
162 Idaho 317, 316 P.3d 1199 (2017)

BURDICK, CJ. - Travis Forbush and Gretchen Hymas, individually and as natural parents of McQuen C. Forbush and Breanna Halowell (Appellants), appeal the Ada County District Court's grant of summary judgment to Sagecrest Multifamily Property Owners' Association, Inc., and its President, Jon Kalsbeek (Respondents). Forbush and Halowell were overnight guests of a tenant who leased a unit at the Sagecrest Apartment Complex (Sagecrest). During the night, hazardous levels of carbon monoxide filled the unit, killing Forbush and injuring Halowell. Appellants brought tort claims against Respondents after the incident. The district court granted summary judgment to Respondents. We affirm in part, reverse in part, and remand.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

This appeal concerns an incident in which a vent on a water heater clogged and caused the emission of hazardous levels of carbon monoxide in unit 4624 at Sagecrest on November 10, 2012. The incident killed eighteen-year-old Private First-Class McQuen C. Forbush, a U.S. Marine; and injured eighteen-year-old Breanna Halowell. Forbush and Halowell were overnight guests of unit 4624's tenant Adra Kipper.

Sagecrest consists of forty-eight separate buildings, each containing four apartments. When Sagecrest was built, Sagecrest Development, LLC, recorded the Declarations of Covenants, Conditions, and Restrictions (CCRs). The CCRs instruct that individuals or entities hold fee title to the separate buildings, each containing the four apartments. The CCRs grant these individuals or entities the "exclusive right" to maintain the interiors of the apartments they own. The unit owners are shareholders in the Sagecrest Multifamily Property Owners' Association (POA), a non-profit corporation. The CCRs task the POA with maintaining the exterior grounds at Sagecrest, including the sidewalks, landscaping, common areas, and fences. By contrast, the CCRs task unit owners with maintaining the "entire interior" of the units they own. To meet these maintenance duties, the CCRs require both the POA and unit owners to employ the same property management company. To that end, the POA and unit owners entered into maintenance contracts with First Rate Property Management (FRPM) in March 2010.

In spring 2011, carbon monoxide concerns emerged at Sagecrest. Evidently, some tenants had reported smelling gas inside of their units. Intermountain Gas was contacted about these concerns and explained the problem was due to certain water heaters' venting systems. Two types of water heaters were used at Sagecrest. Venting on one type had "a metal screen around the bottom of the tank." Venting on the second type "d[id]n't have a screen that goes around, but one in the middle on the bottom." Venting on the second type was prone to clogging, which, in turn, caused carbon monoxide to emit. After meeting with Intermountain Gas about the problem, FRPM surmised that "we just need to clean/vacuum off the screens and it will be fine."

Nonetheless, carbon monoxide concerns grew more serious that summer. In July 2011, Intermountain Gas was again contacted after another tenant reported smelling gas inside of her unit. Intermountain Gas described the carbon monoxide level as "deadly" and attributed it to the unit's water heater. That same month, a professional plumber, Ben Davis, inspected the water heaters at Sagecrest, identified the problematic venting system, and advised that "these issues be solved before any tenants suffer health problems or death." Thereafter, FRPM reasoned that more than just cleaning or vacuuming the screens was necessary, concluding "the only way to fix this problem without modifying the water heater is to replace them completely."

Although the POA knew of the carbon monoxide concerns, it did not move to modify or replace the water heaters. As the POA's President Jon Kalsbeek explained, "the water heaters are interior items of each unit" and, therefore, "an owner's [sic] choice on how to handle this situation." Even so, the POA, primarily through Kalsbeek, became involved with the carbon monoxide issue in several ways. Although the CCRs give unit owners the "exclusive right" over unit interiors, Tony Drost, FRPM's President, testified that the POA, through Kalsbeek, controlled "global issues" that were complex-wide, which included the water heaters. For example, the POA instructed FRPM to conduct carbon monoxide testing inside of the units every three months. To that end, the POA issued two sets of procedures governing carbon monoxide testing. Those procedures also governed the installation of hard-wired carbon monoxide alarms. And, in September 2011, the POA enlisted an engineering firm in an effort to explore solutions short of replacing the water heaters. According to the engineering firm, the various solutions were to (1) increase "fresh air intakes"; (2) replace existing water heaters; and (3) replace "the smoke detectors with CO/Smoke detector combination sensor[s.]"

In November 2011, FRPM relayed the engineering firm's findings to unit owners. Matthew Switzer, who owns the building in which unit 4624 sits, responded that he was unaware of any carbon monoxide issues with his units. FRPM clarified that Switzer's units had "checked in good during the CO detecting." FRPM further indicated that it would contact Switzer if later testing revealed carbon monoxide concerns with his units.

Under the POA's directive, FRPM conducted carbon monoxide testing on March 9, 2012. That testing revealed a high level of carbon monoxide in several units, including unit 4624. However, that testing was later contradicted. When Intermountain Gas tested unit 4624 on March 12, 2012, it reported normal, non-hazardous levels of carbon monoxide. In any event, although FRPM had stated it would contact Switzer if testing revealed carbon monoxide concerns with his units, Switzer was never contacted about the high levels discovered on March 9, 2012.

Warnings were distributed to tenants following the high levels of carbon monoxide discovered on March 9, 2012. The warning, placed on unit 4624's front door, informed tenant Adra Kipper that her unit's water heater was emitting "higher levels of carbon monoxide than we would like to see." The warning further informed Kipper that her water heater would be "replaced next week." A battery-powered carbon monoxide alarm was provided along with the warning because, although FRPM had begun to install hard-wired alarms under the POA's directive, a hard-wired alarm had not yet been installed in unit 4624.

Kipper's water heater was never replaced. And, although Kipper used the battery-powered carbon monoxide alarm initially, she eventually removed the alarm's batteries and placed it in a closet after it started beeping, apparently due to low batteries. Consequently, when Kipper had two overnight guests—Forbush and Halowell—staying over on November 10, 2012, no alarm sounded when the vent on Kipper's water heater clogged and caused the emission of hazardous levels of carbon monoxide. The incident killed Forbush and injured Halowell.

Appellants filed their initial complaint on March 7, 2013, and eventually filed four amended complaints. They named several parties as defendants, including the POA and Kalsbeek, Respondents in this appeal. The district court granted summary judgment to Respondents. Appellants bring this timely appeal.

## II. ISSUES ON APPEAL

1. Did the district court properly grant summary judgment to the POA?

2. Did the district court properly grant summary judgment to Kalsbeek?

3. Should we award attorney fees on appeal?

## III. STANDARD OF REVIEW

This Court reviews a summary judgment order under the same standard the district court used in ruling on the motion. *Kolln v. Saint Luke's Reg'l Med. Ctr.,* 130 Idaho 323, 327, 940 P.2d 1142, 1146 (1997). That is, summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). We construe disputed facts in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Major v. Sec. Equip. Corp.,* 155 Idaho 199, 202, 307 P.3d 1225, 1228 (2013). *Mitchell v. State*, 160 Idaho 81, 84, 369 P.3d 299, 302 (2016).

The main issues in this appeal trigger negligence, which consists of four elements: "(1) a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage." *Grabicki v. City of Lewiston*, 154 Idaho 686, 691, 302 P.3d 26, 31 (2013) (citation omitted). More specifically, this appeal centers on whether a duty existed, which is generally a question of law over which this Court has free review. See *Gagnon v. W. Bldg. Maint., Inc*., 155 Idaho 112, 115, 306 P.3d 197, 200 (2013). However, whether a duty existed becomes a question of fact if it requires resolution of disputed facts. See *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 402, 987 P.2d 300, 314 (1999).

## IV. ANALYSIS

The three main issues raised on appeal are whether (A) summary judgment was properly granted to the POA; (B) summary judgment was properly granted to Kalsbeek; and (C) Respondents are entitled to attorney fees on appeal. We discuss each below.

### A. Did the district court properly grant summary judgment to the POA?

Appellants contend the district court erred by granting summary judgment to the POA because triable issues of fact surround whether the POA (1) owed a premises liability-based duty of care; (2) owed a duty of care it acquired as a result of voluntary undertakings; and (3) is vicariously liable for FRPM's conduct.

#### 1. Premises liability

Appellants first argue the POA owed a premises liability-based duty of care to Forbush and Halowell. As a threshold matter, we note that the POA neither owned nor occupied unit 4624. Instead, Switzer owns unit 4624, and tenant Adra Kipper occupied unit 4624. We must therefore decide whether a premises liability-based duty of care can be imposed on a party who neither owns nor occupies the property at issue.

Appellants correctly inform us that "the general rule of premises liability is that one having control of the premises may be liable for failure to keep the premises in repair." *Jones v. Starnes*, 150 Idaho 257,

261, 245 P.3d 1009, 1013 (2011) (quoting *Heath v. Honker's Mini-Mart, Inc.,* 134 Idaho 711, 713, 8 P.3d 1254, 1256 (Ct. App. 2000)). Appellants maintain that the POA had control over unit interiors under the CCRs and, regardless of the CCRs, actually exerted control over unit interiors. Consequently, Appellants assert it is irrelevant that the POA neither owned nor occupied unit 4624.

Appellants' position overlooks how our premises liability cases are limited to actions involving owners or occupiers of land and their agents. E.g., *Rountree v. Boise Baseball, LLC*, 154 Idaho 167, 171, 296 P.3d 373, 377 (2013) ("The duty owed by owners and possessors of land depends on the status of the person injured on the land . . . ." (emphasis added)); *Stem v. Prouty*, 152 Idaho 590, 591-92, 272 P.3d 562, 563-64 (2012) (analyzing premises liability claim against owner of property); *Harrison v. Taylor*, 115 Idaho 588, 595, 768 P.2d 1321, 1328 (1989) ("Henceforward, owners and occupiers of land will be under a duty of ordinary care under the circumstances towards invitees who come upon their premises."). Thus, we reject Appellants' premises liability argument and reaffirm our case law holding that a premises liability-based duty of care may be imposed only on owners or occupiers of land and their agents.

The dissent, however, maintains that status as an owner or occupier is irrelevant. The dissent's analysis wholly forgets that premises liability furnishes a fundamental tripartite framework, under which land entrants are defined as an invitee, a licensee, or a trespasser. E.g., *Stiles v. Amundson*, 160 Idaho 530, 532 n.3, 376 P.3d 734, 736 n.3 (2016). The dissent's analysis renders the well-established tripartite framework inapplicable. A stranger who neither owns nor occupies the land at issue could not request an invitee to visit the land so as to confer a benefit on the land to the stranger, given that the stranger has no right to the land in the first place. Similarly, a stranger is without authority to authorize a licensee to enter land to which the stranger has no right. Finally, it cannot be said that a trespass occurs when a person enters land to which the stranger has no right simply because the stranger did not authorize that person's visit. Nevertheless, the dissent's analysis would permit these scenarios to be litigated under the rubric of "premises liability."

In the dissent's view, control is the essential test. While the dissent creates several hypothetical scenarios that are irrelevant to this case in an attempt to show that some degree of control, by itself, should be sufficient to trigger premises liability, this Court has never resolved a premises liability case in such a manner. Three of our cases firmly reinforce that premises liability does not extend beyond owners or occupiers of the premises and their agents, and that control determines which party, as between the owner or occupier and their agents, had control of the premises during the relevant time. First, in *Otts v. Brough*, 90 Idaho 124, 131, 409 P.2d 95, 98 (1965), superseded on other grounds by I.C. § 6-801, we explained:

Owners or persons in charge of property owe to an invitee or business visitor the duty to keep the premises in a reasonably safe condition, or to warn the invitee of hidden or concealed dangers of which the owner or one in charge knows or should know by exercise of reasonable care, in order that the invitee be not unnecessarily or unreasonably exposed to danger.

Otts concerned the duty owed by a general contractor to a subcontractor. *Id*. at 131-32, 409 P.2d at 98-99. The general contractor occupied the worksite at issue, as he "stated that he was continually on the job site; that every day he supervised the entire work of the construction of the building[.]" *Id*. at 132, 409 P.2d at 99. We reversed summary judgment that had been granted to the general contractor, concluding triable issues of fact surrounded the general contractor's liability. *Id*. at 135-36, 409 P.2d at 101-02. Otts, therefore, forecloses the dissent's assertion that our ruling today would allow "a general contractor or construction manager, who exercises the requisite control over the premises, [to] escap[e] liability . . . because he does not neatly fit within the categories elucidated today." As demonstrated in Otts, a general contractor or construction manager is regularly in occupation of the premises at issue. Additionally, the general contractor or construction manager is frequently an agent of the owner or occupier. But even supposing premises liability were for some reason inapplicable, the dissent embellishes the notion of a tortious general contractor or construction manager "escaping liability." Premises liability is not the exclusive path to liability.

Similarly, in Jones, as the dissent acknowledges, this Court stated that "the general rule of premises liability is that one having control of the premises may be liable for failure to keep the premises

in repair." 150 Idaho at 261, 245 P.3d at 1013 (quoting *Heath v. Honker's Mini-Mart, Inc*., 134 Idaho 711, 713, 8 P.3d 1254, 1256 (Ct. App. 2000)). Our clear holding in Jones, however, was that the district court properly found premises liability did not apply because the injury occurred "on a public sidewalk or street, and not on [the defendant's] property." *Id*.; see also Heath, 134 Idaho at 714, 8 P.3d at 1257 (affirming summary judgment for defendant because plaintiff's vague assertion that she "may well have been" on property the defendant owned did not raise a triable issue of fact). Jones illustrates that, if premises liability indeed applies, the issue becomes which party, as between an owner or occupier of the land and their agents, had control over the premises. We did not hold, nor even suggest, in Jones that a stranger who neither owns nor occupies the property can be sued in premises liability merely by exercising some degree of wrongful or rightful control over the property.

We reaffirmed these principles in our recent case of *Stiles v. Amundson*, 160 Idaho 530, 531, 376 P.3d 734, 735 (2016), which concerned a "premises liability action brought against . . . the owner of a piece of property[.]" In Stiles, the issue raised was "who, between a landlord and a tenant, owes the relevant duty of care to a tenant's social guests." *Id*. at 533, 376 P.3d at 737. In resolving that issue, we explained that "[e]xisting case law demonstrates it is the entity having control over the property that bears the burden of warning social guests and licensees of dangerous conditions on the property." *Id*. In affirming summary judgment for the property owner, we reasoned that:

[T]enants are liable to injured third parties, including the tenant's social guests, as if they were the owner of the property. This stands to reason, because the tenant, as the possessor of the property, is in the best position to eliminate dangers or to make those dangers known to third parties. Landlords, on the other hand, are not in a comparable position because they do not have possessory control over the land. Likewise, they do not have control over the guests hosted by the tenants, and they likely will not even be aware when a tenant's social guest is on the premises.

Further, landlords, who do not generally have unfettered access to the premises, cannot reasonably be expected to be aware of all potential hazards on the property while the tenancy is in effect, especially in the event that the tenant creates the hazard. It would create an unfair burden on landlords to give them a responsibility to warn social guests to whom they have no connection of dangers of which they have no way of learning. *Id*. at 533-34, 376 P.3d at 737-38. Very similar to *Jones*, *Stiles* reinforces that, if premises liability applies, the issue becomes which party, as between an owner or occupier of the premises and their agents, had control over the premises during the relevant time.

Nevertheless, the dissent "cannot square the . . . decision today with the Court's recent decision in *McDevitt v. Sportsman's Warehouse, Inc*., 151 Idaho 280, 255 P.3d 1166 (2011)." McDevitt involved a plaintiff who sued a tenant for injuries sustained on a sidewalk outside the tenant's retail store. *Id*. at 281, 255 P.3d at 1167. Specifically, the plaintiff tripped over a recessed sprinkler box on the sidewalk. *Id*. The landlord had hired Idaho Scapes, Inc. to install the sprinkler box. *Id*.at 282, 255 P.3d at 1168. At some point after Idaho Scapes installed the sprinkler box, it sunk about an inch below the sidewalk, and the plaintiff tripped on it. *Id*. When the case came before us on appeal, we affirmed that summary judgment was properly granted to the tenant because it owed no duty of care to keep the sidewalk, which was not part of the leased premises, reasonably safe or to warn of hazards. *Id*. at 281, 255 P.3d at 1167. As the dissent correctly observes, we first analyzed whether the tenant occupied the sidewalk, ultimately concluding the sidewalk "was not part of the leased premises." *Id*. at 285, 255 P.3d at 1171. We then addressed arguments concerning whether the tenant controlled the sidewalk outside its retail store. *Id*.

Regarding that inquiry, we emphasized that "[n]o Idaho case has confronted a fact pattern such as the one at issue here, where the area over which the tenant allegedly has control is not a part of the leased premises." *Id*. In looking to other jurisdictions, we explained that, "absent a contractual obligation, a tenant in a multi-tenant shopping mall does not have control over common areas, and therefore has no duty to keep them safe for invitees." *Id*. (listing cases). We then concluded the tenant owed no duty of care to keep the sidewalk outside its retail store reasonably safe or to warn of hazards because the commercial lease and CCRs "imposed the duty to maintain the common areas on the landlord . . . ." *Id*. at 286, 255 P.3d at 1172. Accordingly, McDevitt did not expand the confines of premises liability. Rather, we declined to hold that a tenant who neither owns nor occupies the area at issue can somehow exert the

requisite control to trigger premises liability. Thus, McDevitt aligns with our analysis today. In fact, it is the dissent's analysis that McDevitt does not support. The dissent's analysis would suggest that Idaho Scapes, the entity that merely installed the sprinkler box, could be held liable in premises liability. That issue was never presented to us in McDevitt, and we never suggested that an entity like Idaho Scapes could be sued in premises liability. But once again, the dissent overlooks that, even if premises liability is for some reason inapplicable, it does not represent the exclusive path to liability in tort law.

The above holdings illustrate that premises liability concerns the duties owed by owners and occupiers of land and their agents. Secondary sources are in accord. See, e.g., 2 Premises Liability 3d § 36:1 (2016) ("Premises liability stems from the law of negligence and constitutes the body of law that sets the guidelines involving duties owed by an owner or occupier of real estate . . . ." (emphasis added)); Restatement (Third) of Torts: Phys. & Emot. Harm § 51 (2012) (summarizing the duties that possessors of land owe). Thus, contrary to the dissent's assertion, our ruling in this regard is aptly supported by current law. Premises liability does not contemplate imposing a duty of care on a stranger who neither owns nor occupies the premises at issue merely because the stranger may have exercised some degree of wrongful or rightful control over the premises. Indeed, like we explained in Stiles, ascribing a premises liability-based duty to a party who is without "unfettered access" to the premises would create an unfair burden, as that party "cannot reasonably be expected to be aware of all potential hazards[.]" 160 Idaho at 533-34, 376 P.3d at 737-38.

Declining to deviate from the above principles, we hold that a premises liability-based duty of care cannot be imposed on the POA since it neither owned nor occupied unit 4624.

**2. Voluntary undertakings**

The parties dispute (a) whether this argument is preserved; and (b) if so, whether it creates triable issues of fact.

(a) Is the voluntary undertakings argument preserved?

The POA argues Appellants did not preserve their voluntary undertakings argument for appeal because, although Appellants made voluntary undertakings arguments below, those arguments differ from what Appellants now assert on appeal. According to the POA, below Appellants argued tenant Adra Kipper relied on the POA's alleged voluntary undertakings, but on appeal, Appellants argue FRPM—not Kipper—relied.

The POA's preservation argument is unavailing. Appellants made broad reliance arguments before the district court, stating that "[b]ecause the POA exerted absolute control over the property manager's operation and management at the property, First Rate did not even seek owner input on issues . . . the POA made the call." As a result, the district court reasoned that Appellants' arguments triggered the inquiry of whether the POA "undertook a duty and that Kipper, or even some other party, relied on [the] POA . . . ." That inquiry led the district court to conclude "no party presented any evidence that [the] POA represented to anyone, including First Rate, Switzer, or Kipper, that it, and not the owners, would provide and install carbon monoxide detectors or new water heaters." The district court further explained that FRPM did not rely on the POA's voluntary undertakings, if any, because FRPM understood that unit owners had exclusive control over unit interiors. Given that adverse ruling, Appellants' voluntary undertakings argument is preserved for this appeal.

(b) Did the POA owe a duty of care as a result of voluntary undertakings?

This Court has recognized that if "one voluntarily undertakes to perform an act, having no prior duty to do so, the duty arises to perform the act in a non-negligent manner." *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 400, 982 P.2d 300, 312 (1999). That duty, however, "is limited to the duty actually assumed." *Beers v. Corp*. of Pres. of Church of Jesus Christ of Latter-Day Saints, 155 Idaho 680, 688, 316 P.3d 92, 100 (2013) (citation omitted). "[M]erely because a party acts once does not mean that

party is forever duty-bound to act in a similar fashion." *Id*. This duty arises "when [i] one previously has undertaken to perform a primarily safety-related service; [ii] others are relying on the continued performance of the service; and [iii] it is reasonably foreseeable that legally-recognized harm could result from failure to perform the undertaking." *Id*. (citation omitted). We discuss each element below.

**i. Specific undertakings**

Appellants contend the POA specifically undertook to control (1) the installation of hard-wired carbon monoxide alarms; (2) preventative maintenance; and (3) carbon monoxide warnings.

**1. Hard-wired carbon monoxide alarms**

Appellants argue triable issues of fact surround whether the POA voluntarily undertook to control the installation of hard-wired carbon monoxide alarms. That argument centers on how the POA, through Kalsbeek, issued two sets of procedures governing the installation of hard-wired carbon monoxide alarms.

The POA issued its first set of procedures in March 2012 after learning of carbon monoxide concerns. Under the POA's procedures, hard-wired carbon monoxide alarms were to be installed during "turnovers, preventative maintenance, lease renewals, or faulty smoke detectors . . . ." Thus, the procedures contemplated piecemeal installation. The procedures were amended after a tenant's carbon monoxide alarm sounded in October 2012. The tenant called the fire department, which tested the unit and found the water heater was emitting high levels of carbon monoxide. After that incident, FRPM contacted the POA to request immediate installation of hard-wired carbon monoxide alarms, seeking authorization for a maintenance man to visit "every unit and check and make sure the CO detectors that we installed are in working condition. The units that do not have CO detectors I would like him to install one." Kalsbeek responded on behalf of the POA, stating that he would talk "to the board and see how the board wants to proceed." FRPM's request for immediate installation was further discussed at the POA's annual meeting in October 2012, where it became clear that many units lacked hard-wired carbon monoxide alarms. After that meeting, the POA, through Kalsbeek, amended the procedures, stating that hard-wired carbon monoxide alarms were to be installed "continuously."

The POA argues it acted as nothing more than a "sounding board" for issues affecting multiple owners and, thus, did not exercise control over the installation of hard-wired carbon monoxide alarms. As an issue concerning unit interiors, the POA maintains that unit owners had exclusive control over the installation of hard-wired carbon monoxide alarms. On the one hand, in November 2011, FRPM sent an email to unit owners concerning hard-wired carbon monoxide alarms, seeking unit owners' approval for installation. Yet, eleven months later, Kalsbeek indicated that the POA's procedures governed, stating that "[t]here is absolutely nothing about owners' . . . approval" with respect to the installation of hard-wired carbon monoxide alarms. The POA asserts that Kalsbeek merely meant that FRPM did not need unit owners' approval because FRPM already had authority to make repairs costing less than $250 under FRPM's maintenance contracts with unit owners, and hard-wired carbon monoxide alarms cost less than $250. While the record provides only indirect support for that assertion, its veracity is irrelevant. Even if that assertion is true, a jury could still reasonably find that the POA, through Kalsbeek, undertook to control the installation of hard-wired carbon monoxide alarms by issuing the two sets of procedures.

The district court concluded issuing the two sets of procedures was not an undertaking that would "create a duty to repair or replace the water heaters or to install carbon monoxide detectors inside the units." While the district court is correct that this undertaking would not create a "duty to repair or replace the water heaters or to install carbon monoxide detectors inside the units," that conclusion overlooks whether this undertaking would create a duty to nevertheless control the installation of hard-wired carbon monoxide alarms. We find triable issues of fact surround that issue.

**2. Preventative maintenance**

The second voluntary undertaking Appellants cite concerns preventative maintenance and arises from a string of emails sent on April 15, 2011. That day, FRPM reported to the POA that certain maintenance needed to be performed, explaining that:

> Intermountain [G]as came out today and inspected an empty unit to try to find out what is causing the gas smell from the water heaters. He said the problem is with the venting. There are two different kinds of water heaters here, some have a metal screen around the bottom of the tank, the others don't have the screen that goes around, but one in the middle on the bottom. Those get clogged with lint, hair, debris very easily and if there is not adequate air flow from the bottom then the water heater cannot release exhaust. He said we just need to clean/vacuum off the screens and it will be fine. I think we should add this to the turn over spreadsheet under Typical Items for [the maintenance man] to vacuum out the bottom area and screens. Let me know if this is ok . . . .

Before the POA responded, another email from FRPM clarified that a professional plumber should be hired, explaining:

> No. Please do not have [the maintenance man] vacuum these. This is something the plumber needs to do. I already asked them when I went and had my "plumbing training" at their shop. In order to clean it properly some things have to be taken apart so it can get cleaned from both sides or it would be pointless and/or could cause more problems. I will be in Meridian shortly and will explain. This will be a common problem since the units are located next to the dryers.

Later that day, the POA, through Kalsbeek, communicated disagreement with FRPM's idea that a plumber should be hired, citing cost concerns:

> This seems to be a very expensive solution to have a plumber come out and vacuum vents for water heaters. Why not have [the maintenance man] learn what needs to be done to do it correctly at a lower cost? Are these only going to be done at turnovers? The vents need to be cleaned at least annually for preventative maintenance to be effective, is this something that if regularly vacuumed will not require a labor-intensive process? These could be done at the same time as the filter changes maybe?

Three days later, FRPM sent the POA information on the cost to hire a plumber and requested guidance as to what next steps should be taken. The POA, through Kalsbeek, responded that "[l]et us review this and get back to you next week." The POA never responded, and the maintenance was never performed. As a result, Appellants contend the POA undertook to control the above preventative maintenance and is to blame for the fact that it was not performed.

We note that the district court never addressed this undertaking, although it was raised below. On appeal, the POA argues Kalsbeek's "alleged non-response is not an affirmative act creating an assumption of duty to install detectors. Indeed, it was FRPM who was contractually obligated to have preventative maintenance performed on #4624 bi-annually at the expense of the owner . . . ." Although that argument boasts logical appeal, the undisputed facts do not support it. Instead, the above demonstrates that a jury could reasonably find that the POA voluntarily undertook to control preventative maintenance, regardless of any contractual obligations between FRPM and unit owners.

**3. Carbon monoxide warnings**

The third voluntary undertaking Appellants cite concerns carbon monoxide warnings. Appellants point to two warnings. First, in July 2011, FRPM wanted to distribute a warning it had received from a professional plumber, Ben Davis, who inspected the water heaters after carbon monoxide concerns emerged. Davis's letter detailed the scope of the carbon monoxide threat and advised that "these issues be solved before any tenants suffer health problems or death." The POA, through Kalsbeek, intervened and instructed FRPM to not distribute Davis's letter. Sheila Thomason, FRPM's maintenance supervisor, testified that Kalsbeek's instruction was the sole reason why Davis's letter was not distributed. As

Thomason testified, Kalsbeek wanted to be "in charge of distributing this type of information to the individual - individual owners at Sagecrest."

Second, in March 2012, FRPM contacted Kalsbeek concerning warnings to distribute to unit owners and tenants and provided a draft warning. The warning "stated different levels of CO levels and what the . . . symptoms were experienced at those levels." Kalsbeek reviewed the warning and instructed FRPM to not distribute the warning, insisting it was irrelevant. FRPM, however, clarified that the warning had already been distributed.

The district court found that "no one presented any evidence that [the] POA undertook the duty to warn tenants about carbon monoxide issues . . . ." The POA similarly argues the above facts do not concern "acts to warn the tenants of the dangerous condition on the property previously . . . ." Neither the district court's finding nor the POA's argument persuades us. To be clear, the district court and the POA are correct insofar that the above facts do not show that the POA undertook to warn unit owners and tenants; rather, the above facts illustrate that FRPM undertook to warn unit owners and tenants. But that conclusion overlooks whether the POA undertook to exercise control over warnings by intervening, or attempting to intervene, with regard to the two warnings above. Exercising control over warnings is a different issue than actually distributing warnings, and we find triable issues of fact surround its resolution.

**ii. Reliance**

According to Appellants, FRPM relied on the POA with regard to the three voluntary undertakings explored above. The district court, by contrast, concluded no party relied on the POA and explained that:

> Other than argument, no party presented any evidence that Sagecrest POA represented to anyone, including First Rate, Switzer or Kipper, that it, and not the owners, would provide and install carbon monoxide detectors or new water heaters. In fact, the only evidence is that Kipper did not even know who or what Sagecrest POA was. The only evidence in the record is that both Sagecrest POA and First Rate always recognized that First Rate needed Switzer's consent, as the owner of the unit, to repair or replace the water heaters if the cost was over $250.

The record before us on appeal causes us to disagree. First, as to the installation of hard-wired carbon monoxide alarms, the POA issued two sets of procedures governing that undertaking. The POA's procedures appear mandatory, as they instruct that the "procedures shall be followed . . . ." FRPM referred to the POA's procedures as "Jon's procedures or Jon's way." Specifically, "[h]e came into town . . . and said, '[t]his is what the procedures are going to be.' He laid them out for [FRPM]." And, the POA refused to deviate from those procedures. For instance, although FRPM requested to make immediate installation of hard-wired carbon monoxide alarms in October 2012, the request was never granted. Indeed, Lizz Loop, FRPM's general manager, explained that immediate installation was not performed because FRPM was "following the procedures." Thus, triable issues of fact surround whether FRPM relied on the POA with respect to this voluntary undertaking.

Triable issues of fact also surround whether FRPM relied on the POA with respect to preventative maintenance. As discussed, FRPM proposed hiring a plumber to perform preventative maintenance, provided information on the cost to do so, and requested guidance. The POA, through Kalsbeek, objected to FRPM's proposal, citing cost concerns, but indicated the POA would nevertheless review that information and "get back . . . next week." But the POA never did so, and the preventative maintenance was never performed. Given that the POA represented it would provide guidance, a jury could reasonably find that FRPM relied on the POA regarding this voluntary undertaking.

Finally, triable issues of fact surround whether FRPM relied on the POA with respect to the distribution of Ben Davis's letter. As noted, FRPM sought to distribute Davis's letter in July 2011. Because Kalsbeek's instruction prohibited FRPM from doing so, as Thomason testified, a jury could reasonably find that FRPM relied on the POA with respect to the distribution of Davis's letter. Conversely, reliance cannot be shown as a matter of law regarding the warning issued in March 2012. The key undisputed fact undermining reliance is that the March 2012 warning was issued before the POA, through Kalsbeek,

could intervene. While Kalsbeek instructed that the warning should not be issued, his instruction came too late. In sum, although reliance fails as a matter of law regarding the March 2012 warning, triable issues of fact surround whether FRPM relied on the POA with respect to Davis's letter.

The POA tries to rebut the above by arguing FRPM could not rely on the POA with respect to undertakings FRPM had contracted to perform on behalf of unit owners. The undisputed facts do not support that argument. Based on the above, the record is replete with factual disputes showing that a jury could reasonably find that FRPM relied on the POA. In fact, this case is similar to *Baccus v. Ameripride Services, Inc*., 145 Idaho 346, 179 P.3d 309 (2008). In Baccus, an employer hired a contractor to place safety mats at workplace entryways. *Id*. at 351-52, 179 P.3d at 314-15. On at least one occasion, the contractor failed to do so, and as a result, an employee slipped and became injured. *Id*. The employee sued the contractor in negligence. *Id*. When the case came before us on appeal, we explained with regard to reliance: "[s]o, [the contractor] induced [the employer's] reliance on [the contractor's] promise to replace the safety mats, which increased the risk that . . . [an] employee such as plaintiff could slip, fall, and sustain injury were the promise not kept." *Id*. at 352, 179 P.3d at 315. Here, like Baccus, a jury could reasonably find that the POA induced FRPM's reliance with regard to hard-wired carbon monoxide alarms, preventative maintenance, and carbon monoxide warnings, all of which were matters with the potential to increase the risk of harm to Sagecrest tenants and guests. Therefore, we conclude triable issues of fact surround reliance.

**iii. Foreseeability**

"[N]ormally, the foreseeability of a risk of harm, and thus whether a duty consequently attaches, is a question of fact reserved for the jury." *Stoddart v. Pocatello Sch. Dist. #25*, 149 Idaho 679, 686, 239 P.3d 784, 791 (2010). We find that to be true in this case. We cannot say as a matter of law that Forbush's death and Halowell's injuries were or were not foreseeable. Instead, we find it proper for a jury to decide.

In sum, triable issues of fact surround whether the POA acquired a duty of care as a result of the voluntary undertakings explored above. We therefore reverse the district court's grant of summary judgment in this regard and remand for further proceedings consistent with this opinion. We emphasize that if the POA is found to have acquired a duty of care as a result of these voluntary undertakings, any duty imposed must be limited to the scope of the actual undertaking. Cf. *Beers v. Corp. of Pres. of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 688, 316 P.3d 92, 100 (2013) ("[A]lthough a party may assume a duty by undertaking to act, that duty is limited to the scope of the undertaking.").

**3. Vicarious liability**

Finally, Appellants argue triable issues of fact surround whether the POA is vicariously liable for the torts of its agent, FRPM. "A principal is liable for the torts of an agent committed within the scope of the agency relationship." *Sharp v. W.H. Moore, Inc*., 118 Idaho 297, 303, 796 P.2d 506, 512 (1990). An agency relationship arises when the principal:

> (1) [E]xpressly grants the agent authority to conduct certain actions on his or her behalf; (2) impliedly grants the agent authority to conduct certain actions which are necessary to complete those actions that were expressly authorized; or (3) apparently grants the agent authority to act through conduct towards a third party indicating that express or implied authority has been granted.

*Humphries v. Becker*, 159 Idaho 728, 735, 366 P.3d 1088, 1095 (2016)."This Court has previously viewed the question of whether an agency relationship exists as a question of fact for the jury to determine." *Id*. at 735 n.2, 366 P.3d at 1095 n.2. But, to be clear, "[w]hether facts sufficient to constitute an agency relationship exist is indeed a question of fact for the jury, however, whether a given set of facts are sufficient to constitute an agency relationship is a question of law appropriate for this Court's consideration." *Id*.

The district court rejected Appellants' agency argument, concluding Appellants lacked authority over unit interiors. That conclusion rests on the authority granted to the POA under the CCRs, which the district court found was limited to unit exteriors. We agree insofar that the CCRs do not grant the POA any authority over unit interiors, and hence, the CCRs cannot give rise to an agency relationship over unit interiors. Indeed, the CCRs clearly and unambiguously delineate authority between the POA and unit owners. CCR § 3.3 gives the POA authority over unit exteriors and unit owners authority over unit interiors. CCR § 3.5 reinforces that delineation of authority, as it provides that "[e]ach Owner shall have the exclusive right to paint, repair, tile, wash, paper or otherwise maintain . . . the interior portions of their Four Plex . . . ." Because the CCRs do not give the POA any authority over unit interiors, they cannot give rise to an agency relationship over unit interiors.

However, the district court overlooked how authority bestowed by a contract, like the CCRs, is not dispositive when determining whether an agency relationship exists. E.g., *Thornton v. Ford Motor Co*., 2013 OK CIV APP 7, 297 P.3d 413, 419 (Okla. Civ. App. 2012) ("If the facts show actual control by the principal, an agency is established regardless of the contract language."); *Hylton v. Koontz*, 138 N.C. App. 629, 532 S.E.2d 252, 257 (N.C. Ct. App. 2000) ("It is not dispositive that a contract denies the existence of an agency relationship, if in fact the relationship was that of agent-principal."); *Tomlinson v. G.E. Capital Dealer Distrib. Fin., Inc*., 624 So. 2d 565, 567 (Ala. 1993) ("[T]he language of this provision is not conclusive and will not preclude the finding of agency if there is independent evidence of a retained right of control."). We have long instructed that the "important factor is the control or right of control reserved by the [principal] over the functions and duties of the agent." *Koch v. Elkins*, 71 Idaho 50, 57, 225 P.2d 457, 462 (1950).

In this case, we find triable issues of fact surround whether an agency relationship existed as a result of control the POA actually exerted over FRPM with regard to unit interiors. As a general matter, the record shows that the POA exercised financial leverage over FRPM. As Appellants assert, Sagecrest was FRPM's largest account, and FRPM was therefore required to stay in the POA's "good graces" to keep Sagecrest. CCR § 6.6A supports that assertion, as it required unit owners to employ the same property management company the POA selected to employ for its duties. Further, the POA controlled FRPM's rate of compensation. FRPM's compensation at Sagecrest was twofold: (1) a $150 monthly management fee, paid by the POA; and (2) five percent of monthly gross rental receipts, which, although paid by unit owners, was contingent on the rental rates that the POA and FRPM set. Finally, the POA paid the wages of FRPM's employees who were "fully assigned" to Sagecrest. The POA therefore oversaw those employees' overtime requests. For example, in October 2012, the POA requested FRPM to clarify in which units hard-wired carbon monoxide alarms were installed. In response, FRPM's employee requested to stay late, working overtime, to gather the information. The POA denied the overtime request.

The POA maintains that the above arguments are "completely irrelevant to the issues of control of the interiors of the units." The POA elaborates that "Switzer had a contract with FRPM to manage his unit #4624. Switzer granted authority to FRPM over his residential lot and, as a non-party to the contract, the SMPOA Board could not alter this agreement in any way." We decline to find Switzer's contract with FRPM dispositive. Despite that contract, we find triable issues of fact surround whether the above leverage allowed the POA to exert control over FRPM and unit interiors. Tony Drost, FRPM's President, testified that the POA, through Kalsbeek, controlled "global issues" that were complex-wide. Drost testified that global issues extended to unit interiors and consisted of "the CO testing"; "the water heaters"; "leaks with the windows, stairwells, light bulbs." According to Drost, FRPM was required to "run any global issue through [Kalsbeek] . . . ." Sheila Thomason, FRPM's Maintenance Supervisor, further testified that Kalsbeek "was in charge." She explained that Kalsbeek led FRPM to believe that "he spoke on behalf of the owners." Thus, Switzer's contract with FRPM does not resolve whether the POA exerted actual control over FRPM and unit interiors.

Moreover, as explained above, triable issues of fact surround whether FRPM relied on the POA regarding (1) the installation of hard-wired carbon monoxide alarms; (2) preventative maintenance; and (3) carbon monoxide warnings. See supra Part IV(A)(2)(b). Based on the record before us on appeal, triable issues of fact surround whether the POA's control over FRPM caused FRPM to rely on the POA

with respect to those voluntary undertakings. Consequently, we cannot say as a matter of law that no agency relationship existed as a result of actual control. We therefore reverse summary judgment on this issue and remand for further proceedings consistent with this opinion.

**B. Did the district court properly grant summary judgment to Kalsbeek?**

Appellants contend triable issues of fact surround whether Kalsbeek owed a duty of care he acquired as a result of voluntary undertakings. To make this argument, Appellants rely on the same contentions explored above concerning the POA. See supra Part IV(A)(2)(b). Here, however, Appellants' arguments implicate Kalsbeek as an individual, not as the POA's President. Thus, Appellants seek to hold Kalsbeek personally liable.

"A director who personally participates in a tort is personally liable to the victim, even though the corporation might also be vicariously liable." *Eliopulos v. Knox*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct. App. 1992). The same is true for corporate officers. See, e.g., 18B Am. Jur. 2d Corporations § 1609 (2016) ("A director or officer of a corporation does not incur personal liability for its torts . . . unless he or she has participated in the wrong, had direct personal involvement . . . or authorized or directed that the wrong be done."). "A contrary rule would enable a director or officer of a corporation to perpetrate flagrant injuries and escape liability behind the shield of his or her representative character even though the corporation might be insolvent or irresponsible." *Id*.

In granting summary judgment to Kalsbeek, the district court applied the same logic to Kalsbeek as it applied to the POA and concluded Kalsbeek did not acquire a duty of care as a result of voluntary undertakings. That conclusion represents error. Based on the above, triable issues of fact surround whether the POA acquired a duty of care as a result of voluntary undertakings. And, as noted, Kalsbeek directed those undertakings. Kalsbeek promulgated the POA's two sets of procedures governing the installation of hard-wired carbon monoxide alarms. FRPM even referred to those procedures as "Jon's procedures." Kalsbeek objected to FRPM's preventative maintenance proposal and instructed FRPM that the POA would provide guidance, but he failed to do so. Kalsbeek intervened in an effort to control the warnings issued to unit owners and tenants, and as FRPM explained, Kalsbeek was the sole reason why Ben Davis's letter was not distributed.

Kalsbeek concedes his involvement in these matters, but he contends it does not give rise to a duty of care. He emphasizes how CCR § 7.2 designates him as the "the authorized representative of the [POA] to give and receive notices, approvals, and instructions hereunder." Simply that the CCRs may authorize Kalsbeek's involvement is irrelevant. Even if his involvement were authorized, that authorization would not resolve whether he acquired a duty of care as a result of voluntary undertakings and could therefore be subject to personal liability if he personally participated in tortious conduct.

Thus, we conclude triable issues of fact surround whether Kalsbeek acquired a duty of care for the same reasons identified above. See supra Part IV(A)(2)(b). We therefore reverse summary judgment granted to Kalsbeek.

**C. Should we award attorney fees on appeal?**

Appellants do not request fees. Kalsbeek and the POA request fees under Idaho Code section 12-121, Idaho Rule of Civil Procedure 54(e)(1), and Idaho Appellate Rule 41. Fees are properly awarded to the prevailing party "if the action was pursued, defended, or brought frivolously, unreasonably, or without foundation." *Idaho Military Historical Soc'y, Inc. v. Maslen*, 156 Idaho 624, 633, 329 P.3d 1072, 1081 (2014) (citation and internal quotation marks omitted).

As to Kalsbeek, he is not the prevailing party on appeal and is therefore not entitled to fees. As to the POA, it prevails on appeal on the premises liability issue, but Appellants prevail on the issues of whether the POA may have acquired a duty of care as a result of voluntary undertakings, and whether the

POA may be vicariously liable for FRPM's conduct. Although the POA is the prevailing party on the premises liability issue, Appellants did not bring or pursue that argument frivolously, unreasonably, or without foundation. Accordingly, we do not award fees on appeal.

## V. CONCLUSION

We affirm in part and reverse in part the district court's summary judgment order. We affirm that summary judgment was properly granted as to whether the POA owed a premises liability-based duty of care. However, summary judgment was improperly granted as to whether the POA and Kalsbeek acquired a duty of care as a result of voluntary undertakings, and whether the POA is vicariously liable for FRPM's conduct. We therefore remand this case for further proceedings consistent with this opinion. We decline to award attorney fees on appeal. We award Appellants costs against Kalsbeek on appeal because they prevail against him, but not against the POA.

Justices, EISMANN, JONES and HORTON CONCUR.

Concur by: BRODY (In Part)

Dissent by: BRODY (In Part)

## Dissent

BRODY, J., concurring in part, dissenting in part.

I respectfully dissent from Part IV.A.1. of the Court's opinion, because I disagree with the majority's conclusion that premises liability can only be imposed on an "owner" or "occupier" of land or their agents. This bright-line rule is inconsistent with our prior case law and may allow some responsible parties to escape liability.

The majority begins its analysis with the statement "[a]ppellants correctly inform us that 'the general rule of premises liability is that one having control of the premises may be liable for failure to keep the premises in repair.' *Jones v. Starnes*, 150 Idaho 257, 261, 245 P.3d 1009, 1013 (2011) (quoting *Heath v. Honker's Mini-Mart, Inc*., 134 Idaho 711, 713, 8 P.3d 1254, 1256 (Ct.App. 2000))." The majority then limits this principle by stating that our case law demonstrates that premises liability is limited to owners or occupiers or their agents. The majority contends that the issue of control only comes into play when there is a dispute between owners and occupiers as to whom actually owes a duty to the injured party. I disagree with the majority's analysis. To begin with, none of the cases cited by the majority actually address whether someone other than an owner or occupier or their agents can be held responsible under a premises liability theory. The first case the majority cites is *Rountree v. Boise Baseball, LLC*, 154 Idaho 167, 296 P.3d 373 (2013). In *Rountree*, the plaintiff was a patron at a Boise Hawks baseball game. *Id*. at 169, 296 P.3d at 375. He was seated in the executive section of the stadium when he was hit in the face with a baseball during the game. *Id*. He lost an eye. *Id*. He sued a number of parties, including the baseball team and the owner of the stadium. Id. *Rountree* contains this statement: "[t]he duty owed by owners and possessors of land depends on the status of the person injured on the land . . . ." *Id*. at 171, 296 P.3d at 377. The majority quotes this language, but it is important to recognize that *Rountree* does not actually address whether someone other an owner or possessor of land can be held responsible under a premises liability theory. The issues actually decided in *Rountree* were whether Idaho should adopt the so-called "baseball rule" (a rule which limits owner liability to protect against foul balls) and whether the patron assumed the risk of being hit. *Id*. at 170-75, 296 P.3d at 376-81.

The majority also cites *Stem v. Prouty*, 152 Idaho 590, 272 P.3d 562 (2012). Stem involved a forklift accident. *Id*. at 591, 272 P.3d at 563. The plaintiff lost his leg after being pinned underneath a forklift that toppled over when it broke through a water meter cover in the floor. *Id*. The plaintiff sued the landowner, alleging that the premises were unsafe because the water meter cover was too thin to support

the weight of the forklift. *Id*. The only issue decided by the Court was whether the landowner was not responsible because there was no evidence that he knew that the water meter cover created a dangerous condition. *Id*. at 593-94, 272 P.3d at 565-66. The Stem decision does not address whether a premises liability can be brought against a tortfeasor who is not a landowner or occupier.

The final case cited by the majority is *Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321 (1989). The plaintiff in *Harrison* brought suit against a building owner and tenant when she fell in a hole in a sidewalk in front of the business. *Id*. at 589-90, 768 P.2d at 1322-23. The trial court granted summary judgment in favor of the defendants based on the "open and obvious" doctrine. *Id*. at 590, 768 P.2d at 1323. This Court reversed, finding that the doctrine was inconsistent with Idaho's comparative negligence laws. *Id*. at 595-96, 768 P.2d at 1328-29. Like Stem and Prouty, the *Harrison* decision did not address in any fashion whether a premises liability action could be brought against someone other than an owner or occupier or their agents.

The earliest case where the Court addressed premises liability in the context of a non-owner appears to be *Otts v. Brough*, 90 Idaho 124, 409 P.2d 95 (1965), superseded on other grounds by I.C. § 6-801. In Otts, the plaintiff was injured when he fell into a framed opening in a concrete floor. *Id*. at 128-29, 409 P.2d at 96-97. The plaintiff was a subcontractor who had been hired to do the ceiling insulation in a new school building that was being constructed in Rexburg. *Id*. The plaintiff sued the general contractor for failing to guard and warn against the danger created by the opening in the floor. *Id*. at 129, 409 P.2d at 97. The trial court granted summary judgment in favor of the general contractor, holding that the claim was barred by the defense of assumption of risk. *Id*. This Court reversed, holding that there were genuine issues of material fact which precluded summary judgment. *Id*. at 134-36, 409 P.2d at 100-02. In addressing the duty owed by the general contractor, the Court held: "Owners or persons in charge of property owe to an invitee or business visitor the duty to keep the premises in a reasonably safe condition, or to warn the invitee of hidden or concealed dangers of which the owner or one in charge knows or should know by exercise of reasonable care, in order that the invitee be not unnecessarily or unreasonably exposed to danger." *Id*. at 131, 409 P.2d at 98 (emphasis added).

The majority contends that Otts can be squared with their holding today because there is evidence that the general contractor "occupied" the worksite. While I agree that there is evidence in Otts from which a reasonable jury could reach that conclusion, the "persons in charge of property" language in Otts is a better test for determining whether premises liability should attach than the "occupier" label used by the majority. A simple example illustrates my point.

Suppose I hire a contractor to remodel my kitchen. The contractor works at my house a few days a week while my family and I are still living in the home. One day, my mother comes to visit. She is helping me cook dinner. She steps inside the pantry to get an ingredient and is injured when she falls into a hole in the floor. I had no idea the hole was there and there was no warning or barricade. Can the contractor be held responsible for her injuries under a premises liability theory for creating a dangerous condition on the premises? Under the majority's decision today the answer would likely be no since the contractor does not "occupy" the house. My family and I do. If the analysis were "does the contractor control the premises" -- as I advocate the legal test is in Idaho -- the answer would much more likely be yes. Imposing premises liability on a contractor in a situation like this makes sense because he created the hazard and was in a position to remedy it or guard against it.

The majority's decision to include "agents" within the categories of persons who can be held liable under a premises liability theory, while a step in the right direction, does not go far enough to address my concerns. Another example illustrates my point.

Suppose a local school district hires a general contractor to build a new science wing at its high school. The general contractor enters into a contract with a construction manager to oversee the project. A student is injured when he falls into a hole that has been covered with a flimsy piece of plywood. Can the general contractor and/or the professional construction manager be held responsible under a premises liability theory as "agents" of the school district? The majority says yes, asserting that general

contractors and professional construction managers are "frequently" the agents of the landowner. My experience tells me differently.

This Court explained nearly 100 years ago that "[a]gency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Gorton v. Doty*, 57 Idaho 792, 798, 69 P.2d 136, 139 (1937) (emphasis added). When a school district hires a general contractor to build a new science wing, it usually does so because the district does not have the knowledge, skills, tools, or time to do the work. The general contractor is an independent contractor who exercises its own judgment about how to do the work and provides the tools and skills to get it done. There is a contractual relationship between the district and the general contractor, but that contractual relationship does not necessarily mean there is an agency relationship.

Similarly, the construction manager in my example cannot be the school district's agent. The school district did not even contract with the construction manager so there is no consent by either party and the school district would have no control over anything the construction manager does. The general contractor might control the construction manager depending on the contractual relationship, but a professional construction manager may also be an independent contractor. While I would agree that it is the landowner who typically contracts with a construction manager and that an agency relationship is more likely to exist in that scenario, construction projects are carried out in many different ways and one cannot assume that a construction manager will always be the landowner's agent. Given the complex nature of modern business entities and real estate transactions, it is possible to imagine the prospect of a general contractor or construction manager, who exercises the requisite control over the premises, escaping liability under the majority's rule because he does not neatly fit within the categories elucidated today.

Other jurisdictions have dealt with this issue and have concluded that construction contractors share in premises liability, even though they are neither owner nor occupier. See *Worth v. Eugene Gentile Builders*, 697 So.2d 945 (Fla. Dist. Ct. App. 1997) (holding that contractors may share premises liability for job site injuries when the premises are under the contractor's control); see also 62 AM. JUR. 2D Premises Liability § 6 (2005); 13 AM. JUR. 2D Building and Construction Contracts § 136 (2009); 4r § 384. In Maine, premises liability for other parties has arisen in the context of whether a national fraternity is liable for sexual assault perpetrated by one of its members. In *Brown v. Delta Tau Delta*, 2015 ME 75, 118 A.3d 789 (2015), the Supreme Judicial Court concluded that the national fraternity organization had a premises-liability-based duty to its collegiate chapters' social invitees, even though the national fraternity did not own or occupy the premises in question, because the assault was forseeable, the national fraternity had authority to control its members and actually exercised that control, and because it had a sufficiently close relationship with its local chapters and individual members.

I cannot square the majority's decision today with the Court's recent decision in *McDevitt v. Sportsman's Warehouse, Inc*., 151 Idaho 280, 255 P.3d 1166 (2011). In McDevitt, the plaintiff was injured when she slipped or tripped over a recessed irrigation box in a sidewalk outside of Sportsman's Warehouse in Twin Falls. *Id*. at 281, 255 P.3d at 1167. The primary issue presented in the case was whether Sportsman's could be held liable under a premises liability theory for the alleged dangerous condition. *Id*. at 283, 255 P.3d at 1169. In answering this question, this Court engaged in a two-step analysis. *Id*. at 284-86, 255 P.3d at 1170-73. First, it explained that a tenant "occupies" land. *Id*. This Court then analyzed whether the sidewalk was part of Sportsman's leased premises and determined that it was not. *Id*. This Court's analysis did not, however, stop there. Even though the Court concluded that Sportsman's was not an "occupier" of the sidewalk (i.e., it did not fit within one of the categories of persons defined by the majority today), this Court then went on to analyze whether Sportsman's controlled the sidewalk. *Id*. at 285-86, 255 P.3d at 1171-72. While the plaintiff in McDevitt was ultimately unsuccessful in demonstrating Sportsman's control, all I am saying is that the majority should have applied the same legal analysis to this case.

In this case, the record contains evidence that the POA exercised some control over the interior of the apartment units, regardless of the content of the CC&R's. FRPM's President testified that POA handled "global issues" that affected apartment units complex wide, such as furnace filters and water

heaters. These global issues were not restricted to the exterior of the units, as the CC&R's seemed to contemplate. For instance, the POA ordered the FRPM to conduct carbon monoxide testing inside each unit every three months. They also issued two sets of procedures for handling carbon monoxide issues related to the faulty water heaters, including directing the installation of hard-wired carbon monoxide alarms inside the units. From my perspective, this evidence is sufficient to create a genuine issue of material fact about whether the POA exercised sufficient control to incur premises liability. For that reason, I believe that summary judgment on this issue was not proper. The issue should have been submitted to a jury.

Notes

(1) Scope of the duty owed by a landlord to a tenant: What is the scope of the duty owed by a landlord to her tenant? *Jesse v. Lindsley*, 149 Idaho 70, 233 P.3d 1(2008); *Stevens v. Fleming*, 116 Idaho 523,777 P.2d 1196 (1989); *McKinley v. Lyco Enterprises, Inc*., 111 Idaho 792, 727 P.2d 1120 (1986); *Stephens v. Stearns*, 106 Idaho 249,678 P.2d 41 (1984); *Worden v. Ordway*, 105 Idaho 719, 672 P.2d 1049 (1983). See also I.C. § 6-320.

(2) Scope of the duty owed by a landlord to a land entrant other than a tenant: What is the scope of the duty owed by a landlord to a land entrant other than a tenant? Boots ex rei. *Boots v. Winters*, 145 Idaho 389, 179 P.3d 352 (Ct. App. 2008); *Turpen v. Granieri*, 133 Idaho 244, 985 P.2d 669 (1999); *Sharp v. WH. Moore, Inc*., 118 Idaho 297, 796 P.2d 506 (1990); *Marcher v. Butler*, 113 Idaho 867, 749 P.2d486 (1988); *McKinley v. Fanning*, 100 Idaho 189,595 P.2d 1084 (1979); *Olin v. Honstead*, 60 Idaho 211,91 P.2d 380 (1939).

{3) Lessees, contractors, subcontractors, and the like: When one person leases land to another who is legally responsible for maintaining the premises?

In *Johnson v. K-Mart Corp*., 126 Idaho 316,882 P.2d971 (Ct. App. 1994), plaintiff slipped and fell on ice in parking lot. The trial court granted summa judgment bas d on defendant's argument that its lease did not include control over the parking lot and thus it owed plaintiff no duty of care to maintain the lot in a safe condition. The court of appeals reversed. It initially construed the lease as granting K-Mart nonexclusive control over the parking lot. It then concluded that, "although the covenant to maintain the parking lot may have fixed the obligations as between K-Mart and its landlord, this covenant did not operate to absolve K-Mart of its common-law duty to maintain its leased premises in a reasonably safe condition for its invitees."

**(4) Scope of the duty owed to land entrants for "non-conditions":** Does the land occupier have a duty to protect a land entrant from other land entrants? Does the answer depend upon the status of the entrant? Norman and Genevieve Vollmer brought their greyhound with them to watch the horse racing at the Lewiston Interstate Fair. The dog, apparently wishing to participate, ran onto the race track and into a horse that plaintiff was riding. Plaintiff was thrown and suffered permanent injuries. The Fair Association had a rule prohibiting dogs on the premises and the Vollmers had been informed of the rule. Plaintiff brought an action against the Fair Association:

> The fair association had authorized and licensed the plaintiff to ride in a speed contest upon its ground. The evidence shows that it was a rule generally, and of this association, not to permit dogs upon the fair ground without any restraint upon the part of those in whose company he was or the fair association. The fair association knew the dog went upon the fair grounds and took no steps to restrain the dog or see that he did not become a dangerous agency but relied upon Norman Vollmer and his sister to take proper care and properly restrain the dog. In such case the association was responsible for the acts of Norman Vollmer. Under all of the of these circumstances we are satisfied that it was the duty of the fair association not to permit dogs or any other dangerous agencies to go upon the racetrack where the plaintiff had a right to presume safety; and that it was negligence on the part of the association to permit the dog to go unrestrained upon the fair grounds and the racetrack, and the jury were warranted in concluding

> that it was negligence, and that they were liable as well as the other defendant for the injury resulting from the acts of such dog.

*McClain v. Lewiston Interstate Fair & Racing Association*, 17 Idaho 63, 104P. 1015(1909). See also *McGill v. Frasure*, 117 Idaho 598, 790 P.2d 379 (Ct. App. 1990); *Joyner v. Jones*, 97 Idaho 647, 551 P.2d 602 (1976).

**(5}** **Scope of the duty owed to a person off the premises**: Does a land occupier owe any duty to protect a person who is not located on the premises from a hazard that originates on the premises? See *Jerome Thriftway Drug, Inc. v. Inslow*, 110 Idaho 615, 717 P.2d 1033 (1986); *Boise Car & Truck Rental Co. v. WACO, Inc.*, 108 Idaho 780,702 P.2d 818 (1985); *Splinter v. City of Nampa*, 70 Idaho 287,215 P.2d 999 (1950).

(6} Scope of the duty owed to an entrant for conditions off the premises: In *Heath v. Honker's Mini-Mart, Inc*., plaintiff was injured when she slipped and fell on a vacant lot adjacent to defendant's business. Although the defendant had no interest in the lot, plaintiff argued that patrons to the min-mart frequently parked on the lot. The court rejected the argument since the business owner had no legal right to assume control and maintenance over the premises where e accident occurred. *Heath v. Honker's Mini-Mart, Inc*., 134 Idaho 711, 8 P.3d 1254 (2000). Since the business benefited from the lot, why is it not appropriate that it should be responsible for the risk?

## 2. BEYOND NONFEASANCE: THE DUTY TO ACT

### a. Assumption of Duty

**KUNZ V. UTAH POWER & LIGHT CO.**
**526 F.2d 500 (9th Cir. 1975)**

CHOY, C.J.: Bear Lake lies on the border between Idaho and Utah. Bear River which rises in the Uinta Mountains of Utah flows into Idaho before turning south back into Utah, does not naturally enter Bear Lake. In 1917, however, Utah Power dammed the river and diverted its flow into the lake, allowing it to be used for water storage. Plaintiffs if are ranchers whose lands lie along the Bear River channel downstream from the lake. Prior to 1917, these lands were devoted to wild hays which were dependent upon flooding from the spring runoffs. The installation of the water storage system in 1917 harnessed the spring runoffs and stopped the flooding, so the ranchers converted their operations to alfalfa and cereal crops, which will not tolerate floods.

Because of heavy winter snows and spring rains, the spring runoff in 1971and 1972 was exceptionally large and the ranchers' properties were flooded for several months. They brought an action for damages resulting from the flooding, contending that Utah Power had been negligent in its operation of the Bear River-Bear Lake storage system. Utah Power appeals a jury verdict for the ranchers, arguing that "it had no affirmative duty of flood control and so could not be held negligent for downstream flooding since it did not add to the natural flow of the river during the time in question." The court disagreed:

> In general, the law does not require one person to act affirmatively to prevent harm to another unless he has himself brought about the condition which threatens the harm. Courts have often found an exception to this rule, however, when one person has voluntarily undertaken to assist another. He is then required to exercise reasonable care to protect the other's interests. Thus, when a railroad voluntarily provides a flagman at an intersection, a relationship with motorists is established which creates a duty of care. In cases in which such liability has been found, the plaintiffs condition usually was worsened by his reliance on the defendant's action, though such detrimental reliance has not always been required. []

The line between "malfeasance" and "nonfeasance" is very thin and frequently almost imperceptible. The same conduct can often be described as either an act, for which there is liability, or a failure to act, for which there is none. Prosser has defined the issue of duty and liability in terms of the relationship between the parties and the nature of the plaintiff's dependence:

> The question appears to be essentially one of whether the defendant has gone so far m what he has actually done and has gotten himself into such a relationship with the plaintiff, that he has begun to affect the interests of the plaintiff adversely, as distinguished from merely failing to confer a benefit upon him.

PROSSER, THE LAW OF TORTS § 56, at 340 (4th ed. 1971).

Utah Power insists that the storage system was not intended to be a flood-control project and that it was not held out as such. Its employees admitted, however, that Utah Power had in the past attempted to eliminate or minimize flooding by maintaining sufficient capacity m Bear Lake to handle the spring runoffs and that Utah Power employ es had consulted with ranchers downstream, including the Landowners, concerning water-release and flood problems. Though perhaps not as its primary duty, Utah Power has voluntarily undertaken flood-control efforts in its operation of the Bear River-Bear Lake system. And whether intentionally for flood-control reasons or in furtherance of its other purposes, Utah Power has materially altered the water-flow patterns of the area by regularly storing the annual spring runoffs.

The Landowners have reasonably relied on such storage. As described above, they changed the nature of the farming operation on their lands after the water storage system was constructed in 1917. They replaced crops which depended on the spring runoff and which could survive flooding with crops which could not. It may be true that their lands would have flooded anyway had the storage system not been inexistence, but in that case, they would have still been growing the grasses and wild hays that might have survived the highwater. In its installation and operation of the water storage system, Utah Power established a relationship in which the landowners had to rely on Utah Power to control the spring run-offs.

Under these circumstances, Utah Power must carry the responsibility for avoiding damaging floods. We do not say that it is absolutely liable for flooding, but it must recognize the dependent position in which downstream ranchers have been placed and act accordingly to try, consistent with its other duties, to control floods. Utah Power, therefore, had a duty of care on which liability for negligent damage can be based.

NOTES

(a) What was the source of the company's duty? What did it do that led the court to impose a duty? Had it impliedly agreed to control the water flow? Had it "voluntarily undertaken to assist" the ranchers? What is the role of reliance in the creation of duty? Is the fact that plaintiff relied upon the defendant's actions relevant? What policies are advanced by imposing a duty on the company? Which rationales for tort liability best explain the result? What was the scope of the duty? What interest is protected by the duty?

(b) Notice that the defendant sought to characterize its conduct as nonfeasance. Did the court determine whether the conduct was nonfeasance or misfeasance? At what point ought the court to begin consideration: before the water control devices were installed? after they had been installed? What was the appropriate status quo ante?

(c) This decision by the Ninth Circuit Court of Appeals is one of the antecedents to the Idaho Supreme Court's decision in *Kunz v. Utah Power & Light*, 117 Idaho 901, 792 P.2d926 (1990), excerpted at page 35 supra.

(2) Recall the decision in *Wilson v. Boise City*, 6 Idaho 391,55 P. 887 (1899), in which the city was held liable to a landowner for negligence is re-routing a stream. Are the cases distinguishable? See also *Dunn v. Boise City*, 48 Idaho 550, 283 P. 606 (1929) (city potentially liable for altering drainage pattern of seasonal stream); *Axtell v. Northern Pacific Ry*., 9 Idaho 392, 74 P. 1075 (1903).

**UDY v. CUSTER COUNTY**

Supreme Court of Idaho
136 Idaho 386,34 P.3d 1069 (2001)

WALTERS, J.: This is an appeal from the district court's decision granting summary judgment in a negligence action in favor of Respondents Custer County and Sheriff Mickey Roskelley. The district court held that Sheriff Roskelley did not have a legal duty to remove or warn of rocks on a State highway. We affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

On March 1, 1998, David Udy was driving his truck on Highway 75 approximately two miles north of Clayton in Custer County. Roy Chivers and Roxanna McDonald were passengers in Udy's truck. While driving, Udy encountered a large rock in the road. Udy was unable to avoid hitting the rock as another vehicle was approaching in the opposite lane. Udy's vehicle struck the rock, blowing out the right front tire and causing Udy to lose control. The truck subsequently rolled, causing injuries to Udy and his passengers.

On the night before the accident, Custer County Sheriff Mickey Roskelley and his wife had traveled on Highway 75 to Clayton to serve some papers. Roskelley admitted that on his return from Clayton, he observed several small rocks on the fog line approximately one-third of a mile from the scene of Udy's subsequent accident Sheriff Roskelley did not remove the rocks or notify other deputies or the Idaho Transportation Department (ITO) of the presence of the rocks.

On January 8, 1999, Udy filed a complaint against Sheriff Roskelley and Custer County alleging that Roskelley observed and negligently failed to remove from the highway the rock Udy later struck with his vehicle. The Chivers and McDonalds also filed a complaint against Roskelley and the county alleging injuries as a result of Roskelley's negligence in leaving the rock on the highway. The defendants subsequently filed a motion for summary judgment. On February ˙ 2000 the district court granted the defendants' motion, ruling that as a matter of law, Sheriff Roskelley owed no duty to remove or warn of the rock struck by Udy's vehicle. Udy, the Chivers, and the McDonalds appeal the district court's decision. The question presented on appeal is whether Sheriff Roskelley owed a duty of care to the Appellants to warn of or remove the rocks on Highway 75.

**DISCUSSION**

**A. Sheriff Roskelley's Duty**

…

**2. Duty Under the Common Law**

No liability arises from the law of torts unless the defendant owes a duty to the plaintiff. See *Hoffman v. Simplot Aviation*, 97 Idaho 32, 539 P.2d 584 (1975). Generally, the question whether a duty exists is a question of law, over which we exercise free review. [) This Court follows the rule that "one owes the duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury." *Alegria v. Payonk*, 101 Idaho 617,619, 619P.2d 135, 137(1980). Further, there is a

"general rule that each person has a duty of care to prevent unreasonable, foreseeable risks of harm to others." *Sharp v. WH. Moore, Inc*., 118 Idaho 297,300,796 P.2d 506,509 (1990). However, one also owes no affirmative duty to act to assist or protect another absent unusual circumstances, which justify imposing such an affirmative responsibility. *See Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388,399, 987 P.2d 300, 311 (1999). With these principles in mind, we next examine whether Sheriff Roskelley owed a common law duty to warn of or remove the rocks from Highway 75.

**a. Voluntary Assumption of Duty**

The Appellants first assert that the district court erred in finding that Sheriff Roskelley did not voluntarily assume a duty. They contend that because Sheriff Roskelley testified that it was his practice to remove or contact someone to remove obstructions from the highway, Sheriff Roskelley assumed a duty to remove the rocks, even if he did not have a statutory duty to do so. We disagree with the Appellants' argument.

This Court has recognized that it is possible to create a duty where one previously did not exist. "If one voluntarily undertakes to perform an act, having no prior duty to do so, the duty arises to perform the act in a non-negligent manner." *Featherston v. Allstate Ins. Co*., 125 Idaho 840,843, 875 P.2d 937,940 (1994) (citing *Bowling v. Jack B. Parson Cos*., 117 Idaho 1030, 1032, 793 P.2d 703, 705 (1990)). liability for an assumed duty, however, can only come into being to the extent that there is in fact an undertaking. See *Bowling*, 117 Idaho at 1032, 793 P.2d at 705.Although a person can assume a duty to act on a particular occasion, the duty is limited to t e discrete episode in which the aid is rendered. [] In other words, past voluntary acts do not entitle the benefited party to expect assistance on future occasions, at least in the absence of an express promise that future assistance will be forthcoming. (]

Thus, while Sheriff Roskelley may have voluntarily removed rocks and other debris from the State's highways on prior occasions, the Court concludes that Sheriff Roskelley, by way of these prior actions, did not voluntarily assume a duty to remove the rocks from Highway 75 the night before the accident. There is nothing in the record indicating that Sheriff Roskelley increased the risk created by the rocks on Highway 75; instead, the risk created by the rocks remained unchanged. As the court noted in Santee, "nonfeasance which results in failure to eliminate a preexisting risk is not equivalent to nonfeasance which increases a risk of harm." [*City of Santee v. County of San Diego*, 259 Cal. Reporter. 757,762 (1989)].

Accordingly, we hold that Sheriff Roskelley, despite evidence of prior acts of removal or notification, did not voluntarily assume a duty to remove the rocks he observed on Highway 5 the night before Udy's accident. To hold otherwise would be tantamount to holding that Sheriff Roskelley had a permanent duty to remove obstructions from the highway.

…

For the above reasons, we affirm the district court's summary judgment in favor of Sheriff Mickey Roskelley and Custer County.

TROUT, C.J., AND SCHROEDER AND EISMANN, JJ., CONCUR.

KIDWELL, J., SPECIALLY CONCURRING: The analysis of the majority opinion appears to reflect the law of Idaho and probably most other jurisdictions. To be more specific, no common law ... is owed or due to the plaintiffs in this case under the facts presented. Therefore, I have no alternative, but to concur.

However, I am concerned that the factual situation in the present case could be cited as precedent for the proposition that a public official has no civil duty, no matter how hazardous the situation, to take any action to prevent possible injury to members of the public. An example is appropriate to illustrate my concerns: a sheriff in his patrol car sees a hazardous rockslide around a blind curve. Although his radio works, he does not use it to notify those charged with maintaining the roadway. A person is killed or seriously injured because the rockslide was not removed from the road. In this situation, a question arises as to whether the legal system should impose some minimal duty on a public

official charged with a caretaking responsibility. The question of whether there should be a duty looms larger when the hazard is great and the action necessary to rectify the problem is minimal

> The concept of when the legal system does or should impose a legal duty is elusive: There is a duty if the court says there is a duty; the law, like the Constitution, is what we make it. Duty is only a word with which we state our conclusion that there is or is not to be liability. In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where loss should fall.

William L. Prosser, Palsgraf Revisited, 52 MICH. L. REV. 1, 15 (1953) (footnote omitted).

By analogy, Judge Learned Hand, speaking for the majority in a classic tort case, provides some guidance. See The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932). The facts of this case are well known: two tugboats lost their barges and cargoes during a predicted storm in the Atlantic Ocean. Had the tugs been equipped with working radios, the tug masters would have known about the storm and could have likely avoided it. At issue in the case was whether the tugboat owners had a duty to equip the tugs with working radios. Although at the time, only one tugboat line equipped its tugs with radios, the court held that not using available technology to avoid the storm was a cause of the injury sustained by the companies. Therefore, a duty to use the means available to avert an accident existed.

In the present case, if Sheriff Roskelley had used a communication device to inform the Department of Transportation that a hazard existed on the road, the accident and subsequent litigation could have been prevented. It seems that placing a duty upon Sheriff Roskelley to make a very brief telephone call for the protection of motorists is appropriate.

NOTES

(1) Why was there no duty? What is required to conclude that one person has assumed a duty toward another person? If Roskelley had stopped and removed some but not all of the rocks from the road, would he have assumed a duty? Does Roskelley have to know that Udy is approaching the spot?

What favors ought to be sufficient to find that one person has assumed a duty to protect another from a risk that the first person did not create? What factors are present in the following cases? Is there a single, short list of factors or is it a shifting group?

**(2)** ***Carter Packing Co. v. Pioneer Irrigation District***: Plaintiffs land was bordered by a drainage ditch maintained by Pioneer Irrigation District. The ditch ran through a culvert beneath railroad tracks owned by Union Pacific Railroad. Due to a combination of snow, heavy rain, and a chinook wind, the ditch rapidly filled with water. Despite the railroad's efforts, the culvert became clogged with debris, flooding plaintiffs land. Plaintiff appeals the dismissal of its claim against the railroad. The court affirmed, holding that the railroad's "voluntary assistance on the day in question, in an effort to protect its railroad tracks near the point of overflow," did not impose any duty to protect plaintiff's property. *Carter Packing Co. v. Pioneer Irrigation District*, 91 Idaho 701, 429 P.2d 433 (1967). How specifically must the conduct be directed to the plaintiff before defendant can be said to have assumed a duty? Is the fact that plaintiff relied- or did not rely? upon the defendant's actions relevant? Is *Carter* consistent with *Udy*? Or, is the date of the decision the most important factor?

**COGHLAN v. BETA THETA PI FRATERNITY**

Supreme Court of Idaho
133 Idaho 388, 987 P.2d 300 (1999)

SILAK, J.: This is a tort action filed by a University of Idaho student who was injured when she fell, while intoxicated, from the third-story fire escape of her sorority house.

## I. FACTS AND PROCEDURAL BACKGROUND

### A. Facts

On August 19, 1993, Rejena Coghlan was an eighteen-year-old freshman at the University of Idaho who had recently been notified of her admission to the Alpha Phi Sorority. At that time, the University of Idaho and campus fraternities and sororities were celebrating the end of "Rush Week," which is an event sponsored and sanctioned by the University in conjunction with campus fraternities and sororities. On that day, Coghlan attended an Alpha Phi house meeting where she learned that the Alpha Phi members were invited to attend several parties sponsored by campus fraternities celebrating the end of "Rush Week." At the meeting, Alpha Phi's alcohol policy prohibiting underage drinking was briefly discussed, and Coghlan was assigned a "guardian angel" by the sorority. The "guardian angel" was an active member of the sorority who was supposed to provide Coghlan with assistance during the night's activities. Afterward, however, Coghlan's "guardian angel" allegedly told Coghlan that she would not be "hanging out" with her that night.

Later that evening, Coghlan attended two fraternity parties: one jointly sponsored by the Sigma Alpha Epsilon (SAE) and Pi Kappa Alpha (PKA) Fraternities which was held at the SAE Fraternity house and entitled the "Jack Daniels' Birthday" party, and the other held at the Beta Theta Pi (BTP) Fraternity house entitled the "Fifty Ways to Lose Your Liver" party. Two University of Idaho employees, both Greek advisors for the University, were in attendance at the BTP party. Coghlan alleges that one of the employees saw Coghlan at the BTP party and congratulated her for pledging Alpha Phi Sorority. Coghlan alleges that she was served beer and whiskey at the SAE/PKA. party, and she was served mixed hard alcohol at t e BTP party. She did not have any identification in her possession, and she was not asked at either party for identification prior to being served.

As a result of Coghlan's drinking at the fraternity parties, she became intoxicated and distraught. Coghlan was eventually escorted home by a sorority sister and put to bed in the third floor sleeping area of the Alpha Phi Sorority house. She later fell thirty feet from the third-floor fire escape platform to the ground below. Coghlan was discovered a short time later lying in some bushes below the third-floor fire escape landing. She was taken into the house and paramedics were called. As a result of her fall, she sustained permanent injuries.

## III. ANALYSIS

### B. The Trial Court Erred In Dismissing Coghlan's Claim Against The University Defendants.

The appellants appeal from the district court's order granting the University defendants' motion to dismiss....The district court ... held that the actions of the University. In this case do not constitute acts sufficient to support a duty based on a voluntary assumption of duties.

#### 3. Assumed duty

This Court has recognized that "it is possible to create a duty where one previously did not exist. If one voluntarily undertakes to perform an act, having no prior duty to do so, the duty arises to perform the act in a non-negligent manner." *Featherston v. Allstate Ins. Co*., 125 Idaho 840, 843, 875 P.2d 937, 940 (1994) (citing *Bowling v. Jack B. Parson Cos*., 117 Idaho 1030, 1032, 793 P.2d 703, 705 (1990)). Generally, the question whether a duty exists is a question of law. See, e.g., *Freeman v. Juker*, 119 Idaho 555, 808 P.2d 1300 (1991).in this case, appellants have alleged that two University employees were present to provide supervision at the BTP party attended by Coghlan. Appellants also have alleged that the University employees knew or should have known that BTP was serving intoxicating beverages to underage students and should have taken action at the time they were present in the BTP Fraternity house prior to Coghlan's injury. The appellants further have alleged that the University employees knew

or should have known that Coghlan was intoxicated and should have acted at the time they saw her prior to her injury. These allegations support an inference in favor of Coghlan that the University defendants assumed a duty to exercise reasonable care to safeguard the underage plaintiff from the criminal acts of third persons, i.e., furnishing alcohol to underage students, of which the University employees had knowledge. Therefore, we hold that the pleadings in this case sufficiently state a claim for relief against the University defendants, and that the district court erred in granting the motion to dismiss at this stage of the proceedings. In so holding, we do not conclude as a matter of law that an assumed duty exists and remand this issue for further litigation....

**C. The Trial Court Erred In Holding That Alpha Phi Sorority Owed No Duty To Coghlan.**

Appellants challenge the district court's orders granting summary judgment in favor of Alpha Phi Sorority asserting that the district court erred in finding that Alpha Phi ...did not assume a duty of care through its actions.

…

**3. Assumed duty**

Appellants argue that Alpha Phi assumed a duty which renders it liable to Coghlan for her injuries. As discussed above, [I]f one voluntarily undertakes to perform an act, having no prior duty to do so, the duty arises to perform the act in a non-negligent manner." *Featherston v. Allstate Insurance Co*., 125 Idaho 840, 843, 875 P.2d 937, 940 (1994). Appellants argue that Alpha Phi took numerous actions which fairly constitute undertakings sufficient to create a duty to act in a non-negligent manner. Appellants assert that selecting Coghlan as a sorority pledge and inviting her to attend the fraternity parties with knowledge that alcohol would be served there and encouraging her to drink was a sufficient undertaking to create a duty for Alpha Phi to supervise and protect Coghlan. The appellants also argue that Alpha Phi's assignment of a "guardian angel" to supervise Coghlan during the fraternity parties was a sufficient undertaking to create an affirmative duty which was breached when the assigned guardian angel left Coghlan to attend the parties on her own. Finally, appellants contend that Alpha Phi, involuntarily taking Coghlan back to the sorority house and putting her to bed on the third floor in her intoxicated state, undertook a duty to supervise and protect her until she was no longer in danger of physical harm due to her intoxication.

Liberally construed, the record supports inferences that Alpha Phi invited newly selected sorority members to attend various fraternity parties and knew or should have known that alcohol would be served to underage newly selected sorority members at the parties. The record also demonstrates that Alpha Phi appointed a "guardian angel" sorority member to accompany and assist Coghlan during the activities on the date of Coghlan's injuries. Further, the record supports the inference that Alpha Phi undertook to care for Coghlan after she became intoxicated by taking her back to the Alpha Phi Sorority house and leaving her in bed unattended in the third floor sleeping area of the house. After construing the facts in favor of Coghlan, we find that a material issue of fact exists as to whether the Alpha Phi Sorority voluntarily assumed a duty of reasonable care to supervise and protect Coghlan until she was out of danger of harm due to her intoxication. Therefore, the district court erred in granting summary judgment in favor of Alpha Phi Sorority.

CHIEF JUSTICE TROUT, JUSTICES SCHROEDER AND KIDWELL, CONCUR. JUSTICE WALTERS DISSENTS TO PART III.B.3., WITHOUT WRITING.

NOTES

(1) What facts led the court to hold that the University may have assumed a duty to Coghlan? What was University's "voluntar{y] undertaking)" that was a sufficient "act"? If you were University counsel, how would you advise your client to handle the next fraternity and sorority rush?

What facts led the court to hold that the sorority may have assumed a duty to Coghlan?

(2) ***Bowling v. Jack B. Parson Companies***: Carl Bowling was killed in the course of his employment with Bannock Paving Company, a wholly owned subsidiary of Parson Companies. The two corporations have interlocking directorates and management. Bowling was killed when he was crushed by a truck being driven in reverse without an audible reverse warning device or an observer, in violation of OSHA safety regulations. Parson Companies employed a risk manager, Dave Langrock, to investigate accidents, make safety inspections, insure compliance with OSHA regulations and coordinate insurance coverage. Plaintiffs argued that Langrock had undertaken a risk management program and had done so negligently, causing Bowling's death.

The supreme court disagreed. Although acknowledging that "[ I]t is, of course, possible to create a duty where one previously did not exist. If one voluntarily undertakes to perform an act, having no prior duty to do so, the duty arises to perform the act in a non-negligent manner." This was not the case, however:

> In this case, Langrock's function in relation to Bannock Paving was to periodically inspect the premises. Parson Companies' reason for doing so lay in its capacity as sole shareholder of Bannock Paving, and in aid of the procurement of insurance for the entirety of its operations, including Bannock Paving. During these inspections Langrock found various equipment problems, including the failure of backup warning devices which he noted in his reports. Langrock passed on these findings to Bannock Paving:
>
> > Appellant alleges that these inspections amount to an undertaking by Parson Companies to provide safety inspections and safe working conditions on the Bannock Paving premises. However, we hold that the acts of Langrock and Parson Companies did not create a duty as to Parson for inspecting or monitoring. A sole shareholder undeniably has the right to inspect its corporate holdings.... No duty is created when the shareholder inspection is done for the purposes of procurement of its own insurance. The exercise of this right by Parson Companies did not amount to undertaking Bannock Paving's duty of inspecting the work site for safety purposes.
>
> *Bowling v. Jack B. Parson Companies*, 117 Idaho 1030, 793 P.2d 703 (1990).

Note that the parent company provided management services to its various subsidiaries- including risk management services relating to compliance with OSHA regulations, the violation of which is the alleged cause of decedent's death. Should defendant be able to structure its internal relationships contractually and thus avoid tort liability? Stated differently: should the contractual relationship between the parent and its subsidiaries affect the potential tort liability of a stranger to the contract?

Is Bowling merely another example of the proposition the court offered in *Carter Packing Co. v. Pioneer Irrigation District* that "voluntary assistance on the day in question, in an effort to protect its [property]" did not impose any duty to protect plaintiff? Must the purpose of the defendant's action be the protection of the plaintiff?

(3) ***Sharp v. W.H. Moore, Inc***.: Plaintiff worked in a building owned by defendant. Defendant -through its property manager Security Investments -- employed a security agency to provide protective patrols of the building. Plaintiff was assaulted and raped on a Sunday morning by an unknown assailant who gained entrance to the building through an unlocked third floor fire escape door. Relying upon the "familiar proposition that one who voluntarily assumes a duty also assumes the obligation of due care in performance of that duty," the Idaho Supreme Court reversed a summary judgment for the landlord:

> A landlord, having voluntarily provided a security system, is potentially subject to liability if the security system fails as a result of the landlord's negligence. [] While the landlord/tenant relationship does not in and of itself establish a duty to keep doors locked, once Moore and Security Investments had initiated a locked door policy and had employed a security service with the intent of keeping the doors locked, they undertook a duty and are subject to liability if they failed to perform that duty with a reasonable standard of care.

Justice Bakes dissented. While agreeing that the summary judgment in favor of the landlord should be reversed because it owed plaintiff a duty, he argued that the defendants did not assume a duty:

> The Court's opinion recognizes the contractual relationship between Moore and Security Investments (the property manager) and between Security Investments and Security Police (who provided the periodic daily inspections). However, the Court makes no analysis of how Security Investments and Security Police breached any tort duties owed to Sharp or, for that matter, contractual duties to the plaintiff Sharp. While indeed Security Investments may have breached its contractual duties to Moore, and Security Police may have breached its contractual duties to Security Investments, neither Security Investments nor Security Police breached either a contractual or a tort duty to the plaintiff Sharp, and accordingly summary judgment was appropriate in favor of those two defendants.

*Sharp v. WH. Moore, Inc*., 118 Idaho 297, 796 P.2d 506 (1990).

Should the contractual relationship between the landlord and the property management firm affect the potential tort liability of a stranger to that contract? How does *Sharp* differ from *Carter Packing*? Was this just "voluntary assistance on the day in question, in an effort to protect its [property]"? Must the purpose of the defendant's action be the protection of the plaintiff?

(4) ***Martin v. Twin Falls School District# 411*:** Two students were struck by a pickup when they crossed the street on the way to grade school. The crossing -which was two blocks from the school- had been designated a school crossing and had been marked with signs, flashing lights, and painted lines on the highway. The students brought an action against the city, the school district, the driver, and his employer. The school district's motion for summary judgment was granted by the district court. The supreme court affirmed:

> Absent a duty to provide crossing guards wherever they are needed, the School District had no obligation to adopt regulations to direct how it performs that duty. As this Court held in *Rife[ v. Long*, 127 Idaho 841, 908 P.2d 143(1995)), by providing crossing guards at so e school crossings, a school district does not assume the duty of providing crossing guards at any other places. When a party assumes a duty by voluntarily performing an act that the party had no duty to perform, the duty that arises is limited to the duty actually assumed. *Udy v. Custer County*, 136 Idaho 386,34 P.3d 1069 (2001) (by voluntarily removing rocks and other debris from the highway on other prior occasions, the county sheriff did not assume the duty of doing so on the night in question); *Brooks v. Logan*, 127 Idaho 484, 903 P.2d 73 (1995) (by helping some troubled students in the past, teacher did not assume the duty of helping a particular student who later committed suicide). .

*Martin v. Twin Falls School District#411*, 59 P.3d 317, 138 Idaho 146 (2002).

(5) ***Brooks v. Logan***: Plaintiffs brought a wrongful death action for the death of their fourteen-year -old son, a student at Meridian High School. The son had been asked by his English teacher to make entries into a daily journal as part of an English composition assignment. He did this beginning in September of 1990 and continued on to the end of December 1990. The following January he committed suicide at his home. The journal "contains some passages in which he alludes to death or depression, but there is no definite statement that he was contemplating suicide." Plaintiffs argued that the teacher had assumed a duty to their son, a duty that "arose out of Logan's actions of helping troubled students in the past." The supreme court rejected their claim:

> When alleging an assumed duty, plaintiff must prove that the defendant volunteered to

> help the plaintiff and then failed to exercise due care. That allegation is missing in this case. Nothing in the record supports a finding that Logan volunteered to help Jeff and thus assumed a duty of care for him. Quite the opposite, the evidence in the record indicates that Logan never approached Jeff regarding his journal entries, and at least advised Jeff that she would not read the entries. Further, the record does not reflect that Logan ever volunteered to assist Jeff with his alleged personal turmoil or depression. Based upon the record below, the trial court correctly found that Logan's occasional past actions of helping troubled students did not result in her assuming a duty in this case.

*Brooks v. Logan*, 127 Idaho 484, 489, 903 P.2d 73, 78 (1995).

(6) ***Jones v. Runft, Leroy, Coffin & Matthews***, **Chartered**: In the spring of 1983, John Runft contacted Aaron Jones, a former client, concerning a potential investment in a business venture- the North Idaho Jockey Club (NIJC)-of two other clients, Richard Sigismonti and John Kundrat. After a meeting between Runft, Jones, and Sigismonti, Jones indicated that he was willing to loan NIJC $420,000 if the loan was adequately secured and "if Runft thought it would fly." Runft put together a loan proposal that included an assignment for security purposes of Sigismonti's and Kundrat's partnership interests in Pinecrest Hospital. Jones agreed to the proposal. Subsequently, Runft directed Jones to send him a check for the loan and stated that Runft would place "all" documents in trust with the escrow company pending closing of the deal. Runft was present at the closing and the escrow company disbursed the funds despite the fact that the partnership interests in the hospital had never been assigned as security. The venture eventually defaulted on the loan, Sigismonti and Kundrat declared bankruptcy, and Jones brought suit against the escrow company. During discovery, Jones learned that the escrow company disbursed the funds at the direction of Runft. He and his law firm were then joined as defendants, plaintiff alleging that "Runft breached an assumed duty to act in Jones's best interests by modifying portions of the escrow instructions to allow release of the loan proceeds without the Pinecrest assignment." The trial court granted defendants summary judgment and plaintiff appealed.

> The Idaho Supreme Court began by noting that plaintiff's complaint refers to a breach of an "assumed duty or contract." A claim for breach of an assumed duty is a negligence action where the duty of care arises from a voluntary undertaking. *Bowling v. Jack B. Parsons Companies*, 117 Idaho 1030, 793 P.2d 703 (1990). A voluntary duty is distinct from any other duty the party may have as a result of another undertaking or relationship.
>
> The law firm argues that there are no facts to support a determination that the law firm assumed any duty towards Jones. In support of this assertion, the law firm submitted evidence that Jones [was] aware that Runft was acting as NIJC's attorney and that [he] knew Runft as not acting as [his] attorney. Runft's status as NIJC's attorney, however, does not entitle the law firm to summary judgment on a claim for breach of an assumed duty, if there is a genuine issue of fact whether Runft undertook a separate duty on the behalf of Jones. We conclude that there is a genuine issue of material fact concerning this claim.
>
> Jones argues that Runft assumed a duty to act on behalf of Jones "contractually or otherwise." The August 5 letter [which instructed Runft to handle the transaction in Jones's best interests] and Runft's failure to repudiate the direction in this letter for Runft to act in Jones's best interest create a genuine issue of material fact whether Runft contractually assumed a duty. The statement in the August 5 letter can be viewed as an offer for Runft to enter a unilateral contract. Although the breach of an assumed duty claim sounds in tort, evidence to support the existence of an assumed duty can be contractual in nature.
>
> A contract may ... create a state of things which furnishes the occasion for a tort. If the relation of the plaintiff and the defendants is such that a duty to take due care arises therefrom irrespective of contract and the defendant is negligent, then the action is one of tort. *Taylor v. Herbold*, 94 Idaho 133, 138483 P.2d 664,669 (1971).
>
> The law firm argues that the August 5 letter cannot be used as evidence of an

> assumed duty because the letter was written by Addison and the request in the letter that Runft handle the transaction in the best interests of Jones was never communicated to Jones. It is not required, however, that Jones personally knew of Addison's direction to Runft. Runft does not dispute that Addison was Jones's employee and agent or that Addison had Jones's authority to act on behalf of Jones in the loan transaction. Unless Addison's actions exceeded the scope of his authority, Addison's actions are sufficient to bind Runft to fulfill any duty toward Jones that Runft had assumed. Liberally construing the facts in favor of Jones and making all reasonable inferences in his favor, we conclude there is a genuine issue of material fact whether Runft undertook a voluntary duty to act in Jones's best interests in handling the transaction. Runft's failure to repudiate the unilateral offer contained in the August 5 letter, and his subsequent endorsement and transfer of the $320,000 check to the escrow company creates a genuine issue of material fact concerning his acceptance of this offer.

*Jones v. Runft, Leroy, Coffin, & Matthews, Chartered*, 125 Idaho 607, 873 P.2d 861 (1994).

(7) ***Boots ex rei. Boots v. Winters***: A renter owned two dogs, a white one and a brown one. As the juvenile plaintiff and his brother were walking to school, they noticed that the white dog was in the alley. When they returned the dog to the backyard, plaintiff was attacked by the brown dog. The brother ran to get the mother who was then attacked by the brown dog. They sued the renter and his landlord, arguing in part that the landlord had assumed a duty to protect third parties by regulating the type or size of the dogs that they permitted on their rentals. The court of appeals affirmed summary judgment for the landlord:

> The Idaho Supreme Court has recognized that it is possible to create a duty where one previously did not exist. If one voluntarily undertakes to perform an act, having no prior duty to do so, the duty arises to perform the act in a non-negligent manner. *Udy v. Custer County*, []; *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 400, 987 P.2d 300, 312 (1999). See also *Sharp*, [] Liability for an assumed duty, however, can only come into being to the extent that there is in fact an undertaking. *Udy*, []. See also *Bowling v. Jack B. Parson Cos*., 117 Idaho 1030, 1032, 793 P.2d 703, 705 (1990).
>
> Although a person can assume a duty to act on a particular occasion, the duty is limited to the discrete episode in which the aid is rendered. *Udy*, [].
>
> In the present case, there is no evidence that the Winterses volunteered to help third parties, such as the Bootses, by regulating the type or size of dog that Martinez could keep on the rented property. Jack Winters averred in an affidavit that Martinez paid a deposit of $100 to keep one large dog on the premises, and a copy of the rental agreement confirms s that Martine paid a $100 pet deposit. Martinez testified during his deposition that he Informed the Winterses that he had two medium-sized dogs which he Intended to keep on the premises and, when Jack Winters asked him what type of dogs he had, Martinez informed him the dogs were "mutts." There is no evidence, however, that the Winterses restricted the type or size of the dogs Martinez could keep on the premises. Additionally, there is no evidence in the record that the Winterses secured the pet deposit with the intent to protect third parties from Martinez's dogs. The Bootses' reliance on Sharp is therefore misplaced. In that case, a landlord provided a security service for his tenant's business, and an employee of the business was assaulted and raped by an intruder who apparently gained access to the building through an unlocked door. The Supreme Court held that once the landlord and property manager had initiated a locked door policy and had employed a security service with the intent of keeping the doors locked, they undertook a duty to keep doors locked. Sharp, [J. In contrast, there is no evidence that the Winterses took any actions with the intent of protecting third parties from Martinez's brown dog, and the Winterses therefore assumed no duty to provide such protection for the Bootses.

*Boots ex ref. Boots v. Winters*, 145 Idaho 389, 179 P.3d 352 (Ct. App. 2008).

(8) Good Samaritan statutes: Idaho has adopted three statutes providing immunity for "good Samaritans." For example,

> I.C. § 5-330 Immunity of persons giving first aid from damage claim. That no action shall lie or be maintained for civil damages in any court of this state against any person or persons, or group of persons, who in good faith, being at, or stopping at the scene of an accident, offers and administers first aid or medical attention to any person or persons injured in such accident unless it can be shown that the person or persons offering or administering first aid, is guilty of gross negligence in the care or treatment of said injured person or persons or has treated them in a grossly negligent manner. The immunity described herein shall cease upon delivery of the injured person to either a generally recognized hospital for treatment of ill or injured persons, or upon assumption of treatment in the office or facility of any person undertaking to treat said injured person or persons, or upon delivery of said injured person or persons into custody of an ambulance attendant.

Similar provisions have been adopted immunizing the conduct of volunteer ambulance attendants (I.C. § 5-331) and underground mine rescue participants (I.C. § 5-333). What policy justification exists for such statutes?

(9) §39 Duty Based in Prior Conduct Creating a Risk of Physical Harm

When an actor's prior conduct, even though not tortious, creates a continuing risk of harm of a type characteristic of the conduct, the actor has a duty to exercise reasonable care to prevent or minimize the harm.

Comment:

> c. Risk of a type characteristic of conduct. The duty imposed by this Section is conditioned on the creation of a continuing risk characteristic of the actor's conduct. To create such a risk of harm, the actor's conduct necessarily must be a cause, at the time of the conduct, of a risk of subsequent physical harm. But merely being a cause of a continuing risk is not sufficient for a duty under the Section. The conduct must also be sufficiently connected with the potential for later harm that imposing a duty to prevent or mitigate the harm is appropriate. The duty imposed by this Section is justified by the actor's creating a risk (even if nontortiously) and the absence of the pragmatic and autonomy reasons for the no-duty rule in § 37. Nevertheless, it is unfair to impose this duty when the actor's conduct has not generally increased the risk of harm ...or is quite removed from the risks that pose harm to the other ....

RESTATEMENT {THIRD)OF TORTS § 39 (Proposed Final Draft No.1, Apr.6,2005).

(10) §42 Duty Based in Undertaking

An actor who undertakes to render services to another that the actor knows or should know reduce the risk of physical harm to the other has a duty of reasonable care to the other in the undertaking if:

(a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or

(b) the person to whom the services are rendered, or another relies on the actor's exercising reasonable care in the undertaking.

Comment:

> c.Ordinary duty of reasonable care and affirmative duty based on undertaking. An actor who engages in an undertaking is subject to the ordinary duty of reasonable care provided in § 7 for risks created by the undertaking. In that case, no inquiry into affirmative duties is necessary. This Section, by contrast, addresses an actor's liability for harm arising from other risks when the actor undertakes to ameliorate or eliminate those risks....
>
> The duty provided in this Section is one of reasonable care. It may be breached

either by acts of commission (misfeasance) or by acts of omission (nonfeasance). []
Courts sometimes imply that, if an undertaking duty exists, the defendant is liable for the harm. This improperly conflates the questions of duty and breach. Even where a duty exists under this Section, an actor is subject to liability only for a duty to exercises reasonable care.

d. Threshold for an undertaking. An undertaking entails an actor voluntarily rendering services, gratuitously or pursuant to contract, on behalf of another. The undertaking may be on behalf of a specified individual or a class of persons. The actor's knowledge that the undertaking serves to reduce the risk of harm to another or circumstances that would lead a reasonable person to the same conclusion is a prerequisite for an undertaking under this Section. The actor need not act for the purpose of protecting the other; this Section is equally applicable to those who act altruistically and those who act nonaltruistically, as is often the case when an undertaking is a result of a contractual arrangement. While knowledge that the undertaking will reduce the risk of harm to another is necessary for the existence of an undertaking, knowledge that the other will rely in the undertaking is not.

When the underlying facts are in dispute, the question of whether a duty exists must be submitted to the factfinder with appropriate alternative instructions.

RESTATEMENT (THIRD) OF TORTS § 42 (Proposed Final Draft No.1, Apr. 6, 2005).

(11) § 44 Duty to Another Based on Taking Charge of the Other

(a) An actor who, despite no duty to do so, takes charge of another who reasonably appears to be (1) imperiled and (2) helpless or unable to protect himself or herself has a duty to exercise reasonable care while the other is within the actor's charge.

(b) An actor who discontinues aid or protection is subject to a duty of reasonable care to refrain from putting the other in a worse position that existed before the actor took charge of the other and, if the other reasonably appears to be in imminent peril or serious bodily harm at the time of the termination, to exercise reasonable care with regard to the peril before terminating the rescue.

Comment:

d. Rationale. The rationale for the duty in this Section is primarily the absence of reasons that justify the no-duty-to-rescue rule. Since the actor has voluntarily chosen to engage in a rescue, imposing a duty of reasonable care does little harm to the freedom and autonomy of the rescuer. The actor has singled himself or herself out thereby obviating concerns about a duty to rescue when there are many persons who might perform the rescue equally well. The "taking charge" requirement eliminates much of the difficult line-drawing that might well be required to determine whether preliminary steps by an actor amount to a "rescue" that imposes the duty provided in this Section. It also eliminates any need to distinguish between "easy" rescues and those that impose substantial burdens because the actor, by engaging in the rescue, has already made the choice to engage in a rescue and proceeded significantly in pursuing it. By taking charge of the other, the rescuer may have prevented others from rescuing, but neither reliance nor increased risk need be proved for this Section to be applicable. Finally, the duty imposed by this Section is confined in time and scope by the specific peril to which the other is exposed and therefore does not create a protracted and burdensome obligation.

RESTATEMENT 9THIRD) OF TORTS § 44 (Proposed Final Draft No. 1, Apr. 6, 2005).

**BEERS V. CORP. OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS**

Supreme Court of Idaho
155 Idaho 680, (2013)

HORTON, J., - Heidi Beers, a minor, was injured after jumping from a bridge into the Payette River. Heidi had been attending a campout organized by ward members of her church. Her parents, Gregory and Caralee Beers, brought suit individually and on behalf of their daughter against the Corporation of the President of the Church of Jesus Christ of Latter-day Saints (the COP) and fourteen individual defendants. The Beerses' complaint advanced claims of negligence against all defendants and a claim based upon I.C. § 6-1701 (tort actions in child abuse cases) against the individual defendants. The district court granted the defendants' motions for summary judgment in part, dismissing all negligence claims except for those brought against two individual defendants, Richard and Kathy Kartchner, who have not participated in this appeal. The district court denied the motion for summary judgment as to the statutory claim against five individual defendants, including Richard Kartchner. The Beerses timely appealed and the four individual defendants have cross-appealed from the district court's order denying their motion for summary judgment as to the statutory claim. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Heidi Beers was thirteen years old when she was injured. She belonged to the Autumn Faire Ward (the Ward) of the Church of Jesus Christ of Latter-day Saints (the Church) in Meridian, Idaho. The Ward organized a campout to take place in Smiths Ferry, Idaho, during the summer of 2007. Ward members were invited to a campout to be held August 17-18, 2007, at a cabin owned by Frank and Gloria Skinner. A similar campout had been held in 2005 and 2006. In 2007, the campout was planned by Lisa Panek, chair of the Ward Activities Committee. Ward members were notified of the upcoming event through flyers and a sign-up sheet for a Dutch oven dinner. The only formal activities planned for the campout were the Dutch oven dinner, an evening devotional, and a breakfast. There was no RSVP required and no list of attendance taken.

Heidi wanted to attend, however her parents were not interested in going. Heidi originally planned to attend with a friend's family, but they could not go. Heidi then contacted another friend and asked if she could "get a ride" to the campout. This friend spoke to her mother, Kathy Kartchner, and asked if they could give Heidi a ride to the campout. Ms. Kartchner agreed and testified that it was her understanding that she was only providing a ride to Heidi, as Heidi's grandfather would also be attending the campout. Heidi's parents did not speak with any Ward member regarding Heidi's attendance. The record is silent as to whether Heidi's grandfather agreed to look out for her during the campout.

Heidi rode up with the Kartchners on the evening of Friday, August 17. After her arrival, she rode from the Skinners' cabin to the Smiths Ferry Bridge with around twenty other youths in Bradley Day's pickup. Mr. Day told the youths that he would take them to the bridge if they obtained their parents' permission. After confirming that they had received permission, Mr. Day took them down to the bridge. Heidi had not sought or obtained permission from anyone to attend. Upon arriving at the bridge, some of the youths checked under the bridge for rocks or other obstructions. Many then proceeded to jump from the bridge into the river. Heidi did not jump. There were no injuries that evening, and the youths then returned to the campsite.

Heidi spent the evening with her friends, and they stayed up late talking. Rather than sleeping in a tent provided by the Kartchners, Heidi and her friends slept in the Skinners' cabin. The next morning, following breakfast, members of the Ward began to separate. Some returned home, others went hiking or fishing, and some returned to the bridge to play in the water and jump into the river. Heidi went to the bridge. Before anyone jumped from the bridge, there was another inspection for rocks or other obstructions. Garrett Haueter, an adult present at the bridge, told everyone to jump in the location that had been checked.

Many of those present then began to jump from the bridge into the river. Heidi spoke briefly to Sharolyn Ririe, another adult present at the bridge. Heidi told her that she was scared to jump. Ms. Ririe said that she would also be afraid to jump, as she had a fear of heights. Eventually, Heidi summoned the courage to jump. She climbed over the railing but was outside the area that had been inspected. Heidi hit the water and felt instant pain and numbness. She does not believe that she hit anything on the way down or that she hit the river bottom. Thus, it appears that she jumped directly over one of the bridge support columns. Regardless of the mechanism of injury, Heidi suffered a compound fracture of her ankle. Several of those present helped Heidi to shore where she was attended to by several Ward members.

Defendant Mark Kropf, a physician and Ward member, was summoned. He arrived and attended to Heidi with the help of paramedics from Cascade, as well as an emergency room team from St. Alphonsus that happened to be floating the river. One of the emergency room team members, Dr. Ho, was a physician with expertise in dealing with trauma. Dr. Ho reduced the fracture and brought the bone back within the skin. Heidi was then transported by Life Flight to the hospital.

Heidi's parents then brought this action, individually and on Heidi's behalf, against the Church and fourteen Ward members, asserting claims of negligence and civil child abuse under I.C. § 6-17012 against the individual defendants and claiming negligence on the part of the COP. The COP and the Ward members moved for summary judgment. The Beerses did not oppose the request for summary judgment dismissing their claims against three defendants, Merlinda Haueter, Kirt Nielsen and Katie Nielsen. The district court granted the motions as to the Beerses' negligence claims against all other defendants except Richard and Kathy Kartchner, holding that neither the COP nor the Ward members owed Heidi a duty of care. The Beerses appeal, arguing that both the COP and the Ward members owed Heidi a duty of care arising out of a special relationship and the undertaking of a duty to supervise her.

The district court denied the motions for summary judgment as to the child abuse claim against four Ward members (Sharolyn Ririe, Garrett Haueter, Brenda Kropf and Brent Rasmussen) who were present when Heidi was injured. The district court found that there was a genuine issue of material fact as to whether they should have known that Heidi was likely to be injured. These four Ward members cross-appeal, arguing that the district court erred by finding that an affirmative duty to act exists in the absence of a special relationship to the child.

## II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c); *G & M Farms v. Funk Irr. Co*., 119 Idaho 514, 516-17, 808 P.2d 851, 853-54 (1991). Furthermore, "[a]ll doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom, and if reasonable people might reach different conclusions." *Id*.

Generally, to state a cause of action for negligence, a plaintiff must establish four elements:

> "(1) a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct;
>
> (2) a breach of that duty; (3) a causal connection between the defendant's conduct and thenresulting injuries; and (4) actual loss or damage."

*Grabicki v. City of Lewiston*, 154 Idaho 686, 691, 302 P.3d 26, 31 (2013) (quoting *Fragnella v. Petrovich*, 153 Idaho 266, 272, 281 P.3d 103, 109 (2012)). "Whether a duty exists is a question of law, 'over which this Court exercises free review.'" *Gagnon v. W. Bldg. Maint., Inc*., 155 Idaho 112, 306 P.3d 197, 200 (2013) (quoting *Turpen v. Granieri*, 133 Idaho 244, 247, 985 P.2d 669, 672 (1999)).

**III. ANALYSIS**

A. The district court properly granted summary judgment as to the Beerses' negligence claims.

The Beerses argue that the district court erred in finding that the COP and the Ward members owed no duty to Heidi. As previously noted, a cause of action for negligence must establish: "(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage." *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 399, 987 P.2d 300, 311 (1999).

The critical inquiry in this appeal, as it relates to the negligence claim, is whether the COP or the Ward members owed a duty to Heidi. The Beerses rely upon our statement that "one owes a duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury." *Doe v. Garcia*, 131 Idaho 578, 581, 961 P.2d 1181, 1184 (1998). However, contrary to the Beerses' contention, this statement extracted from Garcia does not impose an affirmative duty on everyone to prevent foreseeable injury to everyone else. Rather, the broad statement in Garcia must be viewed in the context of that case.

Garcia was hired by St. Alphonsus Regional Medical Center as a respiratory therapist. *Id*. at 579, 961 P.2d at 1182. Shortly after being hired, he sought the services of the Employee Assistance Program, staffed by employees of the defendant hospital, for his preoccupation with sex. *Id*. During a counseling session, he told his counselor that he had been terminated from another hospital for "molesting a patient." *Id*. His previous employer had a policy that it would release former employees' personnel files upon written request, but St. Alphonsus made no such request. *Id*. at 580, 961 P.2d at 1183. Doe was a minor who was hospitalized at St. Alphonsus for six weeks approximately a year after Garcia was hired. *Id*. at 579, 961 P.2d at 1182. Following his discharge from the hospital, Garcia began to sexually molest Doe. *Id*.

This Court evaluated whether the hospital owed a duty to Doe, employing the "balancing of the harm" analysis. *Id*. at 581, 961 P.2d at 1184. This is an analysis that this Court employs "in those rare situations when we are called upon to extend a duty beyond the scope previously imposed, or when a duty has not previously been recognized." *Rife v. Long*, 127 Idaho 841, 846, 908 P.2d 143, 148 (1996). In *Rife*, we explained the analysis as follows:

> Determining whether a duty will arise in a particular instance involves a consideration of policy and the weighing of several factors which include:
>
> [T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved (citations omitted).

*Id*. (quoting *Isaacs v. Huntington Memorial Hosp*., 38 Cal. 3d 112, 211 Cal. Rptr. 356, 695 P.2d 653, 658 (Cal. 1985)). After reviewing these criteria, this Court determined that the hospital owed a duty to Doe. Garcia, 131 Idaho at 581, 961 P.2d at 1184.

The broad statement the Beerses rely upon is not generally applicable to the world at large. Indeed, we abrogated the holding of Garcia in *Hunter v. State, Dep't of Corr., Div. of Prob. & Parole*, 138 Idaho 44, 50, 57 P.3d 755, 761 (2002), holding that Garcia "extend[ed] the duty of an employer too far." Otherwise, the general rule that "[t]here is ordinarily no affirmative duty to act to assist or protect another absent unusual circumstances, which justify imposing such an affirmative responsibility" would be devoid of meaning. Coghlan, 133 Idaho at 399, 987 P.2d at 311. Absent unusual circumstances, a person has no duty to prevent harm to another, regardless of foreseeability. Thus, in order to establish that any of the parties had a duty toward Heidi, the Beerses must establish one of the "unusual circumstances"

described in Coghlan. Idaho law recognizes two circumstances in which a person has an affirmative duty of care to another: a special relationship or an assumed duty based on an undertaking. Recognizing the general rule, the Beerses argue that the COP and the Ward members owed a duty to Heidi under both of these theories. We discuss them in turn.

**A. The district court did not err in determining that there was no special relationship between the COP and Heidi.**

The Beerses first argue that the COP owed a duty to Heidi based on a special relationship that existed between the Ward and Heidi. "An affirmative duty to aid or protect arises only when a special relationship exists between the parties." *Rees v. State*, Dep't of Health & Welfare, 143 Idaho 10, 15, 137 P.3d 397, 402 (2006) (quoting Coghlan, 133 Idaho at 399, 987 P.2d at 311). A special relationship can have two separate but related aspects. The Restatement (Second) of Torts states that "(a) a special relation exists between the actor and a third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection." *Turpen v. Granieri*, 133 Idaho 244, 248, 985 P.2d 669, 673 (1999) (quoting RESTATEMENT (SECOND) TORTS § 315 (1966)). Thus, having control over someone or a duty to protect that person is indicative of a special relationship.

This Court has listed examples of individuals having a duty to control another as "a parent's duty to control his child, an employer's duty to control an employee while at work, or a law enforcement officer's duty to control a dangerous prisoner." Turpen, 133 Idaho at 248, 985 P.2d at 673. "The common element in each of these is knowledge of an unreasonable risk of harm and the right and ability to control the third party's conduct." *Id*. Thus, a special relationship imposing a duty to control another's conduct requires a foreseeable risk and the right and ability to control that person's conduct. Determining whether a special relationship exists that gives a person the right to protection "requires an evaluation of 'the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection.'" Rees, 143 Idaho at 15, 137 P.3d at 402 (quoting Coghlan, 133 Idaho at 399, 987 P.2d at 311).

In Coghlan, this Court held that a university did not have "the kind of special relationship creating a duty to aid or protect adult students from the risks associated with the students' own voluntary intoxication." 133 Idaho at 400, 987 P.2d at 312. In that case, a sorority student was injured after falling out of a window following a night of excessive drinking. The Court noted the "adult status of modern college students and the diminished custodial role of modern universities" in determining that the university had no duty to protect the student from the risk of drinking alcohol. *Id*. The concept of custody was also discussed in *Rife*. There, the question was whether a school had a duty to ensure that a student travelled home safely at the end of the school day. This Court explained that although it had "recognized a common law duty to protect against the reasonably foreseeable risk of harm to a student while in the District's custody, we have not previously extended that duty once the student is no longer in a relationship of control or supervision by the District." 127 Idaho at 846, 908 P.2d at 148. Thus, a special relationship requires some level of custody, which *Rife* equated with control or supervision.

In *Rife*, because the student was no longer in the custody of the school, the traditional duty derived from the school's custody of the child did not apply. The Court then applied the balancing of harm analysis and declined to extend the duty to situations after the student is released from the school district's custody, finding the burden would be too large to impose a duty on schools to ensure that the students travelled to and from school safely. 127 Idaho at 847, 908 P.2d at 149. Further, this Court noted that schools are merely releasing the children back into their parents' custody at the end of the school day. Thus, the duty was on the parents to ensure the children's safety. *Id*.

In this case, the district court found that there was no special relationship between the Ward and Heidi. It found that the Ward did not exercise sufficient control over Heidi to rise to the level of custody. It further found that even if a special relationship did exist, it ended along with the campout after breakfast on Saturday morning. The Beerses argue that the district court erred in these findings because the Ward

did exercise control over Heidi and the determination that the Ward campout had concluded was an impermissible finding of fact that should be determined by a jury. We do not reach the second finding, because we conclude that the district court properly concluded that the Ward did not have a special relationship with Heidi that would impose upon it a legal duty to prevent her injury on the bridge.

First, Heidi's participation in the loosely-organized campout is a completely different situation than that of a child's attendance at school. School attendance is legally mandated. During the school day, parents have no ability to supervise or protect their children. That was not the case at the Ward campout. Thus, the custody-derived duty acknowledged in *Rife* between a school and its students during the school day does not apply here. The COP argues that the situation is more akin to the adult student and the university situation presented in Coghlan. The district court in this case noted that "[p]roviding food, shelter, and enforcing minor rules is precisely the level of care and control that a sorority exercises over its members." As was the case with the sorority in Coghlan, there is no evidence that the Ward had any right or ability to control Heidi's actions. The Ward did not have the ability to compel Heidi's attendance at the campout or the Ward-planned activities of dinner, a devotional, and breakfast.

The Beerses suggest that this Court ought to extend or recognize a new duty by weighing the various factors outlined in *Rife*. The district court in this case analyzed the *Rife* factors and determined that extending a duty owed by the Ward members was not appropriate. The district court found that the first two factors were undisputed: injury from bridge jumping is foreseeable, and Heidi was in fact injured. However, the court also found that none of the Ward members had undertaken supervision of the bridge-jumping activity. Thus, it found that the connection between the defendants' conduct and Heidi's injury was too attenuated to impose a new duty. That connection is even more attenuated when the defendant is the COP rather than the individual Ward members. By all accounts, the bridge jumping was not an official Ward activity, it occurred a mile away from the location of the campout, and it took place after the conclusion of the last Ward-planned activity. We are unable to ascribe moral blame to the COP for this incident. We can, however, ascertain negative consequences to the community that would result from imposing a duty and resulting liability upon religious organizations to members of their faith. The result would be a powerful disincentive to organized fellowship activities. Thus, we decline to extend or create a new duty on the part of the COP toward Heidi.

**B. The district court did not err in finding that the COP did not assume a duty to Heidi.**

"Even when an affirmative duty generally is not present, a legal duty may arise if one voluntarily undertakes to perform an act, having no prior duty to do so." *Baccus v. Ameripride Servs., Inc*., 145 Idaho 346, 350, 179 P.3d 309, 313 (2008) (internal quotation omitted). In such a case, the acting party has a duty to perform that act in a non-negligent manner. *Udy v. Custer Cnty*., 136 Idaho 386, 389, 34 P.3d 1069, 1072 (2001). "When a party assumes a duty by voluntarily performing an act that the party had no duty to perform, the duty that arises is limited to the duty actually assumed." *Martin v. Twin Falls School Dist. No. 411*, 138 Idaho 146, 150, 59 P.3d 317, 321 (2002). Thus, merely because a party acts once does not mean that party is forever duty-bound to act in a similar fashion. A beach-goer may assume a duty to rescue a drowning swimmer in a non-negligent manner by undertaking to do so, but that same beach-goer has no obligation to rescue anyone else. In Martin, the school district was not required to post crossing guards at every school crossing even though it had provided crossing guards at certain crossings. Thus, although a party may assume a duty by undertaking to act, that duty is limited to the scope of the undertaking.

Liability for an assumed duty, however, can only come into being to the extent that there is in fact an undertaking." Udy, 136 Idaho at 389, 34 P.3d at 1072. "A duty arises in the negligence context when one previously has undertaken to perform a primarily safety-related service; others are relying on the continued performance of the service; and it is reasonably foreseeable that legally-recognized harm could result from failure to perform the undertaking." Baccus, 145 Idaho at 351, 179 P.3d at 314. In Baccus, the defendant had contracted to place non-slip safety mats at the entrance of a building. The defendant failed to place the safety mats on one occasion and Baccus slipped, fell and was injured. This Court found that by undertaking to place the safety mats which induced reliance by those in the building where the

accident occurred, the defendant had assumed a duty by undertaking to perform an action. *Id*. at 352, 179 P.2d at 315.

The district court in this case found that the Ward had not undertaken supervision of Heidi. It stated that the Ward's knowledge that some minors may attend the campout unsupervised did not constitute an undertaking to supervise Heidi. The Beerses argue that the COP assumed a duty to Heidi because the Church Handbook requires supervision of youth participating in ward activities and there was "Ward Leadership" at the bridge. However, these facts do not rise to the level of an undertaking that creates a duty of care. In Baccus there was a failure to perform a safety-related function that the defendant had previously performed. In Martin, there was no duty to monitor a school crossing even though other crossings were monitored. "The underlying policy here arises from a person voluntarily assuming a position, and by filling that position another can reasonably rely on that person to act with reasonable care and provide protection from unreasonable risks of harm." *Turpen*, 133 Idaho at 248, 985 P.2d at 673. Here, the COP's only affirmative actions were extending an open invitation to all Ward members to attend a campout and planning two meals and a devotional. These actions do not reflect the assumption of a duty by the Ward to supervise Heidi jumping from a bridge a mile away from the location of the Ward campout upon which she could reasonably rely. For this reason, we affirm the district court's grant of summary judgment to the COP.

**C. The district court did not err in finding that the Ward members did not have a special relationship with Heidi.**

The law regarding duty as between Heidi and the Ward members is the same as explained above. Thus, the only consideration is whether there are facts relating to the individual Ward members sufficient to demonstrate the existence of a duty by them, whether founded upon a special relationship or the assumption of a duty. The district court found that none of the Ward members had a special relationship with Heidi. The Beerses devote a substantial portion of their brief to advance their argument that the Ward members owed a duty to Heidi because the risk of harm was foreseeable. The district court found that the risk of harm was foreseeable. It declined to extend a new duty in this situation because it found the connection between the Ward members' actions and Heidi's injury was not sufficiently close, not because of a lack of foreseeability.

As explained above, a special relationship requires a right and an ability to control the conduct of the third party. There is no evidence that the Ward members had such a relationship with Heidi. None of the nine individual Respondents can be said to have had custody of Heidi at any time during the campout, let alone at the time of her injury. Heidi's parents did not speak to anyone regarding her attendance at the Ward campout. When Heidi decided to go down to the bridge, she did so without seeking or obtaining permission from any of the individual Ward members. The facts do not demonstrate that any of the Ward members exercised the level of control over Heidi that would justify imposing a duty based on a special relationship. Thus, the district court properly determined that the Ward members did not owe Heidi a duty because there was no special relationship.

The other basis for finding the existence of a duty is that one or more of the Ward members undertook a duty of supervision toward Heidi. The Beerses argue that eight of the Ward members (Warren Ririe, Sharolyn Ririe, Phil Haueter, Beth Rasmussen, Mark Kropf, Bradley Day, Garrett Haueter and Brent Rasmussen) assumed a duty to Heidi. The district court found that none of the Ward members had undertaken any action to supervise Heidi or the bridge-jumping activity. Each of the individual defendant Ward members will be discussed below, considering any of their actions that may have given rise to an assumed duty to Heidi.

<u>Warren Ririe</u>

Warren Ririe's only connection to Heidi is by virtue of his calling as the High Priests group leader. When no member of the Bishopric was at the campout, leadership responsibilities would have fallen to him.

However, as the Ward, and thereby the COP, owed no duty to Heidi at the bridge, Warren Ririe did not assume a duty to Heidi.

Sharolyn Ririe

Sharolyn Ririe was present at the bridge when Heidi was injured. She was there to watch her children, who were also at the bridge. While she was there she asked some of the youths on two separate occasions if they had checked the water for rocks or other hazards. She also had the conversation with Heidi in which Heidi indicated that she was fearful, and Sharolyn Ririe said that she would be fearful as well. These facts do not give rise to a reasonable inference that Sharolyn Ririe was supervising the bridge jumping in general, or Heidi in particular, much less that Heidi could reasonably rely upon her supervision. Sharolyn Ririe did not assume a duty to Heidi.

Phil Haueter

Phil Haueter's children told him they would be down by the river. He went looking for them on Saturday morning. He walked downstream, never found them, and returned to the cabin. He received word that Heidi was injured and stayed at the cabin, packing up his things. He was never at the bridge on the day Heidi was injured. He did not assume a duty to Heidi.

Beth Rasmussen

Beth Rasmussen was not present at the bridge at any time prior to Heidi's accident. There is no indication that Beth Rasmussen had anything to do with the bridge jumping other than knowing that several children, including her own, were headed down to the river. Beth Rasmussen did not assume a duty to Heidi.

Mark Kropf

Mark Kropf was not at the bridge when Heidi was injured. He had been there briefly prior to the accident to check on his wife and children. He then returned to the cabin to find one of his daughters who was not at the bridge. After finding her at the cabin, he was walking back to the bridge when he was notified that Heidi had been injured. As there is no evidence that he was involved in any way with the bridge jumping, he did not assume a duty to Heidi.

Bradley Day

Bradley Day was not present at the bridge when Heidi was injured. His involvement with bridge jumping occurred the evening before, when he transported a number of children to the bridge to jump. The Beerses argue that his actions the evening before obligated him to supervise the bridge jumping the following day. However, as we held in *Udy v. Custer Cnty*., 136 Idaho 386, 389, 34 P.3d 1069, 1072 (2001), the duty to act is limited to the discrete episode in which the aid is rendered. The district court correctly determined that, assuming he had undertaken a duty to supervise bridge jumping on Friday evening, this duty did not extend to the following day.

Garrett Haueter

Garrett Haueter was present at the bridge when Heidi was injured. He testified that he witnessed some of the youths check the water for hazards as well as for depth. He also warned the jumpers that only a specific area under the bridge had been inspected. Of all the defendants, Garrett Haueter had the most active role on the bridge when Heidi was injured. However, the district court found that his actions did not rise to the level of undertaking supervision. The district court stated that "Garrett relayed information about where the river had been inspected. He never personally inspected the area, nor did he direct the inspection of the area. Furthermore, there is no indication that he exercised control over where the jumpers actually jumped." Indicating where the bridge and river had been inspected did not constitute

assumption of the duty to direct, control, supervise or prevent any person from jumping from the bridge. For this reason, we conclude that Garrett Haueter did not assume a duty to Heidi.

Brent Rasmussen

Brent Rasmussen was not present on the bridge when Heidi was injured. However, he was back and forth between his car and the bridge when the jumping occurred on Saturday. The district court noted that the Beerses relied on the testimony of Sharolyn Ririe and Brenda Kropf that they gave the children permission to jump "because they believed [Brent Rasmussen] was supervising the bridge jumping activity." The district court noted that the record did not support the Beerses' assertion, as it merely demonstrated that "Brother Rasmussen" was present at the bridge and Ms. Kropf believed that "her children should be supervised while at the bridge." These witnesses' subjective expectations, unsupported by any objective evidence that Brent Rasmussen did or said anything to suggest that he was supervising the bridge jumping, is insufficient to demonstrate a genuine issue of material fact as to whether he assumed a duty to Heidi.

For these reasons, we find that the district court correctly granted summary judgment as to the Beerses' claims of negligence.

**D. The district court erred by denying the Ward members' motion for summary judgment as to the Beerses' claim based upon the tort of child abuse.**

The Beerses also brought claims against the individual Ward members for the tort of child abuse based upon I.C. § 6-1701. The district court granted summary judgment in favor of those Ward members who were not present at the time of Heidi's injury as to this claim. The Beerses do not appeal this determination. However, the district court denied the motion as to Sharolyn Ririe, Garrett Haueter, Mark Kropf and Brent Rasmussen. These four Ward members cross-appeal the district court's order denying their motion for summary judgment. We address the preliminary question whether the cross-appeal is properly before this Court before turning to the merits of the cross-appeal.

**1. This Court may properly address the merits of the cross-appeal.**

The Beerses object to this Court's consideration of the cross-appeal, noting the general rule that "an order denying a motion for summary judgment is neither a final order that can be directly appealed nor is it an order that can be reviewed on an appeal from a final judgment in the action." *Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881, 890-91, 243 P.3d 1069, 1078-79 (2010). This statement is true for direct appeals. However, a different rule applies when the denial of a motion for summary judgment is presented by way of cross-appeal. Idaho Appellate Rule 15 provides:

> Right to cross-appeal. After an appeal has been filed, a timely cross-appeal may be filed from any interlocutory or final judgment or order.

Idaho Appellate Rule 11(g) likewise provides the right to cross-appeal "any interlocutory or final judgment [,] order or decree." An order denying a motion for summary judgment is an interlocutory order. *Garcia v. Windley*, 144 Idaho 539, 541, 164 P.3d 819, 821 (2007). Thus, this Court has previously addressed the cross-appeal of an order denying a defendant's motion for summary judgment. *Stephens v. Stearns*, 106 Idaho 249, 253, 678 P.2d 41, 45 (1984). The cross-appeal is properly before this Court.

**2. The district court erred by denying the Ward members' motion for summary judgment.**

Idaho Code section 6-1701(1)(d) provides that an action may be brought on behalf of any child against anyone who has "[i]njured a child as defined in section 18-1501, Idaho Code." Idaho Code section 18-1501(2) provides:

Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health may be endangered, is guilty of a misdemeanor.

Idaho Code section 18-1501(5) defines "willfully" as "acting or failing to act where a reasonable person would know the act or failure to act is likely to result in injury or harm or is likely to endanger the person, health, safety or well-being of the child."

*This Court addressed this broad definition of willfully in Steed v. Grand Teton Council of the Boy Scouts of Am., Inc*., 144 Idaho 848, 172 P.3d 1123 (2007), stating:

> In 2005, the legislature amended Idaho Code § 18-1501 to create a negligence standard of care for the conduct in that statute that must be done "willfully." It defined "willfully" in the statute to mean "acting or failing to act where a reasonable person would know the act or failure to act is likely to result in injury or harm or is likely to endanger the person, health, safety or well-being of the child." Ch. 151, § 1, 2005 Idaho Sess. Laws 467. Defining "willfully" to mean what "a reasonable person would know" is a negligence standard of care. *Ahles v. Tabor*, 136 Idaho 393, 34 P.3d 1076 (2001) (a reasonable person standard encompasses the concept of ordinary negligence); *Nelson v. Northern Leasing Co*., 104 Idaho 185, 657 P.2d 482 (1983) (finding of negligence upheld based upon the risk to a child that a reasonable person would have foreseen); 57A Am.Jur.2d, Negligence, § 133 (2004) ("The phrasing of the standard of care in negligence cases in terms of the 'reasonable person' is firmly implanted in the American law of negligence").

*Id*. at 854, 172 P.3d at 1129 n.3. Focusing on this statement in Steed, the district court concluded that "Sections 6-1701 and 18-1501 create a duty to affirmatively act to protect children where a reasonable person would know the child is likely to be harmed." The district court further concluded that "whether the bridge jumping was a circumstance where a reasonable person should have known it was likely to result in injury" was a question of fact for the jury. Thus, it denied summary judgment as to the four Ward members who were present at the time of Heidi's injury.

The Beerses do not suggest that the Ward members willfully caused or permitted Heidi to suffer or that they inflicted unjustifiable physical pain or mental suffering on her. Rather, relying on the broad definition of "willfully," their theory is that the Ward members willfully caused or permitted Heidi to be injured or to be placed in such situation that her person or health was endangered. The difficulty for the Beerses is that the statute does not impose a duty upon the general public to act in such a way as to protect children from injury or exposure to dangerous conditions. Under the plain text of the statute, this duty only extends to those "having the care or custody of [the] child." As previously discussed, none of the Ward members had "the care or custody of" Heidi. Therefore, I.C. § 18-1501(2) imposed no duties and the district court erred by denying their motion for summary judgment. For that reason, we reverse the district court's order denying their motion for summary judgment.

**IV. CONCLUSION**

We affirm the district court's grant of summary judgment as to the Beerses' negligence claims against the COP and the Ward members. We reverse the district court's order denying the four Ward members' motion for summary judgment as to the child abuse claim and remand for proceedings consistent with this opinion. Costs to Respondents.

Chief Justice BURDICK and Justices EISMANN, J. JONES and W. JONES CONCUR.

NOTES

(1) Is *Beers* a misfeasance case or a nonfeasance case? Of the theories attempted in the case, what is the strongest argument for duty?

**b. Duties Arising from Defendant's Relationship to Plaintiff**

**COGHLAN v. BETA THETA PI FRATERNITY**

Supreme Court of Idaho
133 Idaho 388, (1999)

[The facts are set out in the preceding section of the materials.]

**B. The Trial Court Erred In Dismissing Coghlan's Claim Against The University Defendants.**

The appellants appeal from the district court's order granting the University defendants' motion to dismiss .... The district court ... held that no special relationship exists between the University and its students to give rise to an affirmative duty on the part of the University....

**2. Duty of care**

The district court granted the motion to dismiss based on its ruling that the University did not owe a duty to Coghlan who became intoxicated by consuming alcoholic beverages provided by third parties. This Court follows the rule that "'one owes the duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury.'" *Doe v. Garcia*, 131 Idaho578, 581,961 P.2d 1181, 1184 (1998) (quoting *Alegria v. Payonk*, 101 Idaho 617, 619, 619 P.2d 135, 137(1980)) (emphasis in original). Further, there is a "general rule that each person has a duty of care to prevent unreasonable, foreseeable risks of harm to others." *Id*. (quoting *Sharp v. WH. Moore, Inc*., 118 Idaho 297, 300, 796 P.2d 506,509 (1990)). This Court has previously identified several factors to consider in determining whether a duty arises in a particular situation:

> [T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendants conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

*Rife v. Long*, 127 Idaho 841, 846, 908 P.2d 143, 148 (1995) (quoting *Isaacs v. Huntington Mem'l Hasp.*, 38 Cal.3d 112, 211 Cai.Rptr. 356,695 P.2d653,658 (1985)). See also *Turpen v. Pecha*, 133 Idaho 244, 985 P.2d 669 (1999).

> There is ordinarily no affirmative duty to act to assist or protect another absent unusual circumstances, which justify imposing such an affirmative responsibility. An affirmative duty to aid or protect arises only when a special relationship exists between the parties. See Restatement (Second) of Torts § 314A (1965). The college-student relationship is not listed in Restatement (Second) of Torts § 314A as one of the special relations giving rise to a duty to aid or protect, although the relations listed are not intended to be exclusive. See Restatement (Second) of Torts §314A cmt. b (1965). Determining whether a special relationship existed between the University and Coghlan sufficient to impose a duty requires an evaluation of "the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection."

W. PROSSER, LAW OF TORTS 333 (3d ed.1964) (quoted in *Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3d Cir. 1979)).

The district court adopted the reasoning of *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir.

1979) and *Beach v. University of Utah*, 726 P.2d 413 (Utah 1986), in holding that no special relationship existed between the University and Coghlan in this case. In Bradshaw, the Third Circuit Court of Appeals held that there existed no special relationship between the college and a student imposing upon the college either a duty to control the conduct of the student operating a motor vehicle off campus or a duty to protect a student in traveling to and from a class picnic. The court declined to recognize a duty based on the observation that "[c]ollege students today are no longer minors; they are now regarded as adults in almost every phase of community life." *Id*. at 139.This, combined with the recognition of the demise of the in loco parentis authoritarian role of modem college administrations, led the Third Circuit to conclude that the relationship between a college and its students is not sufficient to create a special relationship on which to predicate liability.

Beach involved an underage intoxicated university student who was injured when she fell off a cliff after wandering away from camp during a university-sponsored activity. The Utah Supreme Court in Beach cited to Bradshaw in finding that no special relationship existed between the university and its students in light of the adult status of modem college students and the diminished custodial role of modem universities. See Beach, 726 P.2d at 418-19. We agree that "the modem American college is not an insurer of the safety of its students." Bradshaw, 612 F.2d at 138.Accordingly, we decline to hold that Idaho universities have the kind of special relationship creating a duty to aid or protect adult students from the risks associated with the students' own voluntary intoxication.

**C. The Trial Court Erred In Holding That Alpha Phi Sorority Owed No Duty To Coghlan**

Appellants challenge the district court's orders granting summary judgment in favor of Alpha Phi Sorority asserting that the district court erred in finding that Alpha Phi did not owe Coghlan any duty of care, that no special relationship existed between Alpha Phi and Coghlan, and that Alpha Phi did not assume a duty of care through its actions.

**2. Duty of care**

While appellants properly point out that "[e]very person has the general duty to use due or ordinary care not to injure others, to avoid injury to others ... and to do his work, render services or use his property as to avoid such injury," *Harper v. Hoffman*, 95 Idaho 933, 935, 523 P.2d 536, 538 (1974), this case does not involve an allegation that Alpha Phi Sorority members affirmatively injured Coghlan. In order to find the existence of a duty of care, the appellants must show that Coghlan had a special relationship with Alpha Phi which obligated the sorority to protect her as an underage student from injuries resulting from her voluntary intoxication. See RESTATEMENT (SECOND) OF TORTS § 314(A) (1964) (stating that an affirmative duty to act may arise only when a special relationship exists between the parties). These relationships generally arise only when one assumes responsibility for another's safety or deprives another of his or her normal opportunities for self-protection. See *id*. at § 314(A)(4).

Examples of the types of "special relationships" ... which give rise to a duty to aid or protect include duties owed by: 1) a common carrier to its passengers; 2) an innkeeper to his guests; 3) a possessor of land who holds his land open to members of the public who enter upon the land in response to his invitation; and 4) one who takes custody of another. *Id.* [] Appellants argue that the relationship between Alpha Phi Sorority and Coghlan is the type of relationship which gives rise to a duty to aid or protect. It is true that Alpha Phi had a level of control over the behavior of Coghlan similar to the University. Like the University, Alpha Phi had a policy against underage drinking and exercised some influence over the behavior of sorority residents. However, as discussed above, society no longer expects universities to monitor the drinking activities of eighteen-year-old college students. [] Therefore, the district court correctly concluded that Alpha Phi's limited influence over Coghlan did not constitute a special relationship sufficient to create an affirmative duty for Alpha Phi to aid or protect Coghlan from injuries resulting from her voluntary intoxication.

CHIEF JUSTICE TROUT, JUSTICES SCHROEDER AND KIDWELL, CONCUR. JUSTICE WALTERS DISSENTS TO PART 111.8.3., WITHOUT WRITING.

NOTES

(1) Why is there no "special" relationship between a sorority and a pledge? What is required for a relationship to be "special"? What factors are shared by the various relationships that the court lists? Recall that the court found that the sorority assumed a duty to *Coghlan*.

(2) "Special relationships," redux: The Idaho courts have also employed "special relationships" as a source of duty or, to say the same thing from the opposite side, a limit on liability, in cases involving pure economic loss. What factors led the courts in these pervious cases to find that the relationship was sufficiently "special" to justified imposing a duty? Are the same concerns present in assumption of duty as in pure economic loss? Recall that one concern in the economic loss cases was the difficulty in establishing a workable, nonarbitrary limit to liability.

(2) §40 Duty Based on Special Relationship with Another

(a) An Actor in a special relationship with another owes the others duty of reasonable care with regard to risks that arise within the scope of the relationship.

(b) Special relationships giving rise to the duty provided in Subsection (a) include:

(1) a common carrier with passengers,
(2) an innkeeper with its guests,
(3) A business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises,
(4) an employer with its employees who are:
(a) in imminent danger; or
(b) injured and thereby helpless,
(5) a school with its students,
(6) a landlord with its tenants, and
(7) a custodian with those in its custody if:

(a) the custodian is required by law to take custody or voluntarily takes custody of the other; and

(b) the custodian has a superior ability to protect the other.

Comment:

f. *Scope of duty*. The duty imposed by this Section applies to dangers that arise within the confines of the relationship and does not extend to other risks. Generally, the relationships in this Section are bounded by geography and time. Thus, this Section imposes no affirmative duty on a common carrier to a person who left the vehicle and is no longer a passenger. Similarly, an innkeeper is ordinarily under no duty to a guest who is injured or endangered while off the premises. Of course, if the relationship is extended -such as a cruise ship conducting an onshore tour- an affirmative duty pursuant to this section might be appropriate.

g. Risks within the scope of the duty of care. The duty described in this Section applies regardless of the source of the risk. Thus, it applies to risks created by the individual at risk as well as those created by a third party's conduct, whether innocent, negligent, or intentional. If the actor's conduct plays a role in creating the risk, § 7[Duty] is also a source of duty.

RESTATEMENT (THIRD) OF TORTS § 40 (Proposed Final Draft No.1, Apr. 6, 2005).

**i. Public Callings**

**CLARK v. TARR**

Supreme Court of Idaho
75 Idaho 251, 270 P.2d 1016 (1954)

GIVENS, J.: A general demurrer to appellant's second amended complaint was sustained and consequent judgment of dismissal entered, on the theory the complaint did not state a cause of action ....

[Fanny Clark was a paying passenger on one of the buses operated by J.E. Tarr, Jr., going from her home in the residential area to the business district of Idaho Falls. Shortly after boarding the bus, the driver, Robert Remoir, stopped it on account of a flat tire. Several school children who were passengers in the bus got out, leaving only plaintiff and Albert Kelly as passengers. The bus driver stated he would have to telephone the garage and get another bus. Ms. Clark asked him if the bus would get to town by four o'clock because she had an appointment; the driver stated it would not. Mr. Kelly also stated he had a four o'clock appointment. They then talked about finding a telephone, so the driver could call for another bus.

[While the driver and passengers were sitting in the bus looking about for a house with telephone wires running to it, defendant Herbert Fell, approached and the driver stuck his hand out of the bus window and stopped Mr. Fell. The bus driver told him he was "broke down" and asked him if he would take the two passengers to town. There is a conflict in the evidence as to whether Ms. Clark asked the driver to do this, but upon Fell agreeing to do so, Ms. Clark and Mr. Kelly got out of the bus and into the Fell car and proceeded toward the business district of Idaho Falls. Both stated they were glad to get a ride as each had an appointment. They had traveled approximately a mile when there was a collision at the intersection of Ash Street and North Water Avenue with a car driven by Donald Mecham.]

Under the allegations of the complaint, respondent Tarr, Jr., d/b/a Idaho Falls Transit Company, operating a general bus business in Idaho Falls, was a common carrier, [], and as such required to exercise the highest degree of care, skill and diligence in receiving appellant and conveying her to her destination and setting her down as safely as the means of conveyance and circumstances permit. []

Respondent Company, be accepting and receiving appellant as a paying passenger, undertook to transport her under the above standard of care to her destination. []

The allegation in the complaint that the Transit Company's driver, in securing the services of Fell and transferring appellant, was acting within the apparent scope of his employment was sufficient to charge the Company with responsibility therefor. []

The demurrer thus admits respondent's agent, acting within the apparent scope of his employment, secured a substitute conveyance to fulfill respondent Company's obligation to appellant as a paying passenger to convey her to her destination, and against her will and without her consent placed appellant in this substitute conveyance and because of this transfer and the negligence of the driver of this substitute conveyance and the negligence of the driver of another automobile, she was injured.

The basis of respondent Transit Company's obligation and liability stems from the contract of transportation which arose when it accepted appellant as a pay passenger and which was to transport her carefully, with appropriate caution and circumspection and without negligence, to her downtown destination.

This obligation was continued when respondent Company's employee allegedly acting within the scope of his employment, because of the flat tire and consequent interruption of the immediate continuance of appellant's trip in respondent Company's conveyance and hence delay, secured a substitute conveyance, and not only tendered appellant this substitute conveyance as a means secured

by respondent Company through its agent for the completion of her journey and fulfillment of respondent Company's obligation, but against appellant's will and without her consent, the respondent Company, through its agent, ejected her from respondent's bus, itself initial negligence, wrongful ejection from a common carrier being actionable, *Lindsay v. Oregon Short Une Ry*., 13 Idaho 477, 90 P. 984 (1907), in the alleged ensuing chain of events culminating in the accident and appellant's injury; and also against her will and without her consent, put her on the substituted conveyance.

Respondent's obligation to exercise the high degree of care required and liability for negligence continued because by the automobile driven by Fell, respondent Company was carrying out its contract of transportation, though by a conveyance not owned or operated by it, but for its purpose in completing and executing its contract. Thus, the automobile was vicariously employed by it and, for the alleged negligent operation thereof, was as liable as for its own conveyance. []

PORTER, C.J., AND TAYLOR, THOMAS & KEETON, JJ., CONCUR.

NOTES

(1) What is the source of the duty owed to plaintiff? Was plaintiff suing for breach of contract? If not, was the contract relevant to the duty issue? What was the nature of the relationship between plaintiff and defendant?

What is the scope of the duty owed to plaintiff? Does the defendant owe plaintiff more than "reasonable care under the circumstances"? Why?

Recall that the court also created an exception for public callings in the pure economic loss cases. See *Strong v. Western Union Telegraph Co*., 18 Idaho 38, 109 P. 910 (1910).

(2) *Straley v. Idaho Nuclear Corp*.: Idaho Nuclear operated a bus line under contract with the United States Atomic Energy Commission (AEC), to transport "authorized personnel" to and from the National Reactor Testing Station (now Idaho National Energy Laboratory, INEL) and various locations in the Idaho Falls-Pocatello area. Idaho Nuclear operated some 85 buses owned by the federal government along fixed routes. According to defendant, only employees of the federal government, AEC contractors and subcontractor employees, Navy personnel, and occasional business invitees are authorized to utilize the bus services. Plaintiff, however, states in his affidavits that he has seen persons not employed at the site ride on buses.

Plaintiff boarded a bus on his way to work one morning. During the trip, he claims the bus hit "something" and he "sailed off his seat and hit the ceiling" of the bus, resulting in serious back, neck and arm injuries. The trial court granted defendants motion for summary judgment on the ground that defendant was a contract carrier rather than a common carrier. The Idaho Supreme Court disagreed:

> [F]rom undisputed facts in the record we conclude that respondent, while it may not be classifiable as a common carrier under public utility law, nonetheless maintains enough of the characteristics normally found in a common carrier to be held to the higher standard of care ascribed to such a carrier....
>
> As mentioned above, respondent does not fit within the traditional definition of "common carrier." Generally defined, a "common carrier'' is one ''who, by virtue of his calling and as a regular business, undertakes to transport persons or commodities from place to place, offering his services to such as may choose to employ him and pay his charges." []

A "private carrier," on the other hand, is "one who, without making it a vocation, or holding himself out to the public as ready to act for all who desire his services, undertakes, by special agreement m a particular instance only, to transport property or persons from one place to another either gratuitously or

for hire." The court noted that "[a]vailability to the public without discrimination appear to be the main feature distinguishing a private and common carrier." Nonetheless, "[t]he distinction between a private and contract carrier appears to be primarily a distinction drawn for purposes of regulation and licensing by public utility authorities and is not a distinction resulting from differing standards of care to be exercised toward the passengers or cargo carried." Here, defendant does not squarely fall within the general definition of "common carrier" because only "authorized personnel"- i.e., certain employees of the federal government, employees of government contractors, and government guests and invitees are generally permitted to use the buses to travel to the site. However, [defendants] relationship to each of its individual passengers such as [plaintiff] does retain enough of the characteristics of a common carrier to raise an issue concerning whether or not [defendant] should be held to the higher standard of care generally ascribed to common carriers. [Defendant] held itself out generally to all members of the public who were travelling to the AEC site as a carrier of persons to and from that site for hire. While the scope of those persons eligible to travel to the AEC site is more restricted than the public in general to whom a common carrier must ordinarily provide service, the scope of persons served by [defendant] is much broader than the usual case of private carriage. Operationally [defendant] is much like any municipal bus line and it resembles a municipal bus line in its relationship to its passengers, specifically in the case of [plaintiff].

.... Considering all of these facts, we think that the relationship between [plaintiff] and [defendant] was more akin to common carriage than private carriage and thus the higher standard of care required of a common carrier should be applied to the relationship.

Although there is authority for the proposition that a claim based on the negligence of a carrier can be founded in either contract or tort, [], the Idaho rule appears to be that such claims against carriers are better grounded in tort. *Ness v. West Coast Airlines, Inc*., 90 Idaho 111, 410 P.2d 965 (1965). The Ness case involved a claim against the defendant airlines for negligently injuring the plaintiff passenger. In bringing his action, the passenger sought recovery on both contract and tort causes of action. The district court struck the contract action from the pleadings prior to trial. In the course of its opinion on appeal, this court affirmed the district court's striking of the contract action, stating: "The defendant was not an insurer of the safety of its passengers. Its liability must be based on negligence." In other words, the court implied that the gravamen of the personal injury action against the carrier sounded intort rather than in contract. [*Straley v. Idaho Nuclear Corp*., 94 Idaho 917,500 P.2d 218 (1972).

What is the scope of the duty owed by a common carrier to its passengers? Is this a higher standard of care than would be the case if the action sounded in contract? That is, does the tort duty serve to protect the carrier- by making it less likely to be held liable for injuries it causes - or the passenger?

(3) **Common carriers**: Plaintiff shipped eight carloads of sheep with defendant. Because of a strike by defendant's employees, the sheep remained in a stockyard in transit for a week during which time a large number died. The defendant challenged a jury instruction that the strike was not an excuse if the delay was unreasonable. The Idaho Supreme Court began by noting that a carrier is an insurer of the ultimate delivery of freight consigned to it. In the absence of a special contract, however, it is only required to deliver the property within a reasonable time. What is reasonable depends upon the circumstances. The court concluded that the strike was one of the "circumstances" and the question, therefore, was whether the defendant had acted reasonably: "defendant was liable if there was a strike, and due diligence had not been exercised by the carrier to overcome the strike; but if it had exercised such due diligence the delay would not have been unreasonable." Since the trial court instructed the jury that the strike was no defense, the court reversed. *Richie v. Oregon Short Une R.R*.,42 Idaho 193,244 P.580 (1926). Who benefits from the scope of duty imposed upon common carriers?

*See also Wood Livestock Co. v. Oregon Short Une R.R*., 50 Idaho 524, 298 P.2d 371 (1931); *Cooper v. Oregon Short Une R.R*., 45 Idaho 313,262 P. 873 (1927); *Crabill v. Oregon Short Une R.R*., 34 Idaho 251,200 P. 121 (1921); *Smith v. Hines*, 33 Idaho 582, 196 P. 1032 (1921); *Mcintosh v. Oregon Railroad & Navigation Co*., 17 Idaho 100, 105 P. 66 (1909).

(4) ***McGill v. Frasure***: Plaintiff, Kerin McGill, was attending "Ladies Night" at Garfield's Bar when she was assaulted by another customer, Connie Frasure. McGill brought suit against the owners of Garfields, alleging that they had been negligent in failing to protect her. Plaintiff appealed a directed verdict for the owners of the tavern. The court of appeals reversed, noting that "while not an insurer of safety of his patrons, the tavernkeeper owes them a duty to exercise reasonable care to protect them from reasonably foreseeable injury at the hands of other patrons." *McGill v. Frasure*, 117 Idaho 598, 601, 790 P.2d 379, 382 (Ct. App. 1990).

(5) Bailments: A general category of relationships in which courts have imposed a tort duty on a contract in with the bailor/bailee relationship:

(a) warehouses: After a fire of undetermined origin destroyed defendant's warehouse, plaintiff sought the return of goods that he had stored in the warehouse. The court noted that, to make a prima facie case, the bailor must establish a bailment contract, delivery of the goods, payment of storage charges, demand for return, and the defendant's failure to return the goods. The burden then shifts to bailee to establish an excuse for its failure such as "that he exercised due care, and the bailed goods were not destroyed because of his negligence." Merely establishing that the fire was of unknown origin is insufficient to satisfy this burden. *Shockley v. Tennyson Transfer& Storage, Inc*., 76 Idaho 131,278 P.2d 795 (1955).

(b) banks: Plaintiff stored bonds in a safe deposit box in defendant's vault. The bank was robbed, and plaintiff's bonds were stolen. The court offered the following statement on the standard to which the bank was to be held:

> Being a bailment for hire, the degree of care which respondent bank was required to exercise over the property entrusted to it by appellant was that which an ordinarily prudent person would take of his own property of like description, and the bank could not be said to be an insurer of such property against theft, if it exercised such care. []
>
> After appellant had proved the bailment and respondent bank had shown the cause of its inability to return the property to be on account of its loss by theft, the burden was upon appellant to show that the bank had not exercised the degree of care required of it, [], but the record discloses an utter lack of affirmative proof.

*Rosendahl v. Lemhi Valley Bank*, 43 Idaho 273, 251 P. 293 (1926). The bailment thus imposes a tort duty- or, the contract contains a "reasonableness" limitation in place of the traditional strict liability standard that is applied in contracts. See also *Riggs v. Bank of Camas Prairie*, 34 Idaho 176, 200 P. 118 (1921); *Bates v. Capital State Bank*, 18 Idaho 429, 110 P. 277 (1910).

(c) miscellaneous bailments: Plaintiff leased a barge and piledriver to defendant. The equipment was destroyed by fire and plaintiff brought an action for its value. After concluding that the bailment had been established, the court noted:

> The question of negligence presents more difficulty. Ordinarily, where property is injured, lost or destroyed while in possession of a bailee, a presumption of negligence arises, making a prima facia case and casting upon the bailee the burden of showing that the loss was due to other causes consistent with due care on his part. [} But, when it appears that the loss or injury was caused by fire or other extraordinary intervention, the burden is upon the bailor to prove a lack of ordinary care or violation of some specific
> duty by the bailee resulting in the proximate cause of damage.

*Carscallen v. Lakeside Highway District*, 44 Idaho 724, 260 P. 162 (1927). See also *Ford v. Transport Holding Corp*., 96 Idaho 388, 529 P.2d 784 (1974)(engine of truck left with defendant froze for lack of antifreeze); *Low v. Park Price Co*., 95 Idaho 91, 503 P.2d 291 (1972) (car in custody of mechanic); *Burt v. Blackfoot Motor Supply Co*., 67 Idaho 548, 186 P.2d 498 (1947) (plaintiff satisfies prima facie case when bailed property not returned on demand); *Bryant v. Clearwater Timber Co*., 53 Idaho 413, 24 P.2d46 (1933) (unless defendant explicitly agreed "to redeliver the truck ... in as perfect condition as when taken, ... the defendant was bound to exercise only due care in preserving the property"); *Glover v. Spraker*, 50

Idaho 16, 292 P. 613 (1930) (cattle bailed with lessee of farm); *Cliner v. Leahy*, 44 Idaho 320, 256 P. 760 (1927) (plaintiff bailed 120 sheep with defendant for pasturing; only 61 sheep were returned).

### ii. Custodial Relationships

**RIFE v. LONG**

Supreme Court of Idaho
127 Idaho 841,908 P.2d 143 (1995)

TROUT, J.: In 1988, Jacob Rife (Jacob), a fifth grader at American Falls Middle School, was walking home from school with his friend, Nick Wilkinson (Nick). The boys crossed the soccer field to the southwest of the school, crossed Bannock Avenue, and approached the intersection of Bannock Avenue and Harrison Street. Nick stopped at the curb, while Jacob continued on, stepped off the curb and walked into the rear wheels of a tractor-trailer driven by Glen Long (Long), resulting in serious injury to Jacob.

Highway 39, or Pocatello Avenue as it is also called, enters the east end of American Falls in a southwesterly direction. It then veers approximately thirty or forty degrees and heads towards the center of town in a northwesterly direction. At this curve where it intersects with Bannock Avenue, Highway 39 becomes Harrison Street as it continues west. The accident occurred at this intersection.

At the time of the accident Long was driving a tractor-trailer unit owned by W.O.M. Inc. prior to entering the curve at Harrison and Bannock, Long observed several students walking toward the intersection. He testified he had driven this route many times and understood this was where many children crossed the road. He also stated the curve was tight, and he had to "ride" the center line in order for his trailer to clear the curb. Jacob's friend Nick testified Jacob was walking in "a daze" and he walked off the curb rather than stopping to check for traffic. Long was already past the point where Jacob entered the street having already made the tum with the truck, but not the trailer. When Jacob stepped off the curb, he was run over by the rear tires of the trailer which "off-track"; that is, they do not follow directly behind and in the path of the tractor's tires when turning.

Jacob's parents (the Rifes), in their individual capacity and as guardians of Jacob, brought a negligence action against Long, his employer, the American Falls School District (the District), the City of American Falls, and the State of Idaho.

The district court granted summary judgment to the District, finding it had no authority over the roadways, and finding it owed no duty of care to Jacob outside of school and school hours. [The Rifes appeal.]

**III. WHETHER SUMMARY JUDGMENT WAS PROPERLY GRANTED TO THE DISTRICT**

**B. The District Does Not Have a Common Law Duty Under these Circumstances**

Next, the Rifes argue that this Court should recognize a common law duty requiring a school district to see that its students travel to and from school safely. They urge us to extend the duty of care we articulated in *Bauer v. Minidoka School District No. 331,* 116 Idaho 586, 778 P.2d 336 (1989). In Bauer, the injured student was on the school grounds prior to the beginning of the school day and the school authorities had knowledge the students used the grounds at that time. This Court quoted from *Albers v. Independent School District No. 302*, 94 Idaho 342,487 P.2d 936 (1971), that: "Generally, schools owe a duty to supervise the activities of their students whether they be engaged in curricular activities or non-required but school sponsored extra-curricular activities." *Id*. at 590, 778 P.2d at 340. The Court then cited with approval two Washington cases which held that the duty a school district owes to its

pupils is "[to] anticipate reasonably foreseeable dangers and to take precautions protecting the children in its custody from such dangers. The child may sue the school district for injuries resulting from its failure to protect the child." *Id*. The Rifes argue that this Court recognized a special relationship between student and school district in Bauer, and we should extend that duty to negligence occurring off the school grounds based upon *Sharp v. WH. Moore*, 118 Idaho 297, 796 P.2d 506 (1990). The Rifes claim the risk of harm was foreseeable to the District, and therefore, under Sharp, the District owed a duty to see that Jacob reached home safely. While we have recognized a common law duty to protect against the reasonably foreseeable risk of harm to a student while in the District's custody, we have not previously extended that duty once the student is no longer in a relationship of control or supervision by the District.

We only engage in a balancing of the harm in those rare situations when we are called upon to extend a duty beyond the scope previously imposed, or when a duty has not previously been recognized. In the present case the Rifes are requesting that we extend the District's duty of care. Determining whether a duty will arise in a particular instance involves a consideration of policy and the weighing of several factors which include:

> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved (citations omitted).

*Isaacs v. Huntington Memorial Hosp*., 38 Cal.3d 112,211 Cal. Rptr.356,361,695 P.2d 653,658 (1985).

With respect to the foreseeability of the harm, this Court has stated:

> [F]oreseeability is a flexible concept which varies with the circumstances of each case. Where the degree of result or harm is great, but preventing it is not difficult, a relatively low degree of foreseeability is required. Conversely, where the threatened injury is minor but the burden of preventing such injury is high, a higher degree of foreseeability may be required.

*Sharp*, 118 Idaho at 300-01, 796 P.2d at 509-10 (citing, inter alia, Isaacs, supra).

We find, in weighing these basic policy considerations, the burden on our school districts would be enormous. If we were to impose a duty on each school district to protect its students outside of school and school hours, they would incur substantial financial and additional manpower burdens. Conversely, the harm to the students is relatively small given that the school district releases the students back to the care of their parents at the end of the school day. We believe the common law duty arose because the parents are not in a position to protect their children while they are attending school. Thus, the school district bears that burden while the children are in its custody. However, after school has adjourned for the day, and the students have been released, the parents are free to resume control over the child's well-being. Accordingly, we decline to extend a common law duty under the circumstances of this case.

McDEVITT, C.J., AND JOHNSON, SILAK AND SCHROEDER, JJ., CONCUR.

## NOTES

(1) Why was there no duty? What is required for "custody"? Presumably actual physical custody will create a duty to the person who is in custody - but will less that actual physical custody suffice? When is a relationship sufficiently custodial -sufficiently analogous to actual physical custody- to impose duty a duty on the custodian? Was the passenger in *Clark v. Tan* in the custody of the bus driver? Consider the following notes.

If the source of the duty is the custodial nature of the relationship, what is the scope of the duty? That is, what must the custodian do to avoid liability?

(2) ***Merritt v. State***: Plaintiff ran away from home repeatedly and was placed in foster care. When she ran away again, she was detained in the Bonner County jail pending a court hearing. While in the jail, she was assaulted by a fellow inmate. Plaintiff brought an action against the state and Bonner County. The court concluded - through obliquely -- that the state was not liable because it did not have custody, i.e., control, over the plaintiff. Bonner County, however, had legal control and thus had a duty:

> One who is required by law to assume the custody of another so as to deprive him [sic] of his [sic] normal power of self-protection or to subject him [sic] to association with persons likely to harm him [sic], has a duty to exercise reasonable care to protect him [sic] from harm.

*Merritt v. State*, 108 Idaho 20, 696 P.2d 871 (1985).

(3) ***Lundgren v. City of McCall***: Plaintiff was watching a Fourth-of-July firework display when he was injured by the explosion of an illegal firework. He sued the city, contending that its police department stood by while others attending the event were illegally drinking and setting off fireworks. The Idaho Supreme Court upheld summary judgment for the city. Noting that, as a general rule, "[m]unicipalities are not liable for the failure to provide police protection in the absence of a special relationship or duty to particular individuals," the court held that this not such a case:

> The respondent's police officers did not have an absolute, all embracing duty to protect the appellant from all types of foreseeable harm. Police officers cannot guarantee the public protection from every potential tortfeasor or criminal. The case law cited by Lundgren does not support his contention that the city owed him a duty of care. This is not a case of negligent entrustment, like *Ransom v. Garden City*, 113 Idaho 202, 743 P.2d70(1987), where the police entrusted the keys of a vehicle to an intoxicated person to drive. It is not a case of negligent inspection, like *Rawson v. United Steelworkers of America*, 111 Idaho 630, 726 P.2d 742, where the mine workers' union had a duty to exercise due care in inspecting the mine. Nor is it a case of negligent supervision, as in *Sterling v. Bloom*, 111 Idaho 211, 723 P.2d 755 (1986), where the plaintiff was hit by a drunk motorist who was on probation for driving under the influence. It is a claim of negligent police protection, for which there is no available authority to support a valid cause of action.

*Lundgren v. City of McCall*, 120 Idaho 556, 817 P.2d 1080 (1991). How does *Lundgren* differ from *McGill*, *Merritt*, or *Bauer*?

(4) **School Districts and students**: Rife is an example of by far the most common custodial relationship, that between students and local school districts.

(a) ***Bauer v. Minidoka School District No. 331***: Plaintiff tripped over sprinkler pipes and broke his leg while playing in an informal football game before the school day started at junior high school. Noting the "special relationship that a student has to a school district," the court reversed a summary judgment for the school district:

In *Albers v. Independent School Dist. No. 302*, 94 Idaho 342, 487 P.2d 936 (1971) this Court noted:

> "Generally, schools owe a duty to supervise the activities of their students whether they be engaged in curricular activities or non-required but school sponsored extra-curricular activities." There, the Court offered no opinion whether schools must provide supervision where students participate in an informal basketball game in the school gymnasium during the Christmas vacation. However, the Court did cite favorably [a Washington decision] pointing out that the duty a school district owes to its pupils is "[to] anticipate reasonably foreseeable dangers and to take precautions protecting the children in its custody from such dangers. The child may sue the school district for injuries resulting from its failure to protect the child."
>
> If the district had a duty to supervise the students involved in the football game, and if the district should reasonably have foreseen the dangers that existed when Tregg and his classmates

> played football on the field where the sprinkler pipes were stored, but failed to take precautions to protect him, the district breached its duty to supervise the students there.

*Bauer v. Minidoka School District No. 331*, 116 Idaho 586, 778 P.2d 336 (1989). What is the source of the duty? Why does the court impose a duty to take affirmative steps to protect the plaintiff? Is *Rife* simply an extension of *Bauer*?

(b) *Sherer v. Pocatello School District # 25*: Alameda Junior High School sponsored a carnival to celebrate the last day of the school year and hired Cliffhanger Recreation, a local business, to provide activities for the students. One of the activities was a "bungee run," in which participants donned a harness tethered to a fixed object by a bungee cord. Participants ran on an inflated rubberized surface to see who could reach the farthest point before being snapped back by the bungee cord. Alyssa Sherer, a student at the school, was injured while participating in the bungee run. The court reversed the summary judgment for the school district.

> The school district bears "a common law duty to protect against the reasonably foreseeable risk of harm to a student while in the [d]istrict's custody." *Rife v. Long*, 127 Idaho 841,846, 908 P.2d 143, 148(1995) (emphasis omitted). This duty is not restricted to activities in the classroom: "Generally, schools owe a duty to supervise the activities of their students whether they be engaged in curricular activities or non-required but school sponsored extra-curricular activities." *Bauer v. Minidoka School Dist. No. 331*, 116 Idaho 586, 590, 778 P.2d 336, 340 (1989) (quoting *Albers v. Independent School Dist. No. 302*, 94 Idaho 342, 344,487 P.2d 936, 938 (1971)).
>
> The duty is not an absolute mandate to prevent all harm; rather, schools are obligated to exercise due care and take reasonable precautions to protect their students. See *Doe v. Durtschi*, 110 Idaho at 472, 716 P.2d at 1244 ("[T]he school district had a statutory duty to make reasonable efforts to protect its students from ...danger. A breach of that duty constitutes negligence."). The school's duty includes "anticipat[ing] reasonably foreseeable dangers and [taking] precautions protecting the child in its custody from such dangers." Bauer, 116 Idaho at 590, 778 P.2d at 340 (quoting []). For that reason, "the fact that [a plaintiff's] injuries were caused by a third party does not absolve [a] school district from liability for its negligence" if the third party's actions were the foreseeable result of the school's negligence. *Doe v. Durtschi*, 110 Idaho at 472-73, 716 P.2d at 1244-45.
>
> The negligence claim relies upon a number of acts and omissions attributable to the school which, if proved, would constitute a breach of duty sufficient to allow a recovery for Alyssa's injuries. Alyssa was a student in the custody of the school and was injured while participating in a school-sponsored activity. The Appellants allege that the school was negligent in choosing to conduct an unreasonably hazardous activity, in failing to supervise Alyssa during her participation in that activity, and in failing to supervise Cliffhanger to ensure that they provided adequate instruction and supervision. These allegations are sufficient to state a claim under Idaho law and for which they would be entitled to money damages against a private individual if established.

*Sherer v. Pocatello School District # 25*, 143 Idaho 486, 148 P.3d 1232 (2006).

(c) *Summers v. Cambridge Joint School District No. 432*: A student and his older brother were dropped off by defendant's school bus. The children crossed highway 95 and walked some distance up their family's driveway when the wind blew the brother's papers back onto the highway. When the bus driver saw the older brother about to enter the highway, he stopped and extended the stop arm. The brother waved the driver on and, after the bus and its trailing cars had passed, gathered up his papers. At this point, the wind blew plastic grass from an Easter basket that the younger brother was carrying into the highway. He ran to get it and was struck by a pickup truck.

> This court has recognized that "... a school district has a duty ... to act affirmatively to prevent foreseeable harm to its students" while in the district's custody. *Brooks v. Logan*, []; *Rife*

*v. Long,* []. That duty does not extend beyond the time the child is in the school district's control or custody. *Rife*, []. Typically, the school district's control or custody ends after school has adjourned for the day, students have been released from class, and they leave the school grounds. ld. At this time, parents are free to resume control over the child's well-being. *Id*.

A school district has a duty to provide transportation services to its students so that, as far as practicable, no student has to walk more than 1 1/2 miles to school or the nearest school bus stop. See I.C. § 33-1501.Forthosechildren riding the school bus, the school district's control or custody over them continues until the school bus driver deposits them in a safe place. See *Chatterton v. Pocatello Post*, 70 Idaho 480,223 P.2d 389(1950); *Crane v. Banner*, 93 Idaho 69, 75,455 P.2d 313, 319 (1969); *Rife*, 127 Idaho at 849,908 P.2d at 151.

[Cambridge School District did not have a duty to protect Ryan Summers at the time of the accident.] Viewing the facts in the light most favorable to the plaintiffs, we conclude the school bus driver deposited Ryan Summers in a safe place. Ryan exited and crossed in front of the school bus, reached his driveway on the opposite side of the highway, and walked approximately twenty feet up his driveway toward his home. The school bus driver noticed Ryan and Matthew Summers stop their progression toward their home and become preoccupied with papers blowing in the highway. The school bus driver re-extended the stop arm and beckoned the Summers' boys to come back into the highway. The boys refused, and Matthew waved the school bus driver on. When the school bus driver drove away, Ryan had not left the area of safety, twenty feet away from the highway, and was still in his own driveway. Ryan had been deposited into an area of safety. At that point, the school bus driver and the school district no longer had Ryan under their control or custody. Neither the school district nor the school bus driver owed any further duty to Ryan Summers.

*Summers v. Cambridge Joint School District No. 432*, 139 Idaho 953, 88 P.3d 772 (2004)

**(5) Employment as a custodial relationship:** Junior staff members of a Boy Scouts camp operated by Grand Teton Council of the Boy Scouts of America alleged that they had been sexually abused by another employee. On appeal, the supreme court held that "[a]n employee is not, by virtue of that relationship alone, in the care or custody of his or her employer. *Hei v. Holzer*, 139 Idaho 81,73 P.3d94 (2003). However, there is no basis for holding that a minor can never be in the care or custody of his or her employer. There is nothing in ...the ordinary meaning of 'care or custody' that would preclude finding that the Steeds were in the care or custody of Grand Teton Council simply because they received some compensation for their services." *Steed v. Grand Teton Council of the Boy Scouts of America*, 144 Idaho 848, 172 P.3d 1123 (2007).

### iii. Other "Special" Relationships

#### A. Non-Professional Relationships

**S.H. KRESS & CO. v. GODMAN**

Supreme Court of Idaho
95 Idaho 614, 515 P.2d 561 (1973)

McFADDEN, J.: This appeal arises out of an action instituted by S.H. Kress & Company, plaintiff-appellant. In its complaint appellant alleged the negligent repair of a boiler by Gate City Plumbing and Heating, respondent, and that as a consequence of the alleged negligent repair the boiler exploded causing extensive property and inventory damage to the appellant. On Saturday, April29, 1967, Robert Noll, appellant's store manager in Pocatello, Idaho, found the store cold and discovered the boiler's fire was out. He attempted to start the fire but failed. Then he called respondents, explained the problem to William C. Godman, owner of Gate City Plumbing and Heating, and requested a repairman. Godman responded that a repairman would be available on the following Monday.

On Monday, May 1, 1967, Cleo Smith, respondents' repairman, arrived, having been instructed by Godman to start the boiler fire. Noll explained to Smith that the boiler was not firing and that he did not know the nature of the problem. Noll then showed Smith the location of the "main water" valve and the boiler room. While examining the boiler, Smith checked the water level and found it "just right." Then he discovered the water feeder, which supplied the water to the oiler, was leaking inside and outside the boiler. He repaired the leak by installing a new gasket m the water feeder. Next, Smith found the electrical switch controlling the gas flow into the boiler turned off. After he turned it on, the boiler fire started. After watching the boiler go through its heating cycle for approximately thirty minutes, Smith went upstairs and replaced a radiator vent. He returned to the boiler room for his tools and checked the boiler again. During this period of time the boiler operated without any difficulty. Before leaving appellant's store Smith advised Noll to watch the water and pressure gauges on the boiler. Smith left around 9:30 a.m.

Around 11:00 a.m., on the same morning, appellant's manager, Noll, went down to the boiler room and found the boiler's water and pressure normal. He returned upstairs and went to his balcony office. Shortly afterward, around 11:30 a.m. the boiler exploded causing extensive damage to appellants store and inventory; fortunately, employees and customers escaped injury.

As a result of the damage the appellant brought an action against Gate City Plumbing alleging negligent repair of the boiler as the cause of the explosion. The appellants sought $67,553.93 for the damage to the building, for the loss of inventory, and for other claims arising out of the explosion. After a jury was empaneled and the appellant presented all its evidence concerning negligence on the part of the respondents, respondents moved for an involuntary dismissal of the action stating that the appellant had failed to establish a prima facie case showing that the cause of the explosion was in any way attributable to a breach of duty by the respondents. In granting the motion for involuntary dismissal the trial court stated that there was no evidence of respondents' duty to discover or to repair the particular piece of equipment which malfunctioned. The trial court on May 21, 1971, entered a judgment of non-suit dismissing the appellants action with prejudice. The appellant appealed from this judgment of non-suit.

In challenging the trial court's dismissal of its complaint, the appellant has raised two issues: one concerning the scope of respondents' duty in repairing the boiler ....

In considering ...the scope of respondents' duty in repairing the boiler, it is necessary to consider, on the basis of the record, what each party expected to be done as the result of respondents' service call. Appellants store manager, Mr. Noll, testified that on Saturday morning he spoke to Mr. Godman by telephone, and stated, "I told him that we didn't have any heat in the building and didn't know what was wrong with the furnace, could somebody please come and see what was wrong.

Following this call the next Monday morning, Mr. Godman instructed a repairman to go to appellant's place and that the boiler's fire had gone out and that he was to get it going. This the repairman did as previously discussed. It is the respondents' position that starting the boiler's fire was the extent of their obligation to appellant. Appellant, however, contends that the duty owed to it is more extensive, and that the respondents should have inspected the boiler's external safety devices.

Testimony of appellants expert witness, Mr. Sudweeks, a graduate mechanical engineer, testified that the gas firing valve in the boiler's interior regulates the gas flow and that this valve cannot be inspected without disassembling the boiler. According to Sudweeks the gas firing valve malfunctioned causing gas to flow unchecked into the firing chamber. As the gas continued to flow freely, the temperature of the boiler increased raising the steam pressure to excessive limits. He explained the relationship between this gas firing valve and an external pressure switch. When the furnace is cool, and the pressure is low, the electric pressure switch opens the gas firing valve causing gas to enter and bum in the furnace, thus raising the temperature and increasing the steam pressure. When the steam reaches the predetermined pressure seton the pressure switch, the switch electrically closes the gas firing valve. He testified that if the gas firing valve were stuck in an open position, the electric pressure switch would have no effect on the operation of the boiler.

Sudweeks further testified that this boiler was also equipped with a steam pressure relief

valve to release excess pressure generated by the boiler. It was also his opinion that the pressure relief valve did not operate as designed since it was corroded. Sudweeks failed to explain, however, whether this corrosion would be detectable by a visual or manual inspection of the steam pressure relief valve. Appellant argues that it was entitled to assume the boiler would be free from immediate danger of malfunctioning parts proximately situated in the repairman's work area which he should have inspected. Appellant states that the standard of respondent's duty is found in Restatement (Second) Torts §§ 323, 395, and404 (1965), which require repairmen to be aware of the reliance an owner could reasonably expect from the repair of a chattel possessing an unreasonable risk of potential physical harm. Respondents in response argue that the cause of the explosion, i.e., the malfunctioning of the gas firing valve, was not something which they were under a duty to inspect. However, appellant contends that even though the gas firing valve malfunctioned, the steam pressure relief valve was a back-up safety device which could have prevented the explosion had it been functioning properly. Appellant insists that respondents' repairman should have discovered the defective steam pressure relief valve which could have averted the explosion.

The proper functioning of the steam pressure relief valve was critical to the safe operation of the appellant's boiler. While it is true that the gas firing valve initially malfunctioned raising the steam pressure above the danger level, the purpose of the steam pressure relief valve was to release steam in such an event and prevent an explosion like the one in this case. The steam pressure relief valve was an external back-up safety device which could be effortlessly inspected and checked. Respondents' repairman knew and understood this valve's function, purpose, and location. Yet, at trial he admitted failing to inspect or check it.

The modem view ... is that an independent contractor who repairs a machine or other product has the same liability as a manufacturer. [] Restatement (Second) Torts § 395 states:

> A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to been dangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.

*Restatement (Second) Torts § 404* applies to repairmen the same duty imposed on manufacturers. We adopt the standard that one who as an independent contractor negligently makes, rebuilds, or repairs a chattel for another is subject to the same liability as that imposed upon negligent manufacturers of chattels.

It is our conclusion that the jury should have been given the opportunity to resolve whether there was a duty to inspect certain safety devices on the boiler, whether the respondents breached that duty, and whether such a breach of duty if so found was the proximate cause of the boiler's explosion. When not functioning properly, a steam boiler is a hazardous instrumentality possessing a great potential for harm. Although respondents' repairman was qualified to work on steam boilers, he failed to inspect the steam pressure relief valve which could have possibly averted the extensive damage to appellant's store and inventory. The relative ease of checking the steam pressure relief valve's effectiveness an performance, its accessible location and its nearness to the working area in conjunction with its importance as a safety device in this case, when balanced with the boiler's potential for harm, are factors which must be considered in the appellant's favor in reversing the involuntary dismissal.

We express no opinion whether or not an inspection of the steam pressure relief valve would have or could have revealed its defective condition or whether the steam pressure relief valve would have averted this danger even if it had been operable. These are matters properly for the parties to adduce evidence and persuade the trier of facts. On the basis of the record before the court we hold that reasonable men could have differed over the existence of a duty and breach of that duty on the part of respondents' repairman in failing to inspect the steam relief valve, and that the district court erred in granting respondents' motion for an involuntary dismissal of appellant's action.

The judgment of dismissal is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

DONALDSON, C.J., & SHEPARD, McQUADE, & BAKES, JJ., CONCUR.

NOTES

(1) What is the source of the defendant's potential duty to the plaintiff? Did the defendant contract with the plaintiff to check the steam pressure relief valve? If the duty is not based upon contract, what is its source? What is the scope of the defendant's duty? What interest is protected by the duty.

(2) Did the duty arise out of the contract between the parties? If so, how can defendant be held responsible for something it did not contract to provide? If not, what was the source of the duty?

(3) *Hoffman v. Simplot Aviation, Inc*.: Plaintiff crashed his vintage airplane while attempting to land. He arranged to have defendant repair the plane. Defendant sent two repairers to the crash; they repaired the craft and left plaintiff a note that it could be flown to defendant's shop for additional work. After verifying that the airplane could be flown, plaintiff took off. Shortly before landing, a bolt that attached the wing strut to the aircraft fuselage failed and broke, causing the left wing to rip off. These events occurred while Hoffman was between 900 and 1,000 feet. The aircraft went into a spin and crashed just short of the airport. Fortunately, plaintiff walked away from the crash.

Plaintiff sued, alleging liability on four theories, including negligence, breach of warranty, and strict liability in tort. Defendant appealed a verdict for plaintiff on breach of implied warranty. The court noted that "none of the materials or services of the defendants in the actual repair of the aircraft caused the accident." Thus, liability "must be based on defendants' inspection of the aircraft following the repairs and their failure during that inspection to discover the defect in the clevis bolt."

The jury found defendant liable for breach of an implied warranty. Defendant challenged the jury instructions on the warranty theory. The Idaho Supreme Court agreed that the instruction was error because "it permitted the jury to find liability absent any proof of fault or negligence by the defendants."

> It is clear that in a sales transaction an implied warranty may be imposed upon the seller to the effect that the goods are merchantable or are fit for the particular purpose for which purchased. I.C. §§ 28-2-314, 315.in circumstances involving personal services, however, the warranty is implied that the services will be performed in a workmanlike manner. The standard imposed may vary depending upon the expertise of the actor, either possessed or represented to be possessed, the nature of the services and the known resultant danger to others from the actor's negligence or failure to perform.

However, as stated in the landmark case of *Gagne v. Bertran*, 43 Cal.2d 481, 275 P.2d 15 (1954):

> The services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence. Those who hire such persons are not justified in expecting infallibility but can expect only reasonable care and competence. They purchase service, not insurance. []
>
> The more vexing problem of theory is the distinction, if any between the doctrines of implied warranty and negligence in circumstances involving the rendering of personal services. Although such causes of action are generally though to be independent of each other, in the instant circumstances they merge into one cause of action. A fundamental component in a negligence action is the existence of a duty (most often to refrain) toward another and a breach thereof. In circumstances involving the rendition of personal services the duty upon the actor is to perform the services in a workmanlike manner....

> We hold that under the circumstances of the case at bar the implied warranty theory of plaintiffs should have been submitted to the jury with proper instructions. [] The jury should have been instructed that plaintiffs were entitled to have defendants' services rendered in a workman-like manner. The standard of care so imposed on the defendants should be determined in light of relevant factors such as: The inherent danger posed by an aircraft; the expertise possessed, or represented as possessed, by the defendants; the knowledge of the defendants' intended use of the aircraft, and the contributory negligence of or assumption of the risk by the plaintiffs, if any, inconsideration of factors such as the age of the aircraft, its previous status and record of repair and maintenance and the previous accident.
>
> Plaintiffs-respondents argue that the recent case of *S.H. Kress & Co. v. Godman*, 95 Idaho 614, 515 P.2d 561 (1973), militates against our result here. We do not agree. In Kress personal services were involved and there as here defendants were called to make repairs and it was alleged that such were made negligently. There also, it was argued that following the repairs an inspection in the immediate repair area would have revealed defects in parts which later caused an accident. Kress was reversed on the sole basis that the existence of a duty on the repairman and a breach thereof were questions which should have been submitted to the jury. There it is implicit that the cause of action was brought in negligence and that the contributory negligence of the owner was a defense. So, in the case at bar we hold that contributory negligence or assumption of the risk are defenses to plaintiffs' theory of implied warranty.

*Hoffman v. Simplof Aviation, Inc*.,97 Idaho 32,539 P.2d584 (1975). See also *Mica Mobile Sales & Leasing, Inc. v. Skyline Corp*., 97 Idaho 408, 546 P.2d 54 {1975).

(4) *Galbraith v. Vangas, Inc.*: Galbraith's house was destroyed in the explosion of her propane water heater. When the water heater had been installed, the Vangas employee making the installation realized that a pressure release valve was missing from the unit. He so informed Galbraith and told her he would return and install the missing valve. He never did not do so. Galbraith sued Vangas contending that the explosion was due to excessive pressure, which would have been prevented if the pressure relief valve had been installed. She further contended that it was the negligent omission of the employee that caused her losses. The Idaho Court of Appeals reversed a summary judgment for Vangas, concluding:

> The existence of a contract does not necessarily mean that a cause of action is entirely contractual. In Idaho a plaintiff may bring an action for tortious negligence arising from a contractual relationship. E.g., *Just's, Inc. v. Arrington Construction Company, Inc*., 99 Idaho 462, 583 P.2d 997 (1978); *McAlvain v. General Insurance Co*., 97 Idaho 777, 554 P.2d 955(1976); *Taylor v. Herbold*, 94 Idaho 133,483 P.2d 664 {1971); *Wallace v. Hartford Fire Insurance Co*., 31 Idaho 481, 174 P. 1009 (1918).
>
> Negligence in the sense of nonperformance of a contract will not sustain an action sounding in tort, in the absence of a liability imposed by law independent of that arising out of the contract itself; rather, active negligence or misfeasance is necessary to support an action in tort based upon a breach of contract. [] Here Galbraith's claim does not assert nonperformance by Vangas of a contract to install a water heater. The water heater was, in fact, installed. Rather, the complaint, in substance, alleges misfeasance by Vangas in installing a water heater which lacked a pressure relief valve.
>
> Moreover, upon the pleadings, this case appears to be one in which there may be liability independent of that arising from the contract itself. The contract for sale and installation of a water heater (complete with a pressure relief device) established the relationship, and certain obligations, between the parties. But each of them also brought into this relationship a more general duty. This is the duty that "one owes ... to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury."

*Galbraith v. Vangas, Inc.*, 103 Idaho 912, 655 P.2d 119 (Ct. App. 1982).

(5) Master/servant: Prior to the adoption of workers compensation laws, the employer/employee relationship provided the best example of a duty arising from a relationship between plaintiff and defendant. For example, in *Ramon v. Interstate Utilities Co*., 31 Idaho 117, 170 P. 88 (1917), plaintiff was employed as a lineman by defendant. He was injured when a telephone pole he was climbing collapsed because it had rotted through eight to ten inches below the ground. The court offered the following statement on the employer's duty:

> The company, in the absence of a contract of employment with respondent whereby the duty to inspect the telephone pole for hidden defects before climbing it devolved upon him, assumed the duty of using due care to the end that the pole upon which respondent was directed to work be reasonably sound and safe. The plaintiff company neglected its duty in this respect and provided a pole that beneath the surface of the ground was old and rotten, which condition was unknown to respondent. Under the great weight of authority, it was clearly the primary duty of the company to use due care to furnish the respondent with a reasonably safe place to work, -- a pole that is allowed to become rotten beneath the ground is not a reasonably safe pole upon which to work. It was not only the duty of the company to use such care to furnish a reasonably safe place but to inspect its pole line as often as necessary, and by reasonable inspection and care to maintain the poles in a reasonably safe condition.

*Ramon v. Interstate Utilities Co*., 31 Idaho 117, P. 88 (1917).

### B. Professional Relationships

NOTES

(1) *Trimming v. Howard*: Plaintiff was treated by defendant for spinal meningitis. During the treatment, a hypodermic needle broke off in plaintiffs back. Because of conflicting statute of limitations, the central issue was whether the action sounded in tort or contract:

> This case is presented to the court upon two theories, [plaintiff] contending that it is one on contract ... and [defendant] as insistently contending that it is a case of malpractice, sounding in tort and therefore barred by [the statute of limitations]. The complaint primarily alleges that a contract for treatment was entered into between the parties. So far so good. But, in the performance of that contract, [defendant] impliedly contracted that he would exercise ordinary and reasonable care, [] which is another way of saying that such duty is imposed by law....
>
> We do not have to deal here with a contract whereby the surgeon expressly undertook to use extraordinary skill and care. That being out of the way, the charging parts of the complaint will determine whether or not the gravamen of this action consists of a breach of the contract, itself, or the duty imposed by law in relation to the manner of its performance. [] Aside from the aggregation of fraud and concealment, the basic allegations of the complaint are directed solely to carelessness, negligence and misconduct as the proximate cause of the injury claimed to have been suffered. [Defendant] is not arraigned for breach of contract but for delinquencies incidental to its performance. As alleged, these are the very foundation of the action, and if true, constituted nothing but malpractice. The gist of a malpractice action is negligence, not a breach of the contract of employment.

*Trimming v. Howard*, 52 Idaho 412, 16 P.2d 661 (1932).

(2) *Flowerdew v. Warner*: Plaintiff fell, injuring his back. Defendant was the treating physician. Plaintiff contended that defendant had contracted to cure him. The Idaho Supreme Court agreed with the trial court that the evidence failed to sustain this contention. It concluded, "Moreover, in the absence of a specific agreement, an agreement of a practitioner with his patient is one for services and treatment, not for a particular result." *Flowerdew v. Warner*, 90 Idaho 164, 409 P.2d 110 (1965). Since the relationship between the doctor and the patient is contractual, why is there a presumption that the claim is not in contract? See also *Ogle v. De Sano*, 107 Idaho 872, 693 P.2d 1074 (Ct. App. 1984).

(3) Scope of the duty owed by a professional: What is the scope of the duty owed by a professional? Is it reasonable care under the circumstances? The scope of duty owed by a professional to a client/patient is examined in the chapter on breach.

### c. Duties Arising from Defendant's Relationship to a Third Party

#### FULLER v. STUDER

Supreme Court of Idaho
122 Idaho 251, 833 P.2d 109 (1992)

McDEVITT, J.: This case arises out of a snowmobile accident. Plaintiff Nina Fuller was injured by a snowmobile operated by the defendants' three-year-old daughter. The plaintiffs brought suit alleging that the defendants were negligent in leaving unattended a snowmobile with the engine running near their three-year-old daughter. While unattended, the three-year-old daughter climbed upon the snowmobile, pressed the throttle, and ran over the plaintiff Nina Fuller, causing severe injuries. Plaintiffs base their claim on the theories of negligent supervision and negligent entrustment. The district court granted summary judgment in favor of the defendants. We affirm.

#### FACTS

The parties do not dispute the facts. On February 20, 1988, the defendant, Andy Studer, and his father-in-law, Charles Seager, took Studer's three-year-old daughter, Barbara, and three other children snowmobiling at Pomerene Ski Area. The snowmobiles involved were a Polaris owned by Mr. Studer and a John Deere owned by Mr. Seager. After giving the children rides on the snowmobiles, Studer and Seager returned to the pickup truck to load the snowmobiles onto the trailer.

When Seager returned to the pickup, he got inside the pickup to rest. Studer returned and took Seager's John Deere for a short ride. After Studer returned from riding the John Deere, he tried to load the Polaris by himself, but a ski got entangled with a cable attached to the trailer, so Seager tried to assist Studer in loading the Polaris. As Studer was driving the Polaris onto the trailer, it threw mud and snow on the John Deere. Seager brushed the snow and mud off the John Deere and then drove the John Deere ahead of the trailer, where he left it with the motor running. Studer's three-year-old daughter Barbara then climbed upon the John Deere and pressed the throttle. The snowmobile took off and eventually went over an embankment and ran over seven-year-old Nina Fuller. Nina received severe and permanent injuries as a result of the accident. Barbara was not injured.

The Seagers were dismissed by stipulation. The Studer's motion for summary judgment was granted by the district court. The district court ruled that the facts lacked any indication that Studer "entrusted" Barbara with the snowmobile and that there was no evidence indicating Barbara's propensity or proclivity for climbing on a snowmobile. Hence, there were insufficient facts to support either theory of negligent entrustment or negligent supervision.]

The elements of an action based upon negligence are: "(1) a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendants conduct and the resulting injuries; and (4) actual loss or damage." *Alegria v. Payonk*, 101 Idaho 617, 619,619 P.2d 135, 137 (1980); *Brizendine v. Nampa Meridian Irrigation Dist*., 97 Idaho 580, 583, 548 P.2d 80, 83 (1976) ....

#### II. NEGLIGENT ENTRUSTMENT

The plaintiffs urge that Studer negligently entrusted the snowmobile to Barbara. To support their theory of entrustment, the plaintiffs rely upon the fact that Barbara was allowed to remain in close

proximity to the idling snowmobile and that a three-year-old would have a natural proclivity to climb upon and play with a snowmobile.

One of the first cases in Idaho to discuss the tort of negligent entrustment is *Kinney v. Smith*, 95 Idaho 328, 508 P.2d 1234 (1973). Kinney does not provide us with much detail as to the specific elements of the tort. Recently, we stated that negligent entrustment is a particularized application of the general principles of negligence law. *Olguin v. City of Burley*, 119 Idaho 721, 810 P.2d 255 (1991). Essentially, the term "entrustment" characterizes the duty of care to be applied in evaluating an alleged tort-feasor's conduct.

The crucial element of this tort is "the legal right to 'control' the thing entrusted which gives rise to the duty in negligent entrustment" and that in exercising control over the thing entrusted a plaintiff need not show that the defendant placed the instrument in "the hands of a child," but that the defendant acted "in a manner that it became likely a child would come into possession of it and use it in such a manner as to create an unreasonable risk of harm to others." *Ransom v. City of Garden City*, 113 Idaho 202, 207, 743 P.2d70, 75 (1987). While "control" usually means legal ownership, the paramount requirement is a person's right to control, even if the person is not the legal owner. *Lopez v. Langer*, 114 Idaho 873, 761 P.2d 1225 (1988).

In this case, the John Deere snowmobile was legally owned by Mr. Seager, who had been driving for most of that day. While Mr. Studer had also driven the John Deere the day of the accident, the affidavits indicate that it was Mr. Seager who had left the snowmobile with the motor running in close proximity to Barbara. It appears that it was Mr. Seager who "controlled" the John Deere snowmobile, Mr. Studer did not have the necessary right to control the snowmobile to impose liability for negligent entrustment. The district court did not err in granting summary judgment on this issue.

**III. NEGLIGENT SUPERVISION**

In addition to their claim of negligent entrustment, the plaintiffs further contend that Studer was negligent in the supervision of his daughter Barbara. Plaintiffs argue that this breach of the duty to supervise is a proximate cause of Nina's injuries.

In order to address the issue of negligent supervision, first we recognize the common law rule that parents are not responsible for the torts of their children. *Gorden v. Rose*, 54 Idaho 502, 33 P.2d 351 (1934); In *Gorden*, this Court rejected an argument that would have imposed liability upon parents for a child's negligence based upon the theory of the "family purpose doctrine." We recognized in *Gorden* that imposing liability in this area would be best handled by the legislature and not by the courts. *Gorden*, 54 Idaho at 512-13,33 P.2d at 355.

Subsequent to the *Gorden* decision, the Idaho Legislature recognized that it is contrary to public policy to hold parents vicariously liable for the torts of their children by enacting I.C. § 6-210. This section holds parents liable for economic losses "willfully caused" by a minor child still living with the parents, but only up to a maximum of $2,500. Subsection (2) of the statute disallows recovery for "less tangible damage such as pain and suffering, wrongful death, or emotional distress." The effect of this statute is to prohibit imposing vicarious liability upon the parents for a child's negligent conduct.

While it could be argued that the doctrine of negligent supervision is just an abrogation of I.C. § 6-210, this is not the case. Negligent supervision is an action based upon the independent act of negligence on the part of a parent in failing to exercise the proper control of a minor child. Like the related tort of negligent entrustment, the term "supervision" characterizes the duty of care imposed upon a person, such as in the parent-child context.

This Court has never dealt directly with the issue of liability to a third party based upon a parent's negligent supervision of a child. This Court has held that parent-child immunity prevents a child from suing his parents for negligent supervision, *Pedigo v. Rowley*, 101 Idaho 201, 610 P.2d 560 (1980), and that parents may not personally profit from the negligent supervision of their children. *Jacobsen v.*

*Schroder*, 117 Idaho 442, 788 P.2d 843 (1990). (If parents bring action in their own name for damages arising from injuries to a child, parents award can be reduced by the percentage of their negligence in supervising the injured child.).

In other contexts, this Court has recognized this tort. In *Bauer v. Minidoka School District No. 331*, 116 Idaho 586, 778 P.2d336 (1989), this Court held that material issues of fact existed precluding summary judgment, therefore remanding a case based on the negligent supervision of a student by the school district. In *Walker v. Shoshone County*, 112 Idaho 991, 739 P.2d 290 (1987), this Court remanded a case based upon the negligent supervision of a 17-year-old prisoner by the county officers in charge of the county jail.

The most informative case in Idaho concerning negligent supervision is *Sterling v. Bloom*, 111 Idaho 211,723 P.2d 755 (1986), where this Court held that the State can be held liable for parole officer's negligent supervision of a parolee. In Sterling we stated that "one who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." Sterling, 111 Idaho at 225, 723 P.2d at 769.

Expanding the Sterling rationale to the parent-child context, a parent who has knowledge of a minor child's propensity for a particular type of harmful conduct is under an affirmative duty to guard against the foreseeable consequences of that specific propensity. Thus, this duty requires a two-step analysis. First, the court must look to see whether a parent has knowledge of a minor child's propensity or proclivity for a specific harmful conduct. If the first step is answered affirmatively, then it must be determined whether the parent took reasonable steps to guard against the foreseeable consequences of the minor child's propensity for the specific harmful conduct.

In support of their motion for summary judgment, the defendants filed the affidavit of Mr. Studer and Mr. Seager. Both affiants stated that they were unaware of any propensity of Barbara to climb upon and play on a snowmobile. The plaintiffs did not dispute these affidavits. Therefore, there was no genuine issue of material fact to show that Mr. Studer knew of Barbara's propensity to climb upon and play on a snowmobile. The trial court did not err in granting summary judgment on this issue.

**CONCLUSION**

We hold that the trial court did not err in granting summary judgment on the issue of negligent entrustment or negligent supervision. The trial court’s decision is affirmed.

BAKES, C.J., JOHNSON, J., AND REINHARDT, J. PROTEM., CONCUR.

BISTLINE, J., DISSENTING: The district court erred in granting summary judgment for the defendants. There is most definitely an issue of material fact that should have been entrusted to a jury to decide. The issue of fact is whether the Studers' three-year-old daughter, Barbara, had any tendencies or proclivities that would cause her father to be aware of where she was and what she was doing while in the proximity of an idling snowmobile. This issue is crucial to both the negligent entrustment and negligent supervision theories of recovery advanced by plaintiffs, though it is more crucial to the latter. It is clear that the negligent entrustment theory might have been readily sustained if the Seagers had not been dismissed from the action. In addition to the majority's failure to recognize the existence of a triable issue of material fact, they erroneously rely on I.C. § 6-210 to construct an argument against the viability of plaintiffs' negligent supervision theory of recovery.

**PART II**

The negligent entrustment theory would have been viable if the original named defendants, Mr. & Mrs. Seager, had not been dismissed from the action. As the majority opinion correctly states in part II of

their opinion, Mr. Seager is the party who owned the snowmobile and left it running in close proximity to the child, Barbara Studer. As an owner of that snowmobile, he would be responsible for any injury done to an innocent party by reason of his negligence in allowing an operable snowmobile, with its engine running, to come into the control of some interloping person, be that person intoxicated, *Ransom v. Garden City*, 113 Idaho 202, 743 P.2d 70 (1987), or any person by reason of age not entitled to be in control and/or operation of a vehicle. The record is unclear as to how the plaintiffs came to stipulate that the Seagers be dismissed with prejudice from the lawsuit. Had they been retained as parties in the action, the summary judgment might not have been granted by the district court.

**PART Ill**

In part Ill of their opinion, the majority relies on I.C. § 6-210 to conclude that "[t]he effect of this statute is to prohibit imposing vicarious liability upon the parents for a child's negligent conduct." This is an incorrect interpretation of the statute and by so indulging, the majority has misguided itself. The intent of the statute is not to preclude vicarious liability, but rather to limit recovery to $2500 against the parents for willful acts of the child. Furthermore, it is inapplicable to this case. Idaho Code § 6-210 clearly applies only to situations where a parent is liable for economic loss willfully caused by a minor. No facts whatever have been presented which suggest, indicate, or intimate that three-year-old Barbara willfully injured the Fuller child, or, that she had any such intent, or that she even knew the child. Further, the issue in the case at bar is not the child's negligence, but rather the father's negligence. The policy implemented in I.C. § 6-210, that of restricting parental responsibility for willful acts by a minor child, cannot be superimposed upon the present situation, where the plaintiffs have asserted an independent basis for finding that the causal negligence in the instant case was attributable to Barbara's father.

**PART IV**

Moreover, it is abundantly clear that the snowmobiling experience was a family affair, and hence a joint venture excursion headed by the adult father and the adult grandfather. A jury should properly hear all of the facts from the available witnesses and make a determination as to culpability. Neither the father or the grandfather can so easily be exculpated from all responsibility; it was they who possessed snowmobiles and arranged the outing. That the grandfather has been dismissed from the action is not a bar to his name being placed on a special verdict instruction which inquires as to percentage of fault. [] Clearly there is a triable issue of fact, and for that reason and in the interests of justice, the judgment of the district court should be reversed and the cause remanded.

NOTES

(1) Why did the majority conclude that there as no duty? What must the defendant have the right to control for there to be a duty to control?

(2) Nature of the "special relationship": What types of relationship are sufficiently "special" to create a duty? In Fuller, the court identified two different types of situations in which a duty might be found, labeling them "negligent entrustment" and "negligent supervision." Consider this division as applied to the following cases.

(a) *Podolan v. Idaho Legal Aid Services, Inc*.: The Idaho Court of Appeals addressed the issue in a legal malpractice action brought by Lee and Dale Podolan. The Podolans had employed Michael Donnelly when he worked in a private firm. Following a period of suspension for unethical conduct caused by his severe psychological problems, Donnelly was briefly employed by Legal Aid. During this period the Podolans contacted him and he agreed to represent them in two different matters. Donnelly failed to represent the Podolans but, as the court noted, "his misrepresentations to the Podolans were very numerous, convincingly performed, and dreadful in their falsity." The Podolans discovered the deception after Donnelly had been fired by Legal Aid. Although they had not been Legal Aid clients, the Podolans nonetheless brought a malpractice action against Legal Aid arguing in part that the agency had negligently supervised Donnelly and thus was liable for their losses.
The court began by noting that negligence requires a duty:

> A duty may arise several ways. In the context of negligent supervision, duty is the product of the supervisor's "special relationship" with the supervised individual, not with the injured person. *Sterling v. Bloom*, 111 Idaho 211,723 P.2d 755 (1986); Utchfield v. Nelson, 122 Idaho 416, 835 P.2d651 (Ct. App. 1992). The duty requires the supervisor who knows the supervisee's dangerous propensities to control the supervisee so he will not injure third parties. *Id*. Our Supreme Court has held that the duty described in the RESTATEMENT (SECOND) OFTORTS §319 applies to questions of negligent supervision in Idaho. Sterling, 111 Idaho at 125, 723 P.2d at 770. That section states one who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm. RESTATEMENT (SECOND) OF TORTS § 319 (1965). Here, there was no bodily harm as contemplated by the Restatement and *Sterling*. But *see Oppenheimer Industries, Inc. v. Johnson Cattle Co*., 112 Idaho 423, 431, 732 P.2d 661, 669 (1968) (negligence of brand inspector could be imputed to State Brand Board for property loss in allowing sale of stolen cattle).

The court concluded that Donnelly's conduct at Legal Aid gave the agency no notice that he was "engaged in a fantasy pursuit." *Podolan v. Idaho Legal Aid Services, Inc*., 123 Idaho 937, 854 P.2d 280 (Ct. App. 1993).

What is required to "take charge of a third person"? Recall that one situation in which a person may have a duty to protect another person is when the first person takes custody of the second. Does "take charge" give rise to a custodial relationship? Will less than physical custody suffice? When is a relationship sufficiently custodial- sufficiently analogous to actual physical custody- to impose duty a duty on the custodian? Did the doctor in *Davis* take charge of the nurse? Did the bartender in *Alegria* take charge of the drinker? Did the bartender take charge of the dangerous instrumentality? Is this the distinction between negligent entrustment and negligent supervision?

If taking charge is at the core of the source of the duty in such cases, what is the scope of the duty? That is, what must the person who takes charge do to avoid liability?

(b) *Stanberry v. Gem County*: Plaintiff struck a horse that had wandered onto the highway beside the county fairgrounds. The horse had been loaned by one of the defendants to the other. The trial court granted a summary judgment for the horse's owner and plaintiff appealed. The Idaho Supreme Court affirmed, noting that generally a bailor is not liable for the negligent use of the bailed property by the bailee. *Stanberry v. Gem County*, 90 Idaho 222, 409 P.2d 430 (1965).

What are the differences in the relationship between defendant and the third party that justify the different results in *Stanberry* and *Alegria*? Is the difference the degree of the degree of control that the owner can exercise? The moral culpability of loaning a horse vs. selling alcohol? The differing of harm?

(c) *Ryley v. Lafferty*: Plaintiff brought an action for injuries to her son who was beaten by defendant's son. She alleged that defendant's son, "Elmer Lafferty had a vicious and malignant disposition and the habit of persuading and inveigling smaller boys into secluded places and away from older and adult people and of beating, bruising, maiming, and punishing such smaller boys, and that the defendants ...well knew of such habit and ... notwithstanding such knowledge and information, they allowed him to go alone among smaller boys and to continue ... to beat, bruise, and maim them." The trial court overruled defendants' demurrer to the complaint:

> While it is true that parents are not liable for torts committed by their minor children without their consent and knowledge, yet the principle applicable to the facts alleged in this case is that the parents are liable if it appears that they knew that their child was guilty of committing the particular kind of tort habitually and encouraged the child, as alleged, and made no effort to correct or restrain him. Under such circumstances as alleged the child's tort was committed with the parents' knowledge and implied acquiescence, and such consent may be expressed or implied, rendering the parents liable without proof of their actual knowledge of the tort sued upon.

> Having full knowledge of their child's habits, traits, and vicious disposition, and encouraging him in the manner charged to continue such acts, would constitute assent and participation on the part of the parents in the tort alleged, and, if so, it would be regarded as negligence upon the parents' part. It may be a question of fact as to whether the child knew of his parents [p]resenting any resistance or admonition made by other adult persons whose children were also beaten and maimed, for to encourage the child the parents must signify their consent to a continuation of their child's conduct, or direct or ratify the act, or that the child was at the time acting as their agent or servant in their interests or for their benefit.

*Ryley v. Lafferty*, 45 F.2d 641 (N.D. Idaho 1930). What is the source of the duty? Did the parents take charge of their delinquent child?

(d) *Bell v. Joint School District No. 241*: Plaintiff was a passenger in a pickup that was struck by a school bus. The bus was passing the pickup when the pickup turned left. Plaintiff appealed a jury verdict, contending that the trial court had improperly instructed the jury that the negligence, if any, of the [pickup] driver Kenneth Schwartz, would become a factor in the instant case if you determine that [plaintiff] Roy D. Bell had supervisory authority over Kenneth Schwartz and the he failed properly to supervise or direct Kenneth Schwartz after he has a reasonable opportunity to see or know that the driver was operating the pickup without due regard for the safety of others and that plaintiff was negligent in failing to exercise his authority or acquiesced or cooperated in the act complained of.

Plaintiff argued that his "supervisory power was not such as to require him to act affirmatively to control the driving of the vehicle." After noting that plaintiff knew where the driver was planning to tum and that the driver was not signaling, the court concluded:

> In any event, the record clearly shows that Bell was Schwartz's immediate supervisor, and Bell's failure to exercise his right of control over Schwartz may have constituted independent negligence on Bell's part which contributed to the injuries he sustained in the accident. The challenged jury instruction was, therefore, a proper statement of the applicable law. *Bell v. Joint School District No. 241*, 94 Idaho 837,499 P.2d 323 (1972).

What are the differences in the relationship between defendant and the third party that justify the different results? Is the difference the degree of foreseeability? The degree of control that the supervisor can exercise?

(e) *Doe v. Durtschi*: Durtschi was a fourth-grade teacher who sexually molested the plaintiffs. Plaintiffs allege that school district knew or should have known that Durtschi had committed similar acts in his previous assignment within the district. The court held that the mere fact that the injuries were caused by a third party does not absolve defendant where the conduct causing the injuries was the risk that made defendant's actions a breach of duty: "The very risk which constituted the district's negligence was the probability that such actions might occur....The fact that the foreseeable danger was from intentional or criminal misconduct is irrelevant; the school district had a statutory duty to make reasonable efforts to protect its students from such a danger. A breach of that duty constitutes negligence." *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986). How did the school board take charge of the teacher?

(f) *Sterling v. Bloom*: Another case involving a disastrous mixture of alcohol and motor vehicles. Plaintiff's vehicle was struck, and she was severely injured by Bloom who was legally intoxicated at the time. Defendant was on probation from a conviction for felony DUI-his third DUI conviction. ln addition to Bloom, Sterling sued the state, arguing that the Probation and Parole Board had acted negligently in supervising Bloom's probation in allowing him to drive a motor vehicle for nonemployment purposes, allowing him to reside in the same building which housed the Seven Mile Lounge, and to work there as a bartender. The court began by noting that "the Board has a statutory duty to supervise probationers and, where appropriate, to investigate and report violations of probation conditions for the purpose of revoking probation." Since the relationship established by the statute was "custodial in nature," defendant was required "to control his charge and to guard other persons against his dangerous propensities." The court concluded:

> the key to this duty is not the supervising individual's direct relationship with the endangered person or persons, but rather is the relationship to the supervised individual. The duty extends to the protection and safety of "others" foreseeably endangered. Where the duty is borne by governmental officials, it is a duty more specific than one to the general public; instead, it is a duty to those foreseeably endangered. []
>
> Clearly a duty can be owed to more than single individuals known to the tort-feasor. In a case like the instant one, the duty is owed to a class rather than a single individual. With a drunk driver on the highways, it is strictly a matter of chance who may become his victim. For certain, however, potential victims include those persons in the class of motorists on the same highway. The negligent conduct here involved and alleged obviously endangered more than the single victim, Maude Sterling. As Dean Prosser noted, "liability in tort is based upon the relations of persons with others; and those relations may arise generally, with large groups or classes of persons, or singly, with an individual."[] Here, the admitted negligent supervision of Bloom by the probation officer foreseeably created a potential for harm to those motorists whom Bloom would encounter on the state's highways. The probation officer owed those motorists a duty.

*Sterling v. Bloom*, 111 Idaho 211, 723 P.2d 755 (1986).

(g) *Ransom v. Garden City*: Plaintiffs were injured when their vehicle was struck by another vehicle that was being drive the wrong way down a one-way street. The driver of the vehicle had been the passenger in the vehicle when it had previously been stopped by a police officer. The officer concluded that both the driver and the passenger of the vehicle were intoxicated. After arresting the driver, the officer gave the keys to the passenger. The accident occurred shortly thereafter. Plaintiffs's claim against Garden City was predicate upon negligent entrustment. After examining several cases applying the negligent entrustment theory, the Court concluded:

> The cases illustrate that the negligent entrustment rule is nothing more than a particularized application of general tort principles....
>
> Where a person has a right to control a vehicle, he must exercise ordinary care and not permit another to use it in circumstances where he knows or should foreseeably know that such use may create an unreasonable risk of harm to others. [) Defendant's argument that the tort requires ownership of the vehicle was rejected because the officer had legal control over the vehicle and "[i]t is the right to 'control' the thing entrusted that gives rise to the duty in negligent entrustment cases, [], and this require to 'control' is not limited to those who hold absolute title." *Ransom v. Garden City*, 113 Idaho 202, 743 P.2d 70 1987).

(h) *Lopez v. Langer*: The right-to-control issue was central to Lopez Plaintiff alleged that the father of the driver was independently liable because he was the owner of the vehicle and had been negligent in entrusting the vehicle to his son given the son's driving record. The court stated:

> An owner or other person in control of a vehicle and responsible for its use may be held liable for damages resulting from use of the vehicle by another under the theory of negligent entrustment, where such person knew or should have known that such use may create an unreasonable risk of harm to others. *Kinney v. Smith*, []

*Lopez v. Langer*, 114 Idaho 873, 761 P.2d 1225 (1988). The court held, however, that the father did not have actual control since he had transferred that to the child's mother from whom he was divorced; the mother had failed to re-register the vehicle. Note also that the court's statement suggests that the source of the duty in Kinney was the general, action-involving-foreseeable-risk- the same predicate relied upon by the majority in *Alegria*. Is harm less foreseeable in one rather than the other situation?

(i) *Rausch v. Pocatello Lumber Co*.: Plaintiff worked as an independent contractor, installing carpet for defendant. One of defendant's employees pulled a chair from beneath plaintiff as he was sitting down causing serious injuries to plaintiff. Plaintiff sued defendant on a negligent supervision theory, alleging that defendant had a duty to know of an employee's dangerous propensities and to take care to control the employee so that he will not cause injuries to third parties. Relying upon *Podolan*, the court reversed a summary judgment for defendant because plaintiff was entitled to a jury determination of whether the

employer was aware of its employee's "propensity to engage in rough and dangerous horseplay." *Rausch v. Pocatello Lumber Co*., 135 Idaho 80, 14 P.3d 1074 (Ct. App. 2000).

(3) §41 Duty to a Third Person Based in Special Relationship with Person Posing Risks

(a) An actor in a special relationship with another owes a duty of reasonable care to third persons with regard to risks posed by the other that arise within the scope of the relationship.

(b) Special relationships giving rise to the duty provided in Subsection (a) include:

(1) a parent with dependent children,
(2) a custodian with those in its custody,
(3) an employer with employees when the employment facilitates the employees causing harm to third parties, and
(4) a mental health professional with patients.

RESTATEMENT {THIRD) OF TORTS § 41 (Proposed Final Draft No. 1, Apr. 6, 2005).

**d. Statutes as Sources of Duty**

**WHEELER v. OREGON R.R. & NAVIGATION CO.**

Supreme Court of Idaho
16 Idaho 375, 102 P. 347 (1909)

STEWART, J. [Plaintiff brought a wrongful death action for the death of his three-year-old daughter who was struck by defendant's railroad train. The accident occurred at a grade crossing used by the general public in passing from the train depot to a boat landing where passengers take passage upon boats plying upon Lake Coeur d'Alene. The crossing is used by 500 to 1,000 people daily. There were no gates or and lookout at the crossing to warn of approaching trains or to signal trains of any danger at the crossing.] The whistle was not blown, nor the bell rung or any indication given from the train of its approach to the crossing....

Counsel for respondent [plaintiff] argue that the facts thus disclosed by the evidence ... constitute negligence ... upon the part of the railroad company in operating such train; while counsel for appellant [defendant] argues that the railroad company was not guilty of negligence and exercised due care as required of an ordinary person under the circumstances.

It is generally conceded, by the authorities, that the question of negligence may be one of law or law and fact. If from the evidence different minds of prudent and reasonable men might come to different conclusions, as to whether there was negligence, then the question is one of fact to be submitted to the jury under proper instructions; but if only one conclusion is deducible from the facts, then the question becomes purely a question of law. [] If, then, from the facts detailed by the evidence in this case reasonable and prudent men might disagree as to whether the company was negligent, then the question of negligence becomes one of fact, and under proper instructions should be submitted to the jury. []

This question, however, is not open to controversy in this case, for section 2821 of the Rev. Codes of this state makes a railroad company liable for all damages sustained by any person and caused by its locomotive, trains or cars when the provisions of the section are not complied with. Rev. Codes, section 2821:

> A bell of at least twenty pounds weight must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road or highway, and be kept ringing until it has crossed such street, road, or highway; or a steam whistle

> must be attached, and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same, under a penalty of one hundred dollars for every neglect, to be paid by the corporation operating the railroad, which may be recovered in an action prosecuted by the prosecuting attorney of the proper county, for the use of the state. The corporation is also liable for all damages sustained by any person, and caused by its locomotives, trains, or cars, when the provisions of this section are not complied with.

It will be seen from this section that the failure to ring a bell or blow a whistle, when approaching a street crossing or roadway, makes the company liable for damages sustained by any person and caused by a locomotive, train or cars. This statute does not rest the liability for damages upon the contingency that the injury sustained was the result of the failure to ring the bell or blow the whistle but declares absolutely that where the bellis not rung or the whistle blown and damages are sustained, the company is liable. This section, no doubt, was enacted for the purpose of requiring a railroad company operating a train over a track, crossing a street or public highway, to give a signal of warning of the approach of such train, and to thereby notify persons attempting to pass over the same of the approach of such train. It prescribes a penalty for a failure to comply with its provisions and makes the company liable for all damages sustained.... [T]his section provides that a railway is liable for all damages sustained by any person caused by a locomotive, train or cars, when a bell is not sounded, or a whistle blown....

It is true ... that the authorities on this question are not uniform, but we believe that the better reason is with the proposition that the failure of the railroad company to comply with the statute is negligence per se, negligence in law. Under this statute the plaintiff makes his case by showing the negligence or noncompliance with the law, and the injury; ...

It then must be conceded in this case that the defendant was guilty of negligence by failing to comply with the law of this state in ringing a bell or blowing a whistle at the time of approaching the crossing where the accident occurred and is liable in this case for the injury....

We find no error in this record and the judgment is affirmed.

SULLIVAN, C.J., AND AILSHIE, J., concur.

**ON PETITION FOR REHEARING**

AILSHIE, J. - A petition for rehearing has been filed in this case, and we are asked to again consider the provisions of § 2821 of the Revised Codes. It is contended by the petitioner that the construction we have placed on the provisions of that section is too harsh and not warranted by the language of the statute itself, and that it is also contrary to the decision of the courts construing similar statutes. We have held, and are of that opinion still, that a failure to ring a bell or blow a whistle at a crossing as required by the statute is in itself negligence. This fact alone would not entitle a plaintiff to recover, unless he can also show that the injury was inflicted by the defendant's locomotive or train of cars. The fact that a bell was not rung, or a whistle blown would not make the company liable for an injury that it did not inflict. When, however, it is shown that the injury was inflicted by the defendant's locomotive or train of cars at a place where it is required to blow its whistle or ring its bell, and it is shown that the company failed and neglected to comply with the law in this regard, the plaintiff has made a prima facie case that he is entitled to have submitted to the jury. If, on the other hand, the injured party has been guilty of contributory negligence, either in failing to look and listen or in recklessly and carelessly subjecting himself to the danger from which he received his injuries, that is a proper matter of defense, and the burden of proof rests with the defendant.

We see no reason for granting a rehearing in this case. The petition is denied.

SULLIVAN, C.J., AND STEWART, J., concur.

NOTES

(1) What is the **source** of the duty? What is the **scope** of the duty? What **interest** is protected by the duty?

(2) What role did the statute play in this case? Was plaintiff required to prove that defendant failed to act reasonably or only that defendant failed to comply with the statute?

(3) Does the statute impose strict liability on the railroad? Could the railroad have acted with "due care under the circumstances" and avoided liability despite not ringing bell?

(4) **Wrongful death actions** are the most common statutory duty in negligence law. I.C. § 5-311 provides in part: "When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death." Like Wheeler- and unlike most statutes that are construed to create a duty- the wrongful death statute explicitly creates a cause of action.

(5) § 38 Affirmative Duty Based on Statutory Provision Imposing Obligations to Protect Another
When a statute requires an actor to act for the protection of another, the court may rely on the statute to decide that an affirmative duty exists and its scope.

Comment:

c. *Express and implied statutory causes of action*. Some statutes that impose an obligation to protect others expressly provide for a private cause of action. Even without such a provision, courts may find that a private cause of action is implied. On the other hand, sometimes statutes expressly or implicitly bar a private cause of action. This Section addresses the interstices left when statutes neither provide for nor negate private rights of action. When the legislature has not provided a remedy, but the interest protected is physical harm, courts may consider the legislative purpose and the values reflected in the statute to decide that the purpose and values justify adopting a duty that the common had not previously recognized.

Whether an implied statutory claim or, on the other hand, a judicially recognized tort claim exists may affect several aspects of the claim, including the available remedies and the availability of affirmative defenses and excuses recognized by the negligence per se doctrine.

d. *Relationship with negligence per se*. Whether a statute provides an affirmative duty in tort is different from negligence per se for statutory violations. Negligence per se relies on a specific statutory standard to pretermit reference to the more general reasonable-care standard for adjudicating the question of breach of duty. But even without the statute, the actor is subject to a duty of reasonable care and potential tort liability. Employing a statute to provide a tort duty where none previously existed creates a new basis for liability not previously recognized by tort law. This is a more significant role for a statute to play in a tort case that the negligence per se role of providing a specific standard of care to displace the more general reasonable-care requirement. This Section is limited to statutes that impose obligations to act for the safety of others where tort law otherwise would not have so provided under the rule in § 37.
RESTATEMENT (THIRD) OF TORTS § 38 (Proposed Final Draft No. 1, Apr. 6, 2005).

**CARSON v. CITY OF GENESEE**

Supreme Court of Idaho
9 Idaho 244, 74 P. 862 (1903)

AILSHIE, J. - [This action was commenced to recover damages for personal injuries received while traveling over a defective sidewalk within the corporate limits of the city of Genesee. Plaintiff had been visiting a sick neighbor and was detained until after dark. On her homeward trip, she stepped into a hole broken in the board sidewalk at the intersection of the walk along Spruce street with the walk on Walnut street, fell, and was injured. She says she was walking along "just the same as anyone would walk up the street," and that she did not know that the holes were there or that the walk was out of repair. She had used another route to go to the neighbor's house that afternoon. The city appealed a judgment for plaintiff.].

The ... most serious point urged by appellant is: That "in Idaho, municipal corporations are not liable in damages to the individual for injuries sustained by reason of defective streets or sidewalks." []

*Davis v. Ada County*, [5 Idaho 126,47P.93 (1896)], is urged by appellant as an authority from this court sustaining the position of the city. In that case the sole question involved was the liability of a county of this state for damages caused on account of a defective and negligently constructed bridge. The conclusion reached in that case is plainly stated in the syllabus as follows: "A county is not liable for damages sustained by reason of negligence in construction and maintenance of bridges unless made so by statute."

It can only be said that that case decides any question involved in this case under consideration, upon the assumption that the same principle applicable to counties of this state applies equally to the cities and villages organized under the general laws of the state. We therefore approach this subject as an open question in this jurisdiction.

Appellant insists that cities organized under the general laws "are not distinguishable in principle from counties created by law." Upon this point we will first examine the legislation of the state relative to their respective powers and duties....

Section 81 of the act of 1899 providing for the government of cities and villages, [], is in part as follows: "The city council, or board of trustees, shall have the care, supervision and control of all public highways, bridges, streets, alleys, public squares and commons within the city or village, and shall cause the same to be kept open and in repair and free from nuisance."

It will be seen from the foregoing that the power of cities and villages in this state over the streets is exclusive and unlimited, and the question therefore arises: Are their express or implied duties to the public and the individual commensurate with the powers granted them? It is conceded that there is no express statute in this state making municipal corporations liable in damages for negligence. The only remaining question is: Can such liability be said to be implied?

*Beach on Public Corporations* ...says: "The general rule is that under the powers usually conferred upon municipal corporations in respect to streets within their limits, it is their duty to keep them in a reasonably safe condition for use by travelers in the usual modes, and that they are liable in damages for injuries resulting from neglect of such duty; and this rule extends not only to the roadbed but also to the structures over it."

... It must be conceded that the American authorities are at variance on this question, but we think a great weight of authority from both text-writers and adjudicated cases sustains the liability of such municipal corporations. Much of this diversity of precedent appears to be due to the legislation of the respective states with reference to the powers and duties of cities and villages ....

It seems to us that incorporated cities and villages act not only in a legislative and governmental capacity, but also in a private or business capacity, and that the care and repair of streets and sidewalks ... is ... a ministerial or business duty it owes to the individuals it impliedly invites to travel over its thoroughfares. []

> Cities and villages become incorporated because of the fact that a large number of people have gathered together in the same community and deem it to their best interest, both governmental and business, to assume corporate existence. In such communities travel both by day and night is so much greater in comparison with the travel over the country at large that the maintenance of good and safe thoroughfares for the protection of life and property becomes an urgent necessity, and such corporations should be held liable for a negligent discharge of that duty. The application of this principle should prove a spur to the officials of such corporations to keep the streets and sidewalks in a safe condition for the uses to which they are dedicated. Its denial would be to defeat the plainest justice in many instances.

SULLIVAN, C.J., AND STOCKSLAGER, J., concur.

NOTES

(1) What is the source of the duty? What is its scope? What interest is protected by the duty?

(2) What role did the statute play in this case? Was plaintiff required to prove that defendant failed to act reasonably or only that defendant failed to comply with the statute?

(3) Does the statute impose strict liability on the municipality? In *Miller v. Village of Mullan*, plaintiff fell and broke her leg when a board in the sidewalk broke as she stepped on it. The court held the village could not be liable in the absence of notice:

> If this court should hold that the municipalities of this state are chargeable with notice of the time when and conditions under which a wooden sidewalk or cross-walk ceases to be safe for pedestrians on account of age and use where no patent or obvious defect is apparent, it would subject them to a hazard, care and expense that but few of them could afford. [] If, on the contrary, a walk has been used for so long that it is in a general state and condition of decay and disrepair, and is allowed to remain in such condition, notice of such condition will be imputed to the municipality, and if so bad as to be dangerous, such failure to repair or improve it will become negligence. In order to impose liability in such case as this, the condition of the walk must be such that danger may reasonably be apprehended at anytime, and therefore reasonable diligence and prudence would require that it be guarded against.

*Miller v. Village of Mullan*, 17 Idaho 28, 104 P. 660 (1909).

(4) What is the rationale for basing a duty on the statute in this case? Is the statute like the statute present in *Wheeler*? To the extent that they differ, what is the relevance of the differences? Since the statute does not impose liability, why does the court use the statute to support its determination that the city has a duty to plaintiff?

(5) *Mahaffey v. Carlson*: Plaintiff constructed a ditch to carry water from the Lemhi River to his land. Defendants subsequently constructed a ditch to irrigate their lands. At the point where the two ditches intersected, defendants replaced plaintiff's ditch with a flume. Plaintiff accepted the change. Nothing was said about the burden to maintain the flume. The flume was subsequently washed out. Defendants refused to repair it. The court noted that

> [Defendants] take the position that there is not testimony in the record that supports or even tends to support the theory that [defendants] were under obligation or owed a duty to [plaintiff] to keep the flume in proper repair. C.S. § 5653, provides as follows:

> "Any person, company or corporation, owners of any ditch, flume or other conduit, cannot lawfully deny to any other person, company or corporation the right to cross their right of way with another ditch, flume or conduit either upon a higher or lower level, where the same can be done in a convenient and safe manner; provided, that such second person, company or corporation shall be liable for all damages that may accrue from the construction of such ditch, flume or other conduit across the conduit of another."

C.S., § 5657, provides that:

> "The owners or constructors of ditches, canals, works or other aqueducts, and their successors in interest, using and employing the same to convey the waters of any stream or spring, whether the said ditches, canals, works or aqueducts be upon the lands owned or claimed by them, or upon other lands, must carefully keep and maintain the same, and the embankments, flumes or other conduits, by which such waters are or may be conducted, in good repair and condition, so as not to damage or in any way injure the property or premises of others."

> Under the provisions of the statute ... the duty of defendants, after receiving permission to construct a flume across their ditch in lieu of the ditch that was theretofore constructed, was to carefully keep and maintain the flume in good repair and condition so as not to damage or in any way injure plaintiff's property, otherwise they became liable, by virtue of the provisions of the statute last quoted, for all damages that might accrue by their failure so to do....

*Mahaffey v. Carlson*,39 Idaho 162,228 P.793 (1924). What is the relationship between the duty and breach elements of the prima facie case? Which does the statute provide?

**OPPENHEIMER INDUSTRIES, INC. v. JOHNSON CATTLE CO.**

Supreme Court of Idaho
112 Idaho 423, 732 P.2d 661 (1986)

HUNTLEY, J.-This appeal arises out of a grant of summary judgment for the State Brand Board on the ground that the complaint by Oppenheimer Industries was barred by provisions of the Idaho Tort Claims Act.

In 1981, Oppenheimer contracted with Bolen Cattle Co.to care for several head of cattle owned by Oppenheimer. Oppenheimer alleges Bolen re-branded the cattle and sold them without Oppenheimer's permission. Oppenheimer sued Bolen and several of the purchasers of the Oppenheimer cattle for conversion in February 1983and brought action against the State Brand Board on the theory that the Board's failure to require proof of ownership of the cattle despite presence of "fresh" brands on the cattle violated the non-discretionary directives of the Idaho Administrative Procedure Act (IDAPA) 11.02. and constituted actionable negligence, as such failure resulted in the conversion of Oppenheimer's cattle.

A state deputy brand inspector inspected the converted cattle prior to the sale and noticed two brands on the cattle, one of which was "fresh," (i.e., had not yet scabbed over or healed). Such "fresh" brands were, at the most, two weeks old and could have been as new as one day old. The inspector testified that he knew he had the right to require proof of ownership of such cattle before they were sold, but that it was general practice to merely rely on the reputation of the seller (here, Bolen). The inspector had heard nothing detrimental concerning Bolen's reputation. The inspector also stated that he simply could not conceive of a "scam" of such magnitude, involving so many cattle (1,681 head). As a result, the inspector neither requested proof of ownership or a bill of sale from Bolen, nor did he advise Oppenheimer that cattle bearing its brand were being sold by Bolen, which fact the inspector knew prior to the sale.

In the instant case, IDAPA 11.02.3[12] sets forth the standard of conduct required of a state brand inspector in two distinct contexts: When confronted with a "fresh" brand, and when confronted with two or more brands. The regulation clearly states that, "fresh brands ...shall not be accepted as proof of ownership unless accompanied by a brand inspection certificate or a bill of sale covering older brands." That regulation further provides: "(a) The state brand inspector may inquire into the ownership of all livestock bearing two or more brands."

The language of the regulation speaks for itself. While a state brand inspector may exercise discretion in deciding whether to inquire into the ownership of livestock bearing two or more brands, the appearance of a "fresh" brand mandates that the same inspector shall not accept such a brand as proof of ownership absent a certificate or bill of sale covering older brands. There is no room for discretion in implementing this policy directive. Accordingly, since the deputy brand board inspector in the instant case testified that the brands he encountered were "fresh," but he nevertheless did not require further proof of ownership of the cattle, the trial court erred as a matter of law in dismissing the complaint ....

DONALDSON, C.J., AND BISTLINE, J., concur.

BAKES, J., dissenting- .... I fail to find within the facts of this case anything which would support a finding, as a matter of law, that an action in negligence lies in favor of Oppenheimer, a third party to the brand inspection, against the State Brand Board. I know of no law in this state which would establish such a cause of action. The State Brand Board owes no duty to protect Oppenheimer against loss, damage or theft of its cattle by third parties. The mere fact that the brand regulations in question result in an indirect benefit to all members of the public dealing with the cattle or livestock trade does not in and of itself create a cause of action in Oppenheimer for any alleged failure to protect him against loss or theft of his cattle. In *Sterling v. Bloom*, 111 Idaho 211, 723 P.2d 755 (1986), this Court held that an action would lie intort in favor of a third party (Sterling) who was injured as a result of the negligent conduct of the state with regard to an individual entrusted to the state's charge. In Sterling, the Court based the existence of a cause of action upon the Restatement (Second), Torts §§ 315, 319. However, in the present case, it is clear that Restatement (Second), Torts, §§ 319, does not apply. Neither statute nor regulation imposes upon the State Brand Board or the brand inspector any responsibility or duty to supervise feedlot operations such as the one involved in the present case. In short, I fail to see any basis in the law or facts of this case for asserting that the state was under a duty to protect Oppenheimer against the loss or theft of its cattle.

SHEPARD, J., concurs.

**ON DENIAL OF PETITION FOR REHEARING**

HUNTLEY, J.-The petition for rehearing by the board asserts one issue we wish to address, that being that "there was no relationship between Oppenheimer, Bolen Cattle Co., and the brand board giving rise to any duty on the part of the brand inspector toward Oppenheimer." This assertion ignores the basis upon which liability exists in this case, namely IDAPA 11.02.3, which reads:

> IDAPA 11.02.3. Fresh brands on cattle, horses, mules and asses bearing older brands shall not be accepted as proof of ownership unless accompanied by a brand inspection certificate or bill of sale covering older brands. (a) The state brand inspector may inquire into the ownership of all livestock bearing two or more brands.

[12] IDAPA 11.02.3 provides: "Fresh brands on cattle, horses, mules and asses bearing older brands shall not be accepted as proof of ownership unless accompanied by a brand inspection certificate or a bill of sale covering older brands.
(a) The State Brand Inspector may inquire into the ownership of all livestock bearing two or more brands."

We take this opportunity to clarify that liability in this case is solely premised upon IDAPA 11.02.3. Our opinion states that "[w]hile a state brand inspector may exercise discretion in deciding whether to inquire into the ownership of livestock bearing two or more brands, the appearance of a "fresh" brand mandates that the same inspector shall not accept such a brand as proof of ownership. ***" []....

The further argument, that IDAPA 11.02.3 fails to define those to whom the brand inspector's duty is owed is addressed in *Sterling v. Bloom*, 111 Idaho 211, 723 P.2d755 (1986). While the statute does not purport to identify by name or class those to whom that assigned duty is owed, in the instant circumstances, obvious to the utmost, the motorists foreseeably endangered by the negligent supervision of Bloom are within the class protected. [] Here, cattle ranchers, like Oppenheimer, who rely on the brand inspectors to do their jobs, are within the class protected.

Obviously, the brand inspector did not supervise Bolen in the same fashion that the state supervised Durtschi and Bloom. However, at the time of inspection, the brand inspector had the authority and duty to ensure that Bolen had not fraudulently rebranded someone else's cattle. This he allegedly failed to do, despite the regulatory directive that such brands "shall not be accepted as proof of ownership unless accompanied by a brand inspection certificate or a bill of sale covering older brands." The reasoning of Durtschi applies here. One whose negligence brings about harm at the hands of a third party is liable for that harm.

DONALDSON AND BISTLINE, JJ., concur.

SHEPARD, C.J., & BAKES, J., dissenting .... The opinion on rehearing, without citing any authority for the proposition, now holds that the "brand inspector had the ... duty to insure that Bolen had not fraudulently rebranded someone else's cattle." While it is a proper role of government to protect its citizens from unlawful conduct of individual members of society via the law enforcement and police powers of the state, government does not have a "duty to insure" against damage caused by the unlawful conduct of third parties. Government was never intended to be an "insurer" or guarantor of the safety of the person or property of the general public.

## NOTES

(1) What is the source of duty? What is the scope of the duty? What interest is protected by the duty. Is the dissent correct that the interest holders must be identified in the statute? Were the interest holders more specifically identified in the statute involved in *Carson*?

(2) What role did the statute play in this case? Was plaintiff required to prove that defendant failed to act reasonably or only that defendant failed to comply with the statute?

(3) *Doe v. Durtschi* involved a negligence action against a local school which had employed a teacher who had sexually molested several of his fourth-grade students. The court held, inter alia, that the exemption in Idaho Torts Claims Act for intentional conduct was inapplicable to the school district since that was the source of the risk that made the defendants conduct negligent towards the students:

> The fact that the foreseeable danger was from intentional or criminal misconduct is irrelevant; the school district had a statutory duty to make reasonable efforts to protect its students from such a danger. A breach of that duty constitutes negligence. Under the allegations of the present case, Durtschi's actions would not constitute a supervening cause, and the school districts tortious conduct would not arise out of assault and battery.

*Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986).

(4) *Brizendine v. Nampa Meridian Irrigation District*: Plaintiff sought damages for flooding caused by a break in defendant's canal. At issue was the role of a statute which provided that an irrigation district "must carefully keep and maintain ... its canals] in good repair and condition, so as not to damage or in any way injure the property or premises of another." The defendant appealed a verdict for plaintiff

contending that the trial court had improperly relied upon a statute to determine the applicable standards of care. The court rejected this argument, concluding that the statute did not establish a standard of care: "[the statute] defines a duty owed by an irrigation district, nor [sic]the standard of care by which the trier of fact determines whether the defendant has breached his duty.... [The statute] imposes a duty to 'carefully keep and maintain [canal banks] in good repair and condition'; the statute does not define whether a defendant has failed to 'carefully keep and repair' its canal banks." *Brizendine v. Nampa Meridian Irrigation District*, 97 Idaho 580, 548 P.2d 80 (1976). What is the relationship between duty and breach of duty?

**BROOKS v. LOGAN**

Idaho Supreme Court
127 Idaho 484,903 P.2d 73 (1995)

TROUT, J.- This is a wrongful death action and an action for negligent infliction of emotional distress arising from the suicide of fourteen-year-old Jeffrey Brooks.

**I**
**BACKGROUND AND PRIOR PROCEEDINGS**

In this case, Jeffrey Brooks (Jeff), who was a student at Meridian High School, was asked by his English teacher, respondent Laura Logan (Logan), to make entries into a daily journal as part of an English composition assignment. He did this beginning in September of 1990 and continued on to the end of December 1990.The following January he committed suicide at his home.

After Jeff's suicide, Logan read through his entries in the journal and then turned it over to a counselor who subsequently delivered it to Jeff's parents, James and Diane Brooks (the Brooks). The Brooks then called Logan, and according to them she indicated that she had "re-read" the journal provisions and decided that the Brooks should have it. When the composition project began, Logan advised the students that she would be reading their journals; however, after a few months Jeff expressed concerns that he could not fully express himself knowing that Logan would read his entries. Thereafter Jeff's journal contains a passage written by Logan in which she indicated that she would not read the journal for content but would instead check the entries for dates and length. In her affidavit, Logan claims she never read Jeff's journal after advising him that she would not. She, therefore, disputes the Brooks' assertion that she "re-read" Jeff's journal after his death. To the contrary, she maintains that she read the journal entries for the first time only after Jeff's death. Jeff's journal contains some passages in which he alludes to death or depression, but there is no definite statement that he was contemplating suicide.

The Brooks brought suit against Logan and the Meridian School District (the District) and have alleged that the District has a duty regarding the investigation and training of qualified teachers, and a duty [to establish a suicide-prevention program].

Logan and the District filed a motion for summary judgment .... The trial court granted Logan and the District's motion, finding that they did not owe a duty of care to Jeff .... Because there was at least a factual question about whether Logan had indeed read the entire journal, the judge concluded that for the purposes of the summary judgment motion he would deem that she had read the journal. In spite of that, the court still concluded that Logan had no responsibility to take action. The case is now before us on appeal from the grant of summary judgment.

**III. EXISTENCE OF A DUTY**

The elements of common law negligence include (1)a duty, recognized bylaw, requiring the defendant to conform to a certain standard of conduct; (2) a breach of duty; (3) a causal connection

between the defendant's conduct and the resulting injuries; and (4) actual loss or damage. *Alegria v. Payonk*, 101 Idaho 617, 619,619 P.2d 135, 137 (1980) (citing *Brizendine v. Nampa Meridian Irrigation District*, 97 Idaho 580, 548 P.2d 80 (1976)). Thus, an analysis of the propriety of a summary judgement for a negligence cause of action must necessarily begin with an evaluation of duty.

**C. Statutory Duty**

Next, the Brooks contend that the Idaho Code creates a duty to protect the health and morals of students, and further that this duty extends to the prevention of suicide by a student at his home. The Brooks first argue that I.C. §33-202, which requires children between the ages of seven and sixteen to be instructed in subjects commonly and usually taught in public schools in Idaho, gives rise to a "special relationship." They argue that this statute creates a special duty, and that parents can bring a private cause of action based on this statute. The Brooks also cite I.C. § 33-512(4), which provides that the school district board of trustees have a duty "[t]o protect the morals and health of the pupils." They argue this is a codification of the special relationship between schools and students and thus establishes the duty owed by school officials.

The district court found that the statutory duty codified in I.C. § 33-512(4) did not extend to the circumstances of this case. We disagree. Previously, we have ruled that when the legislature enacted I.C. § 33-512(4), it created a statutory duty which requires a school district to act reasonably in the face of foreseeable risks of harm. *Czaplicki v. Gooding Joint School District*, 116 Idaho 326,331, 775 P.2d640, 645 (1989*); Doe v. Durtschi*, 110 Idaho 466,716 P.2d 1238 (1986). We again discussed this statutory duty in *Bauer v. Minidoka School District No. 331*, 116 Idaho 586, 778 P.2d 336 (1989). In that opinion we noted that this statutory duty exemplifies the role of the state to the children in school, which is a role described as one in loco parentis. *Id*. at 588, n8 P.2d at 338. We quoted favorably from a Washington opinion which pointed out that "the duty a school district owes to its pupils is '[t]o anticipate reasonably foreseeable dangers and to take precautions protecting the children in its custody from such dangers.'" *Id*. at 590, 778 P.2d at 340 (quoting *Carabba v. Anacortes School District No. 103*, 72 Wash.2d 939,435 P.2d 936, 946 (1967)).

Thus, under our previous case law we have determined that a school district has a duty, exemplified in I.C. § 33-512(4), to act affirmatively to prevent foreseeable harm to its students. The District made several arguments on appeal, one of which urges the Court to find that no duty arises in this case because the injury occurred off the school grounds. We do not find this argument persuasive. Under the District's rationale, Logan would have a duty to prevent Jeff's suicide if it occurred on the school grounds. Conversely, if he had stepped one foot off the school grounds and committed suicide, no duty would arise. We do not believe this arbitrary line can be drawn. For the purposes of this motion we must assume that the negligence occurred, if at all, while Jeff was attending school and Logan failed to seek help. The result of the alleged negligence is the only element that did not take place on the school grounds. Therefore, we find that the question of whether Logan had a duty to seek help for Jeff is essentially a question that has already been addressed by this Court.

Accordingly, we find that there is a duty which arises between a teacher or school district and a student. This duty has previously been recognized by this Court as simply a duty to exercise reasonable care in supervising students while they are attending school.

**IV**
**OTHER ELEMENTS OF NEGLIGENCE**

**A. Breach and Causation**

The second element of a negligence cause of action, that of breach of duty by the allegedly negligent party, requires measuring the party's conduct against that of an ordinarily prudent person acting under all the circumstances and conditions then existing. *Alegria v. Payonk*, 101 Idaho 617, 619,619 P.2d 135, 137(1980) (citing *Nagel v. Hammond*, 90 Idaho 96, 408 P.2d 468 (1965)). What circumstances and conditions existed is a factual question to be determined by the trier of fact. *Toner v. Lederfe Laboratory*,

112 Idaho 328, 348, 732 P.2d 297, 317(1987) (Bakes, J. concurring specially) (citing *O'Connor v. Meyer*, 66 Idaho 15,154P.2d 174 (1944)). Thus, the trier of fact will determine what circumstances and conditions existed in Logan's classroom at the time of the suicide, and will compare her actions, or lack of action, to those of an ordinarily prudent teacher acting under such conditions.

The third element, causation, requires the trier of fact to determine whether Logan and the District could reasonably have foreseen or anticipated that the failure to refer the student for help might result in injury to that student. See *Alegria*, 101 Idaho at 619, 619 P.2dat 137. Factual issues of proximate cause are again for the jury to resolve, and not the court. *McKinley v. Fanning*, 100 Idaho 189, 190, 595 P.2d 1084, 1085 (1979).

Faced with the conflicting factual question of whether Logan read the journal or whether she could have detected his suicidal thoughts if she had read the journal, for the purposes of this motion this factual dispute must be viewed in the light most favorable to the non-moving party. *Doe v. Durtschi*, 110 ldaho 466, 470,716 P.2d 1238, 1242 (1986) (quoting *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d402 (1979)). The Brooks have submitted an affidavit from Mr. Brooks in which he claims Logan had read the journal prior to Jeff's death. Additionally, the Brooks submitted the affidavit of Dr. Hamilton, which states that based upon his reading of the journal, and clinical interviews with the family, it was apparent that Jeff was suffering from adolescent turmoil and had he been referred for help, his suicide may have been prevented.

By submitting these affidavits, the Brooks have raised the question of whether Logan had knowledge of Jeff's suicidal thoughts and whether her actions, or inactivity, resulted in Jeff's suicide. A motion for summary judgment must be denied if the evidence is such that conflicting inferences can be drawn therefrom, and if reasonable people might reach different conclusions. [] We therefore leave for the trier of fact the determination of whether the duty has been breached and whether that breach was the cause of the resulting injuries.

**V**
**CONCLUSION**

Based upon the factual dispute arising from the affidavits in the record, and the potential breach of a legal duty owed to Jeff, we find that the motion for summary judgment was improperly granted.

JOHNSON AND SILAK, JJ., CONCUR; McDEVITT, C.J., CONCURS IN RESULT. YOUNG, JUSTICE PROTEM., CONCURRING IN PART AND DISSENTING IN PART

NOTES

(1) What is the source of duty? What was the scope of the duty? What interest is protected by the duty.

(2) *Brooks II*: Following remand, the district court granted summary judgment for the school district, concluding that the district was immune under the Idaho Tort Claims Act. The supreme court affirmed.

(3) What role did the statute play in this case? Was plaintiff required to prove that defendant failed to act reasonably or only that defendant failed to comply with the statute? How does the use of the statute in this case differ from a negligence per se situation? Is there a difference? What is the relationship between duty and breach of duty?

(4) Did the statute impose strict liability on the school board? I.C. § 33-512 provides in part: The board of trustees of each school district shall have the following powers and duties:

(1) To determine the length of school terms which in no case shall be less than nine (9) months;

> (4) To protect the morals and health of the pupils;
> (5) To exclude from school, children not of school age;
>
> (7) To exclude from school, pupils with contagious or infectious diseases who are diagnosed or suspected as having a contagious or infectious disease ...;
>
> (11) To prohibit entrance to each schoolhouse or school grounds, to prohibit loitering in schoolhouses or on school grounds and to provide for the removal from each schoolhouse or school grounds of any individual or individuals who disrupt the educational processes or whose presence is detrimental to the morals, safety, academic learning or discipline of the pupils. A person who disrupts the educational process or whose presence if detrimental to the morals, health, safety, academic learning or discipline of the pupils or who loiters in schoolhouse or on school grounds, is guilty of a misdemeanor.

(5) Following the decision in Brooks, the legislature enacted I.C. § 33-5128:

Suicidal tendencies- Duty to warn. (1) Notwithstanding the provisions of section 33-512(4), Idaho Code, neither a teacher nor a school district shall have a duty to warn of the suicidal tendencies of a student absent the teacher's knowledge of direct evidence of such suicidal tendencies.

> (2) "Direct evidence" means evidence which directly proves a fact without inference and which in itself, if true, conclusively establishes that fact. Direct evidence would include unequivocal and unambiguous oral or written statements by a student which would not cause a reasonable teacher to speculate regarding the existence of the fact in question; it would not include equivocal or ambiguous oral or written statements by a student which would cause a reasonable teacher to speculate regarding the existence of the fact in question.
> (3) The existence of the teacher's knowledge of the direct evidence referred to in subsections (1) and (2) of this section shall be determined by the court as a matter of law.

The supreme court applied the statute in *Carrier v. Lake Pend Oreille School District# 84*, 142 Idaho 804, 134 P.3d 655 (2006). Carrier was an action brought by the parents of a student who committed suicide. The court held that the legislature had reduced the scope of the duty owed by school districts to warn of potential suicides: "The Legislature was well aware of the damages caused by suicides and the risks suicide presents to students and their families and friends. However, it still chose to balance these risks against the liability under the *Brooks I* decision by adopting a statute with the express purpose of narrowing the duty to warn announced by this Court in *Brooks I*." The legislature had the power to do so and the court upheld the "narrow definition of 'suicidal tendencies'" in the new statute.

(6) Statutes, ordinances, regulations, and other enforceable norms: A duty may be predicated on a number of statute-like norms:

(a) *Anderson v. Blackfoot Livestock Commission Co*.: Plaintiff purchased a number of hogs from defendant. He added them to his herd. When hogs began to die, he contacted a veterinarian who determined that the animals were dying from hog cholera. At trial, plaintiff argued that defendant had breached a duty owed to him under regulations promulgated by Director of the Bureau of Animal Industry. These regulations required all sales yards to inoculate hogs against hog cholera. The court noted:

> That the regulations imposed a duty on the part of the defendant Commission Co. to vaccinate or inoculate hogs incompliance therewith, cannot be questioned. The fact that this defendant did not itself commit the acts or omissions with which we are here concerned does not relieve it from responsibility imposed by the regulations.

*Anderson v. Blackfoot Livestock Commission Co*., 85 Idaho 64, 375 P.2d 64 (1962)

(b) *Johnson v. Jones* was a legal malpractice action that arose out of the purchase by the Johnsons of a mobile home sales business. The earnest money agreement provided that the "buyer and seller [are] to share equally in attorney's fees." Defendant Nagel, an attorney, prepared the sale contract.

Nagel reviewed the earnest money agreement prior to drawing up the sales contract; the Johnsons paid one-half of Nagel's $250 fee. Nagel never spoke with the Johnsons or affirmatively stated that he would represent them. The Johnsons' complaint alleged that Nagel breached his duty to them by failing to disclose his possible conflict of interests and by failing to advise them both of the need to inventory the business and of their right to receive certain assets. The trial court granted Nagel a summary judgment; the Johnsons appealed, alleging that "compensable damages arose out of the failure of the attorney to fulfill fiduciary responsibilities imposed by the Code of Professional Conduct." The Idaho Supreme Court held that the Code of Professional Conduct could be the source of a tort duty: "If, as the uncontroverted facts show, Nagel was aware or should have been aware that both the buyer and seller were paying his fee, he would be under a duty to disclose to both parties the possible conflict of interest and obtain the consent of both parties before proceeding with the contract." The court relied upon a formal opinion from the Idaho State Bar Committee on Professional Ethics in support of its conclusion that the attorney had a duty to disclose. The court did not, however, offer any discussion of why the Code of Professional Conduct created a tort duty to the attorney's clients. *Johnson v. Jones*, 103 ldaho 702, 652 P.2d 640 (1982).

(7) Is it possible to generalize a list of factors that a court ought to rely upon in deciding that it will rely upon a statute to create a duty? Remember that a "duty" specifies a relationship of obligation between one group and another: one group is under a duty to refrain from invading the protected interests of another group or is under a duty to act to protect the interests of the other group. Must the statute denominate a protected class of individuals? Must this class be less than "the general public"? Must the statute denominate the obligated class? Must the statute denominate a prohibited or required type of conduct? What else ought the statute to specify? How, again, does this differ from negligence per se? See generally Caroline Forell, The Interrelationship of Statutes and Tort Actions, 66 OREGON LAW REVIEW 219 (1987).

(8) The *Carson*, *Miller*, *Durtschi*, *Oppenheimer*, and *Brooks* cases involved governmental entities that arguably would have been immune from suit in the absence of the statute. Thus, the statutes can be viewed as waivers of sovereign immunity.

(9) The cases involve statutes that create duties where none had previously existed. Statutes may also operate as a liability limiting mechanism. For example, the common law rules potentially applicable to ski operators - since they are land occupiers and the skiers are invitees - have been substantially reduced by statute. Another example is the state's cattle industry which is able to avoid the costs both of fencing and tort liability for damage done by wandering cattle. Such statutory immunities are examined below in the chapter on defenses.

(10) Statutes and negligence law: Statutes can playa number of roles in a negligence case, including:

(a) statutes as a source of duty: When should a court treat a statute as creating a duty? Recall that "duty" has been defined as "a requirement that one conduct himself in a particular manner with respect to a risk of harm." *Keller v. Holiday Inns, Inc*., 105 Idaho 649, 671 P. 2d 1112 (1983). "Duty" thus is the legal shorthand for the conclusion that one person is obligated to act with some degree of care to avoid risking an invasion of another person's interest. We have also repeatedly analyzed duty in terms of source, scope, and protected interest(s).

This suggests that the relevant concerns that a court should consider are:

(i) Does the statute specify an obligated class of interests?
(ii) Does the statute impose an obligation?
(iii) Does the statute specify a protected class of interests?

That is, the statute must specify that some group is obligated to protect some class of interests. The statute may do so either explicitly or implicitly.

Note the statute in *Carson v. City of Genesee*: "The city council, or board of trustees, shall have the care, supervision and control of all public highways, bridges, streets, alleys, public squares and commons within the city or village, and shall cause the same to be kept open and in repair and free from nuisance." The court read this statute as stating: (i)the city council (ii)shall (iii) protect the interests of users of the public highways, bridges, streets, alleys, public squares and commons.

Similarly, note the language of the regulation at issue in Oppenheimer:

Fresh brands on cattle, horses, mules and asses bearing older brands shall not
Be accepted as proof of ownership unless accompanied by a brand inspection certificate
or a bill of sale covering older brands.

(a) The State Brand Inspector may inquire into the ownership of all livestock
bearing two or more brands.
The court read the statute as stating: (i) the State Brand Inspector (ii) shall not accept fresh brands as proof of ownership (iii) to protect the owner of the older brand.

(b) statutes as sources of scope of duty/standard of care: Statutes can also specify the scope of duty or standard of care, i.e., be the basis for a jury instruction on negligence per se. In Oppenheimer, for example, the regulation states that the brand inspector shall not accept a fresh brand. In Carson, on the other hand, the statue does not specify a standard of care, simply stating that the roads and sidewalks "be kept open and in repair and free from nuisance." The court read the general standard of care, i.e., due care under the circumstances, into the statute.

(c) sometimes a source of duty, sometimes a standard of care, and sometimes both:

(i) A statute like that in Carson is only a source of duty; it does not trigger negligence per se because it specifies only the result- that the roads and sidewalks are to be kept open and in repair - rather than how the city is to act. Unless the statute specifies actions, e.g., stop at stop signs, then it is no more specific that the general standard of care (due care) and cannot substitute for it. For example, in *Brizendine v. Nampa Meridian Irrigation District*, 97 Idaho 580, 548 P.2d 80 (1976), plaintiff sought damages for flooding caused by a break in defendant's canal. At issue was the role of a statute which provided that an irrigation district "must carefully keep and maintain ...pts canals] in good repair and condition, so as not to damage or in any way injure the property or premises of another." The court held that the statute did not establish a standard of care: "[the statute] defines a duty owed by an irrigation district, nor [sic] the standard of care by which the trier of fact determines whether the defendant has breached his duty." That is, the statute imposes a duty to "carefully keep and maintain [canal banks] in good repair and condition," but it does not define what actions the defendant is required to undertake to meet this standard.

(ii) When there is an existing duty - more frequently the general rule that acts that create risks obligate the actor to act with due care- a statute may substitute for the general standard of care by providing a more specific standard. For example, a landowner has a duty to trespassers "to refrain from willful and wanton acts that might cause injury." *Huyck v. Hecla Mining Co*., 101 Idaho 299, 612 P.2d 142 (1980).in *O'Guin v. Bingham County*, 142 Idaho 49, 122 P.3d 308 (2005), two children trespassed on defendant's landfill. The court held that the county's failure to place fences around the landfill in violation of state and federal regulations was negligence per se because it defined the applicable standard of care.

(iii) statutes as both source of duty and scope of duty/standard of care:

When the statute is like those in Oppenheimer or Blackfoot Livestock Commission, it forms the basis for the application of negligence per se- it imposes a specific standard of care ("shall not accept afresh brand") that replaces the general standard of care ("due care under the circumstances").

The Idaho courts have not always carefully distinguished among these categories:

> The effect of establishing negligence per se through violation of a statute is to conclusively prove the first two elements of a cause of action in negligence. *Slade v. Smith's Management Corp.*, 119 Idaho 482, 489, 808 P.2d 401, 408 (1991). Negligence per se lessens the plaintiffs burden only on the issue of the "actor's departure from the standard of conduct required of a reasonable man." [] Thus, the elements of duty and breach are "taken away from the jury." [] Once proved, however, negligence per se does not differ in its legal consequences from ordinary negligence.

*Ahles v. Tabor,* 136 Idaho 393, 34 P.3d 1076 (2001).

# Chapter IV

# BREACH

## [A] THE GENERAL STANDARD OF CARE

### 1. RISK/UTILITY ANALYSIS

#### LeDEAU v. NORTHERN PACIFIC RY.

Supreme Court of Idaho
19 Idaho 711, 115 P. 502 (1911)

AILSHIE, PRESIDING J. - Respondent obtained a judgment against defendant for $1,287.75, damages alleged to have been sustained by reason of personal injuries received by respondent while riding on appellant's railway train. The respondent took passage on appellant's train at Houston Station, Montana, for a trip to Coeur d'Alene City, and while traveling between Taft and St. Regis stations, a rock or boulder rolled down the mountain-side, passed through the car window, and struck respondent on the shoulder, inflicting a serious blow.

It appears that the railroad track runs around a precipitous rocky mountain-side, and that at the place where the accident occurred the track passes through a cut in the point of a spur of the mountain, and that this cut is about twenty feet deep. From the top of the open cut the mountain slopes back and is rather rugged and precipitous and is covered with loose rock and boulders. No one saw the rock start, and no one pretends to testify as to the cause which started it, or the place from which it fell. The respondent testifies that when he first saw it, it was in the air, some ten or twenty feet from him, and apparently had come from high up on the mountain; that it was coming with great force. Another witness, who at the time sat on the seat beside respondent, saw the rock at about the same time, when it was in the air falling toward respondent. It broke through the top of the car window and struck respondent on the shoulder and rolled off onto the floor. The evidence varies as to the size of the stone, but it was somewhere from three to twenty pounds in weight.

Some evidence was introduced to show that the company had noticed that rocks frequently rolled down this mountain-side and lodged on the track, and that it had been necessary at times to stop the train and have them rolled off before passing. This is the substance of all the evidence given in the case.

The appellant contends that the evidence is not sufficient to charge the railroad company with negligence, and it is therefore not sufficient to support the verdict and judgment. The only question for consideration is that of negligence. It is clear from this evidence that the rock did not fall from the side of the cut. It was evidently not an overhanging or loose rock left on the face of the cut through which the track was laid. The respondent seems to think that the rock came from high up on the mountain-side, and that theory is borne out by the testimony of the other witnesses, as well as by the surrounding circumstances, and the actual falling of the stone and its striking the car at the height and place where it did strike. It must have come from a considerable distance in order to have gained a sufficient momentum to drive it from the place where it last struck the ground above the face of the cut and carry it through the car window in the direction in which it was passing when it struck respondent.

It is clear, therefore, that the accident did not occur by reason of anything which the appellant or its agents or employees did, nor did it occur through any defect in the appliances which appellant was using, or the instrumentalities it was employing as a common carrier. The only theory on which appellant could be held for the results of this accident would be that it owed to respondent, and to all of its passengers, an active duty to employ such means as were necessary and sufficient to either clear the

mountain-side of loose and overhanging rock and stone, or else to construct along its right of way such retaining walls or barriers as would be likely to prevent rock and stone from rolling down the mountain-side onto its track. To require such an active duty on the part of a railroad company operating in this mountain region, where roads are necessarily built through canyons and around mountain-sides, where the bluffs and hills rise precipitously for hundreds and sometimes thousands of feet above, would be imposing upon the company a duty that would be burdensome and might sometimes prove prohibitive to transportation companies. The mere suggestion of building retaining walls along railroad rights of way through some of the canyons and ravines in this mountainous country demonstrates its futility. No company could support such an expense.

On the other hand, we have no doubt but that the railroad company is under an active duty and obligation to its passengers to take such reasonable precaution as is necessary to remove or prevent obvious dangers, whether they be on its right of way or beyond its right of way. [] But what might be termed an apparent and obvious danger along a railroad track in some sections of the United States, especially in less mountainous and rugged sections, would clearly not be considered an obvious danger along a line of road through the mountains, canyons and gorges of this country, and particularly in northern Idaho.

It should be remembered that in this case the respondent did not attempt to prove that the appellant's right of way, or the mountain-side at the particular place where this accident occurred, was unusually dangerous, or presented obvious and patent dangers to the traveling public, against which the appellant ought to have taken special precaution or have made specific effort to remove.

SULLIVAN, J., CONCURS.

NOTES

(1) What standard did the court employ in determining whether defendant had breached its duty to plaintiff?

(2) Risk: What factors are relevant to a determination that defendant breached her duty? The concept of "risk" is helpful: risk is a probability that some untoward event will occur. It thus has two components: (1) some probability- foreseeability? -that (2) a harm will occur. This is a range of possibilities. Events can be risky along two different axes: a small probability of a major catastrophe or a large probability of a minor harm.

(3) Foreseeability: Why did the court in LeDeau conclude that the defendant had not breached its duty to plaintiff? Was the event unforeseeable? What evidence did plaintiff introduce to prove that the events was foreseeable? Did the plaintiff simply fail to establish that the event was more likely to occur at this point rather than at any point along the right of way? Why would this be relevant? Would plaintiff have prevailed if he had been able to establish that rocks had been found in the past on the tracks at the location when he was injured? If he had been able to establish that rocks were often found at the location? How probable must the event be? Must the risk be "apparent and obvious"?

More recently, the Idaho Supreme Court has stated the general standard to be:

> In general, it is held that "one owes the duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury." ... [T]his Court [has] stated:
>
> > Every person has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him, and to do his work, render his services or use his property as to avoid such injury. In determining whether such duty has been breached by the allegedly negligent party, his conduct is measured against that of

> an ordinarily prudent person acting under all the circumstances and conditions then existing.

*Alegria v. Payonk*, 101 Idaho 617, 619, 619 P.2d 135, 137 (1980).

**STEVENS v. FLEMING**

Supreme Court of Idaho
116 Idaho 523, 777 P.2d 1196 (1989)
[page 19 supra]

NOTES

(1) How did the court evaluate the breach issue? In paragraph, the court offers three perspectives on breach: the reasonable person standard, risk-benefit balancing, and a policy rationale. We will take up the reasonable person in the next section. Here our focus is on the risk-benefit balancing.

(2) The court writes, "The burden [to act with reasonable care] is lodged squarely on the individual defendant to weigh the burdens associated with undertaking a particular caution against the probability of loss occasioned by a dangerous condition multiplied by the gravity of that loss. *United States v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947).it is the responsibility of the jury to evaluate the defendant's resolution of this equation in order to determine the presence or absence of negligence."

Did the court offer any guidance on applying the Hand Formula to the facts? What are the "burdens associated with undertaking a particular caution" in this case? What is "[the] dangerous condition?" What is the "probability of loss occasioned by [that] dangerous condition?" What is "the gravity of that loss?"

Are these questions to be answered before the fact of the accident? After the fact? Is the jury likely to be able to avoid the hard fact that the plaintiffs' father was killed in the fire?

(3) **"the gravity of that loss," i.e., the gravity of harm**: What magnitude of harm is required for conduct to be a breach of duty? In an early case, the court noted:

> The expression "ordinary care" is a relative term rather than a fixed and unvarying one. What would be "ordinary care" under one state of facts would be gross negligence under other conditions; and so what would amount to the "highest and utmost care" in one situation would be only "ordinary care" in another, and therefore when the term "ordinary care" is used we mean such care as is proportionate to the danger to be avoided or risk to be incurred, judging by the standard of common prudence and the surrounding facts and circumstances.

*Denbeigh v. Oregon-Washington R.R. & Navigation Co*., 23 Idaho 663, 132 P. 112 (1913), quoting *Anderson v. Great Northern R.R*., 15 Idaho 513, 99 P. 91 (1908). In another contemporaneous case, the court wrote:

> Where the danger is exceedingly small and trivial, it may not be negligent at all to disregard it Where it is exceedingly great and obvious, it would be negligence per se n itself]to incur the hazard .... In other cases it would be open to question whether incurring the hazard would be consistent with ordinary care, and incases of this kind the question of ... negligence is one for the determination of the jury.

*Carson v. City of Genesee*, 9 Idaho 244,250, 74 P. 862, 863 (1903) (quoting *Samples v. City of Atlanta*, 95 Ga. 110, 22S.E. 135, 136 (1894)).is this consistent with the decision in *LeDeau*? In *Stevens*?

(4) **"the burdens associated with undertaking a particular caution," i.e., the utility of the conduct:** The cases also recognize that the utility of defendant's conduct is a factor in determining

breach. Why would the utility of defendant's conduct be relevant to the question of breach? Is it the utility of the conduct to defendant? Is it the utility of the conduct to society? What is "the conduct"?

Did the decision in *LeDeau* on the cost of preventing the occurrence of a foreseeable event? Did the court, in other words, decide that the utility of railroads was sufficiently great that the company ought not to be driven from business? Was the cost prohibitive? Would defendant have been required to construct rock barriers along its entire line? In *Stevens*, should the defendants be found to have breached their duty to the decedent if the cost of installing safety devices was low? Was low in relationship to the value of a human life?

In *Idaho Northern R.R. v. Post Falls Lumber Co.*, defendant was driving logs down a stream to its sawmill when they jammed, flooding plaintiff's property. The court began by noting that "[i]t is the policy of this state to encourage the employment of the watercourses for any useful and beneficial purpose, and to that end the power of eminent domain has been granted by the state for the purposes of improving streams, so that the people interested in the country through which they flow may utilize them for beneficial purposes." The court was quick to point out, however, that this public policy did not resolve the issue:

> The person who undertakes to float logs and lumber down a stream must exercise reasonable care in order to avoid injury to the property of others. The fact that a stream is navigable does not give anyone a right to dump logs and timber into the stream and allow the same to go unattended and without being cared for, and as a consequence to form dams and divert the current of water to the injury and damage of others. No doubt the damages which a riparian proprietor may sustain as a natural and unavoidable consequence of the navigation of a stream either with boats and other craft or rafts and logs, where the same is conducted with due care and in a reasonably prudent manner, must be borne by such riparian proprietor as a natural and consequent injury under the rule of damnum absque injuria. *Mashburn v. St. Joe Improvement Co*., 19 Idaho 30, 113 Pac. 92 (1910). On the other hand, the party who is attempting to navigate such a stream must exercise care proportionate to the dangers and difficulties of the undertaking and the liability of inflicting injury upon others. If the exercise of such care will entail such an expense as to make the enterprise unprofitable, the result will necessarily be that he will not navigate the stream. This, however, is a problem with which he is confronted and which he must solve at this own risk and responsibility.
>
> The appellant when it placed its logs in Eagle Creek did so with notice of the conditions of the stream and the situation of respondent's railroad grade and track. Appellant owed respondent the duty of exercising reasonable care and diligence in looking after its logs and keeping them moving and preventing them piling up and jamming so as to inflict unnecessary damages on respondent.

*Idaho Northern R.R. v. Post Falls Lumber Co.,* 20 Idaho 695, 119 P. 1098 (1911).

(5) Unnecessary risks: Does the fact that a risk is unnecessary affect the breach issue? In an early case involving a railroad turntable, the court offered the following rationale for holding the railroad liable:

> The turntable in question was a dangerous instrument, insecurely fastened, in its very nature attractive to children, was located in a public place, and the agents and employees of the defendant corporation knew its dangerous character and knew that it was frequented by people in the vicinity and used by them for amusement. The construction of the machine was such that the distance between it and the frame in which it revolved was greater on one side than on the other, so much so that the limb of a person, and the body of the deceased, could be caught between the table and the frame around it. This fact, and the fact that children could revolve it, made it so dangerous that it became the duty of the defendant to keep it so secured that it would be safe. It would be no more difficult or inconvenient to keep this turntable locked than it is to keep a switch which is in constant use locked. It is usual, if not universal, for railroad companies to keep switches which are in constant use locked. The use of a lock upon this turntable would have prevented the accident, and the failure of the defendant to so secure said turntable is negligence.

*York v. Pacific & Northern Ry.*, 8 Idaho 574,69 P. 1042 (1902) (Quarles, J., concurring). Does this analysis tum on the minimal burden imposed on defendant? Is the case distinguishable from *LeDeau*? From *Stevens*?

(6) **Least-cost avoider**: In *York*, Justice Quarles noted that it ''would be no more difficult or inconvenient to keep this turntable locked than it is to keep a switch which is in constant use locked." What should the rule be when it is plaintiff who can most cheaply avoid the loss. Should plaintiff be required to invest to protect herself if this will be less costly?

Defendants canal crossed plaintiffs land. The canal leaked, and plaintiffs land had been damaged by the seepage. On appeal from a jury verdict for plaintiff, defendant argued that, "at a small expense on the part of the plaintiff, any surplus water that may have come from defendant's ditch could have been conducted off the land of the plaintiff, so that the same would do her no harm." The court rejected this argument, noting that defendant "cannot avoid his responsibility by showing that the one injured might have avoided the damage by a slight expense." *McCarty v. Boise City Canal Co*., 2 Idaho 245, 10P.623 (1886). Is *McCarty* consistent with the economic interpretation of the Hand formula?

## 2. THE REASONABLE PERSON

*When I use the word "negligence" in these instructions, I mean the failure to use ordinary care in the management of one's property or person. The words "ordinary care" mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. Negligence may thus consist of the failure to do something which a reasonably careful person would do, or the doing of something a reasonably careful person would not do, under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.*

-IDJ12.20

*As William Burroughs, in an interview with Paul Krassner on the possibility of communicating with dead people like Lenny Bruce and Jack Kerouac, said: "Subjective, objective- what's the difference?"*

NOTES

(1) Is *IDJI2.20* consistent with *LeDeau*? with the Hand formula? Does the reasonable person engage in a cost-benefit calculation?

(2) **Objective or subjective**? Is the general standard objective or subjective? That is, does it make any difference what the individual defendant knew or didn't know? In a case involving an explosion at an oil well, one defendant contended that she was unaware of the risk involved in a defective "gas trap." The court rejected this argument:

> Among those acquainted with oil and gas operations, it is a matter of general knowledge that gas-traps as originally constructed are dangerous. The trap at the well had lost the upper barrel with the small gas jet, leaving only the lower barrel with an opening in the pipe much larger, a condition of increased hazard. Manipulating such a dangerous instrumentality, both defendant[s] were under obligation to reasonably inform themselves of its peril to others: that they did not anticipate resultant injury is no excuse.... Injury having resulted from their negligence ... they were ...liable for the damage.

*Hartman v. Gas Dome Oil Co*., 50 Idaho 288,295 P. 998 (1931).

In a criminal prosecution, the judge instructed the jury that to find the defendant guilty of

possession of methamphetamine it was required to find that "the Defendant knew or should have known that the substance possessed was a controlled substance." On appeal, the supreme court reversed defendant's conviction:

> The instructions as given allowed the jury to convict Blake on each count upon a finding that he was actually in possession of the methamphetamine and cocaine and that he "should have known that the substance[s] possessed were ... controlled substance[s]." Blake contends, and we agree, that this language improperly allowed the jury to convict him using a negligence standard. That is, even if Blake did not actually know methamphetamine was under the seat or cocaine was in the wallet, he should have known and is equally culpable as if he did know.
>
> ...[The state's] arguments ignore this Court's holding in Fox ... that "knowledge that one is in possession of the substance" is an essential element of the offense.

*State v. Blake*, 133 Idaho 237, 985 P.2d 117(1999). The difference between "knew" and "should have known" is one measure of the difference between a subjective and an objective evaluative standard.

(3) *Rumpel v. Oregon Short Line Ry*.: If the "reasonable person" embodies the community's perception of what types of conduct are unreasonably risky, how closely tied to any particular community is the standard?

Plaintiff was a laborer employed at a feed and livery stable in Nampa. ln the course of his employment he was required to cross F Street repeatedly. The defendant had blockaded the street with its freight cars. To avoid a lengthy detour around the train each time he crossed the street, plaintiff crawled under the boxcars. When plaintiff attempted to pass under the train for the sixth time, the train started up unexpectedly and injured plaintiff. The trial court allowed plaintiff to introduce evidence of the fact that it was common practice for people in Nampa to crawl beneath the defendant's boxcars because they so commonly blockaded F Street. On appeal by defendant, the court concluded:

> The fact that it was attempted to be proven, over the repeated objections of defendant, that it was the custom of the people of the town of Nampa to crawl under the cars when they blockaded the streets, if fully proven, could not have the slightest effect upon the plaintiffs right to recover, as a custom of the people in putting themselves daily in imminent danger of their lives in passing under cars blockading the streets ... could not excuse the plaintiff in his indulgence in conduct so reckless and so wanting in ordinary prudence and care. While it is improper and unlawful for a railroad company to unnecessarily blockade a street of a town or city with its cars, yet every man is bound at his peril to use ordinary care to preserve his own life and limbs ...; Therefore, all evidence of the custom of the people in passing under the cars so blockading the streets was irrelevant and incompetent and should have been excluded.

*Rumpel v. Oregon Short Line Ry*., 24 Idaho 13, 35 P. 700 (1894).

(4) Learners and children: How should the law treat those who are less skilled?

(a) Learners: A student pilot with 29.4 hours of flying time rented an airplane from the plaintiff for her first solo cross-country flight. As she attempted to land the plane, it crashed. On appeal, plaintiff raised several objections to the verdict for defendant. One of these was a challenge to

> the standard of care applied by the trial court. She contends that the court used the standard of an experienced pilot exercising ordinary care, rather than the standard of a student pilot exercising ordinary care. The argument suggests that there are separate standards for experienced pilots and student pilots. This premise is incorrect. There is only one standard- ordinary care. The degree of experience is a factor to be considered, along with other circumstances, in applying the standard. However, itis not a conceptual element of the standard itself....
>
> The question, then, is whether the trial court, in its determination of negligence, gave due consideration to Blough's relative lack of experience. In his memorandum decision, the trial judge described Blough's prior training and experience. The court examined the specific tasks involved

> in landing the airplane under the existing circumstances. His finding of negligence was couched in terms of Blough's particular training and experience. We conclude that the trial court properly applied the negligence standard to this case.

*T-Craft Aero Club, Inc. v. Blough*, 102 Idaho 833, 642 P.2d 70 (Ct. App. 1982).

(b) *Children*: The Idaho courts apply a somewhat similar standard to judge the reasonableness of a child's conduct:

> A child is held to that standard of care which would be expected from an ordinary child of the same age, experience, knowledge, and discretion.... Because these factors vary so greatly among children and because children are naturally unpredictable and impulsive, it is especially difficult to judge their conduct as a matter of law. Instead, it is preferable to submit the issue of their conduct to a jury.

*Davis v. Bushnell*, 93 Idaho 528, 564 P.2d 652 (1970).

In *Goodfellow v. Coggbum*, 98 Idaho 202, 560 P.2d 873, (1977), the Idaho Supreme Court adopted the rationale of the Minnesota Supreme Court:

> As a general rule, a child is held to [the Davis] standard .... There is a well-recognized exception, however, when a child is operating a motor vehicle upon a public highway. ln such instances, the child is held to an adult standard of care....
>
> Although the jurisdictions are split on whether to recognize this exception, ...we believe that it represents the better rule. The rationale supporting it was best stated in *Dellwo v. Pearson*.

*See also Robinson v. Westover*, 101 Idaho 766,620 P.2d 1096(1980); *Kelly v. Bruch*, 91 Idaho 50, 415 P.2d 693 (1966); *Mundy v. Johnson*, 84 Idaho 438, 373 P.2d 755 (1962); *Laidlaw v. Barker*, 78 Idaho 67, 297 P.2d 287 (1956).

(c) IDJI 2.02 -Duty of care- minor child

> A minor child has a duty to exercise the degree of care which would reasonably be expected of an ordinary child of the same age, maturity, experience and knowledge when acting under similar circumstances.

**An Ethical Aside**

(1) Personal responsibility: What is the basis for imposing liability for less than reasonably careful conduct? Reconsider the statement from *Stevens v. Fleming*. The court in Stevens argued that it was based upon personal responsibility.

The prevalent view in the late nineteenth and early twentieth centuries was succinctly captured by Professor Ames: "The early law asked simply, 'Did the defendant do the physical act which damaged the plaintiff? The law of today ... asks the further question, 'Was the act blameworthy? The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril." James Barr Ames, Law and Morals, 22 HARV. L.,. REV. 97 (1908). Why is "the early law" "unmoral"? Why isn't it moral to conclude that - as between two innocent individuals - the one whose conduct was the cause of the injury ought to pay for the loss?

Holmes expands on this perspective in The Common Law. At one point He argues that "[t}he requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability." Thus, it is the moral blameworthiness of the individual's choice that is the predicate of liability. Subsequently, however, he writes that "(t]he law considers ...what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that." What is the basis for liability in negligence? Are the two excerpts consistent? How can Holmes' position be squared with the commonplace statement that negligence is conduct - not state of mind?

Is "objective morality" an oxymoron? Consider: is a person of less than average intelligence who does not recognize a risk morally culpable? Is such a person legally responsible for his negligent conduct? Is a person who is insane morally culpable? Is such a person legally responsible for her negligent conduct? Is "reasonableness" truly a moral standard?

The underlying moral position of liability predicated upon fault is most apparent in a situation where the individuals were strangers prior to the accident: the moral position of negligence law is that defendant's benefits from his own conduct are a valid excuse for not paying plaintiff for the harm that such conduct causes. That is: if the defendant's benefit "outweighs" in some sense plaintiff's loss, defendant is not required to compensate plaintiff for the loss.

Strict liability challenges this fundamental point: as between an innocent plaintiff and an actor who has caused injury, the actor ought to bear the entire cost of the action particularly if the gains to be derived from that action are as great as defendant contends, i.e., strict liability embodies a cost-internalization rationale: force the actor to internalize all the costs of his conduct where the defendant alone reaps the benefits.

Which position is ethically preferable? What assumptions and goals are needed to answer this question? Again: why isn't it moral to conclude that- as between two innocent individuals, the one whose conduct was the cause of the injury ought to pay for the loss? That is: why is it moral that innocent non-actor ought to bear the loss caused by the actor's conduct?

(2) **Men, women, and "reasonableness":** Can a woman be a "reasonable man"? Can a woman be a "reasonable person"? Can a woman be "reasonable"? Is "reasonable" inherently sexist?

In her now-classic study of the psychological development of girls and boys, Carol Gilligan discussed a traditional test for moral development, "Heinz's dilemma." The dilemma involves Heinz, a man who is faced with a decision whether to steal a drug that he cannot afford in order to save his wife's life. The dilemma was one of a series designed to measure moral development in adolescence. The reasons for and against stealing are explored through a series of questions "that vary and extend the parameters of the dilemma in a way designed to reveal the underlying structure of moral thought."

> Gilligan discusses two children's responses to the dilemma. The children, Amy and Jake, were "bright and articulate and ... resisted easy categories of sex-role stereotyping, since Amy aspired to become a scientist while Jake preferred English to math." Nonetheless, their moral judgments seem initially to confirm familiar notions about differences between the sexes, suggesting that the edge girls have on moral development during the early school years gives way at puberty with the ascendance of formal logical thought in boys.
>
> Jake, at eleven, is clear from the outset that Heinz should steal the drug. Constructing the dilemma ... as a conflict between the values of property and life, he discerns the logical priority of life and uses that logic to justify his choice:
>
> For one thing, a human life is worth more than money, and if the druggist only makes $1,000, he is still going to live, but if Heinz doesn't steal the drug, his wife is going to die. (Why is life worth more than property?) Because the druggist can get a thousand dollars later from rich people with cancer, but Heinz can't get his wife again. (Why not?) Because people are all different ....
>
> Jake also considers the legal implications of his choice, arguing that, if Heinz is caught, "the judge would probably think it was the right thing to do." When it was pointed out that, in stealing the drug, Heinz would break the Jaw, Jake replied that "the laws have mistakes, and you can't go writing up a Jaw for everything that you can imagine."
>
> Thus, while taking the Jaw into account and recognizing its function in maintaining social order (the judge, Jake says, "Should give Heinz the lightest possible sentence"), he also sees the law as man-made and therefore subject to error and change. Yet his judgment that Heinz should

steal the drug, like his view of the Jaw as having mistakes, rests on the assumption of agreement, a societal consensus around moral values that allows one to know and expect others to recognize what is "the right thing to do."

In contrast, Amy's responses convey "an image of development stunted by a failure of logic." When asked if Heinz should steal the drug, she replies in a way that seems evasive and unsure:

Well, I don't think so. I think there might be other ways besides stealing it, like if he could borrow the money or make a loan or something, but he really shouldn't steal the drug - but his wife shouldn't die either.

When asked why Heinz should not steal the drug, Amy does not consider either property or law but rather "the effect that theft could have on the relationship between Heinz and his wife: If he stole the drug, he might save his wife then, but if he did he might go to jail, and then his wife might get sicker again, and he couldn't get more of the drug, and it might not be good. So, they should really just talk it out and find some other way to make the money. Seeing in the dilemma not a math problem with humans but a narrative of relationships that extends over time, Amy envisions the wife's continuing need for her husband and the husband's continuing concern for his wife and seeks to respond to the druggist's need in a way that would sustain rather than sever the connection. Just as she ties the wife's survival to the preservation of relationships, so she considers the value of the wife's life in a context of relationships, saying that it would be wrong for her to die because, "if she died, it hurts a lot of people and it hurts her." Since Amy's moral judgment is grounded in a belief that, "if somebody has something that would keep somebody alive, then it's not right not to give it to them," she considers the problem in the dilemma to arise not from the druggist's assertion of rights but from his failure of response.

[S]eeing a world comprised of relationships rather than of people standing alone, a world that coheres through human connection rather than through systems of rules, she finds the puzzle in the dilemma to lie in the failure of the druggist to respond to the wife. Saying that "it is no right for someone to die when their life could be saved," she assumes that if the druggist were to see the consequences of his refusal to lower his price, he would realize that "he should just give it to the wife and then have the husband pay back the money later." Thus, she considers the solution to the dilemma to lie in 'Taking the wife's condition more salient to the druggist or, that failing, in appealing to others who are in a position to help.

Just as Jake is confident that the judge would agree that stealing is the right thing to for Heinz to do, so Amy is confident that, "if Heinz and the druggist had talked it out long enough, they could reach something besides stealing." As he considers the law to "have mistakes," so she sees this drama as a mistake, believing that "the world should just share things more and then people wouldn't have to steal." Both children thus recognize the need for agreement but see it as mediated in different ways – he impersonally through systems of logic and law, she personally through communication in relationship.

CAROL GILLIGAN, IN A DIFFERENT VOICE 25-29 (1982). See also Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL Eouc. 3 (1988).

Does converting "reasonable man "to "reasonable person" eradicate the term's sexism? Or merely obscure - and thus embed - it? Does Gilligan's discussion cast light on the "reasonable person" standard? What would a reasonable person do in Heinz' position? What did learned Hand conclude?

Should the negligence-determining standard be changed? Would "good neighbor" be preferable? Would an instruction embodying a "concerned person" standard be an improvement? Would these verbal formulations change the results in actual cases?

(3) Italians and "reasonableness": Can an Italian be "a reasonable person"? Guido Calabresi, previously dean of Yale law School and a federal court of appeals judge, has written on the question of

"reasonableness." He noted that the standard descriptions provided for the "reasonable person" were all "unmistakably male":

> The reasonably prudent man was invariably described rather vaguely, but always in male terms. In England, he was defined as the man on the Clapham Omnibus - a definition which has always left me utterly cold since I have never met the Clapham Omnibus or any man on it, and have no idea why reasonableness should attach especially, to those males who ride that line. In Roman law (and, by derivation, in most civil law countries) the analogous figure was "the good father of the family." I have met many good fathers of families in my time, and I suppose some of them even reasonable. In America the definition - perhaps the most startling of all -was given by courts and commentators as "the man who takes the magazines at home and in the evening pushes the lawn mower in his shirt sleeves." I must say I have never understood what this (like riding the Clapham Omnibus) has to do with reasonableness of behavior- stereotypical masculinity perhaps, but reasonableness? One has to wonder at the glory of the law! In any event, all these people whose attributes seem, in Europe and America, to define reasonableness are unmistakably male. It would not be surprising, then, if "reasonable man," at law, meant reasonable male and not reasonable person.

Furthermore, he argues, since reasonableness is a question of attitudes, the "key question is whose attitudes are reasonable." A question to which the law gives at best an uncertain answer:

> Is reasonableness defined by the attitudes and points of view of the dominant ethnic, racial, or sexual groups in the society, or are those who do not share these views to be tested by their own standards? Different still, are the standards, though unitary and applied to all, a mixture of those of all groups- of all reasonable persons and not merely of white reasonable fathers riding Clapham Omnibuses while mowing their lawns in their shirt sleeves? And if the attitudinal differences are so great that such a mixture is impossible (as it would be, physically, between the blind the seeing), which attitudes should be considered reasonable, and for whom?
>
> Let us assume that for cultural reasons women drive differently than men. It is not impossible- though I doubt it. My wife drives far better than I do, but she drives well in a somewhat different way I drive. I do not believe that either her greater skill or her different style are because she is a woman and I am a man. It seems more likely to me that it is due to those who taught me, not to mention our personality difference. Still, if it were the case that women qua women drove differently than men, it would not be all that surprising. If a society is sexist- and ours surely is- it would not be odd that people within that society who were characterized as different and treated differently would react to different treatment by behaving differently in a wide variety of everyday contexts. Driving is such a context, so it should not be outside the range of possibility that in our sexist society women as a group would drive differently than men as a group. If this were so, would it be appropriate to consider how reasonable women drive in deciding whether a woman had behaved reasonably when her driving led her to be a victim in an accident? Or should the test instead be that of driving behavior of a combination of the two? The same line of reasoning can be applied to Italians. Since behavior is also a product of cultural differences, is the "stereotype that Italians drive fast, and squiggle between cars, and act as though they perennially involved in a sporting event ... such a cultural attribute"? Is such driving reasonable, or is the standard to be imposed that of another culture whose values stereotypically give rise to "stodgy, plodding driving?" This problem is even more significant and dramatic today because it is fundamental to the issue of women's liberation. It is the question of whether equality is being achieved at an appropriate price when one moves form the "reasonable prudent man," to the "reasonable prudent person." If all that has happened is a verbal change and women are now expected to act as reasonable men did before (in order to qualify as reasonable persons), rather than men being expected to act, at least in part, as reasonable women did, then equality may be there - but at the cost of cultural subjugation!
>
> I do not think I am exaggerating this tendency of the previously dominant group to offer equality, but only when the group seeking it accepts the culture of the group granting it. Ask

> yourselves, for example, why, when an objection is made to the designation of toilets as "Men's Room" and "Ladies' Room," the difference is usually corrected by a change to "Men's Room" and 'Women's Room" rather than to "Gentlemen's Room" and "Ladies Room." It may be, of course, that the reason for this is that we don't like gentility in toilets, and that both the terms "ladies" and "gentlemen" connote something to which we object. That would be fine. But it may also be that equality will be granted only if we are willing to conform to the male stereotype and therefore the female stereotype of gentility becomes unacceptable, even if itis the better ideal to which both men and women ought to aspire.

GUIDO CALABRESI, IDEAS, BELIEF, ATTITUDES, AND THE LAW 22-23, 27-29 (1985).

(4) One possible approach to answering such questions is to consider how "reasonableness" functions as a standard. Is "reasonableness" a formal, i.e., "empty" term? Remember the critique that the term is actually sexist because women are not "reasonable." If "reasonableness" is a formal, i.e., "empty," concept, how can it be predicated upon a moral position? Is it precisely because it is a formal concept that it embodies a moral perspective? What is the source of the moral content of the term? See Steve Smith, Rhetoric and Rationality in the Law of Negligence, 69 MINN. L. REV. 277 (1984).

## [8] PARTICULARIZING THE STANDARD OF CARE

### 1. JUDGE AND JURY

### McPHETERS v. PETERSON

Supreme Court of Idaho
108 Idaho 107, 697 P.2d 447 (1985)

DONALDSON, C.J. -- On March 5, 1982, five-year-old Aaron McPheters was injured in an automobile accident in a residential Boise neighborhood. As he entered the intersection of Latah and Kootenai streets, Aaron was struck by an automobile driven by respondent, Gene Peterson. Wallace and Debra McPheters initiated this action seeking damages on their own behalf and as the parents and guardians of Aaron McPheters. They allege that the accident resulted from the negligence of Gene Peterson ....

The case was tried to a jury. The jury returned a special verdict finding that there was no negligence on the part of Gene Peterson or the Ada County Highway District which was the proximate cause of the accident. The McPheters have appealed citing as error the trial court's refusal to give Instructions 20 through 25 of their proposed jury instructions. The appeal against the Highway District was dismissed by stipulation of the parties.

The sole issue on this appeal is whether the failure to give plaintiffs' requested instructions 20 through 25 constitutes reversible error. The record reflects that at the close of the evidence at trial, the district judge met with counsel outside the presence of the jury to discuss the proposed jury instructions. At that time, the McPheters' attorney objected to the court's refusal to give plaintiffs' instructions 20 through 27. Those instructions spoke to the standard of care required of the operator of an automobile; in particular, the standard of care required when a child is present.

In declining to give the instructions, the trial judge stated that he was electing to rely on the approach set forth in the Idaho Jury Instructions (IDJI). He noted that IDJI222 recommends that no instruction on the care required for the safety of a child be given. He further stated that, although he recognized some of the proposed instructions were taken from previous Idaho Supreme Court opinions, he believed under the circumstances of the present case they were argumentative and unnecessary, as the approved instructions adequately set forth the standard of care. 5 I.R.C.P. 51(a)(2) recommends that a trial judge use the IDJI whenever it contains an applicable instruction, unless the

judge finds that a different instruction would more adequately, accurately, or clearly state the law. I.R.C.P. 51(a)(2) (1980). Pursuant to this recommendation, the trial judge defined "negligence" for the jury according to the general definition contained in IDJI 210 [now 2.20]. He also instructed the jury as to the standard of care required of a minor. IDJI 201? We believe that these instructions adequately set forth the standard of care required of respondent in this case. Appellants contend that the instructions did not adequately delineate the standard of care required of an adult in relation to a child, or of an operator of a motor vehicle in relation to a pedestrian. We disagree. As we have previously stated "Pin all but the most intricate negligence cases, the general definition of negligence sufficiently outlines the required standard of care."

The jury was instructed that ordinary care means "the care a reasonably careful person would use under circumstances similar to those shown by the evidence." Appellant has chosen not to provide us with a complete trial transcript, and, thus, we are unable to assess the evidence presented at trial. However, viewing the evidence most favorably to respondent as we are required to do on appeal. The record actually before us does not demonstrate that this case was so intricate as to require additional instructions amplifying on this general standard of care. We hold that the trial court's instructions adequately stated the standard of care required of respondent in the present case.

The decision of the trial court is affirmed.

BAKES, J., AND McFADDEN AND WALTERS, JJ. PROTEM, concur.

BISTLINE, J., dissenting -I dissent from the majority's conclusion that the district court did not err in refusing to instruct the jury concerning the standard of care an automobile operator owes to a pedestrian and an adult owes to a child. Those instructions were vital in properly informing the jury of the requisite standard of care Mr. Peterson owed Aaron McPheters.

The instruction the district court used to instruct the jury with respect to the "standard of care" due in this case reads as follows: "The words 'ordinary care' mean the care a reasonably careful person would use under the circumstances similar to those shown by the evidence." Such a definition is too general to have any chance of being properly applied to the facts of a case such as this one. The Restatement of Torts (Second) §285, comment d, states this point succinctly:

> If the standard of conduct is not fixed by reference to a legislative enactment, it is that of a reasonable man under the circumstances which, at the time of his action, the actor knows or has reason to know. This standard is, without more, incapable of application of the facts of a particular case. It requires further definition, so as to express the opinion of society as to what should be done or left undone by a reasonable man under the circumstances of the particular case.

The three requested instructions adequately delineated the standard of care of a reasonable person under the circumstances of this case. They read as follows:

> Plaintiffs' Requested Instruction No.23: While it is the duty of both the driver of a motor vehicle and a pedestrian, using a public roadway, to exercise ordinary care, that duty does not require necessarily the same amount of caution from each. The driver of a motor vehicle, when ordinarily careful, will be alertly conscious of the fact that he is in charge of a machine capable of projecting into serious consequences any negligence of his own. Thus, his caution must be adequate to that responsibility as related to all the surrounding circumstances. A pedestrian, on the other hand, has only his own physical body to manage and with which to set in motion a cause of injury. While usually that fact limits his capacity to cause injury, as compared with a vehicle driver, still, in exercising ordinary care, he, too, will be alertly conscious of the mechanical power acting on the public roadway, and of the possible serious consequences from any conflict between himself and such forces. And the caution required of him is measured by the

> danger of safety apparent to him in the conditions at hand, or that would be apparent to a person of ordinary prudence in the same position.[13]

Plaintiffs' Requested Instruction No. 24: You are instructed that it is ordinarily necessary to exercise greater care for the protection and safety of young children than for adult persons possessing normal and mature faculties. Their conduct is unpredictable, and a person operating an automobile should anticipate their thoughtlessness and impulsiveness. You are further instructed that it is a matter of common knowledge that children may at unexpected moments run upon or across the part of highways used for vehicles and where !he driver of a motor vehicle knows of the presence of a child or children in, or adjacent to the street or highway upon which he is traveling, or should know that children may reasonably be expected to be in such vicinity, such driver is under a duty to exercise care commensurate with the emergencies presented. One driving an automobile must not assume that children of immature years will exercise the care of their protection and must not assume that such children will not expose themselves to danger.

> Plaintiffs' Requested Instruction No. 25: Ordinarily it is necessary to exercise greater caution for the protection and safety of a young child than for an adult person who possesses normal physical and mental faculties. One dealing with children must anticipate the ordinary behavior of children. The fact that they usually do not exercise the same degree of prudence for their own safety as adults, that they often are thoughtless and impulsive, imposes a duty to exercise a proportional vigilance and caution on those dealing with children, and from whose conduct injury to a child might result.
>
> Plaintiffs' Requested Instruction No.23was taken directly from the California Pattern Jury Instructions, BAJI 5.51....

[ln] *Jones v. Mikesh*, 60 ldaho 680,686, 95 P.2d575,578(1939), ...this Court approved the following instruction:

> The court instructs the jury that neither a pedestrian nor an automobile has a superior right to any part of a public highway in the State of Idaho. Each with respect to the other in the use of the highway is entitled to equality of right, the duties of both are reciprocal; however, while the duty of exercising reasonable care for their own safety and the safety of others is imposed alike on both the pedestrian and the driver, the automobile being a dangerous instrumentality capable of inflicting fatal injuries, the comparative safety of its driver in case of a collision with a pedestrian is to be taken into consideration in measuring the duty of a driver.

Plaintiffs' Requested Instruction No.24 has also been approved by this Court.

[] In *Davis v. Bushnell,* 93 Idaho 528, 531, 465 P.2d 652, 655 (1970), this Court approved a similar instruction and noted the appropriateness of such instructions by stating, "ordinary and due care may mean different conduct under different circumstances."

Plaintiffs' Requested Instruction No.25 is based upon the California Pattern Instructions, BAJI 3.38.... Other states approve of similar instructions and the statement of law contained therein. [] The reasons for giving Requested Instruction Nos.24 and 25 are self-evident; they are contained in the instructions themselves. They are particularly relevant and should have been used in this case in light of the fact that the accident occurred in the area of Monroe Elementary School where Aaron was returning home from kindergarten.

The above three requested instructions are correct statements of the law. Each has persuasive reason for its being used in this case and should have been allowed in order that the jury understand

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[13] "A minor has the duty to exercise the degree of care which would be expected from an ordinary child of the same age, experience, knowledge and discretion, under similar circumstances.

clearly what the reasonable person would have done under the circumstances of this case. Refusing to give such instructions constitutes reversible error, []and I accordingly dissent.

NOTES

(1) What are the views of the majority and dissent on the respective roles of judge and jury? Which is consistent with Holmes' position in *Goodman*? With Cardozo's position in *Pokora*?

(2) Particularizing the standard of care: Bistline quotes the Restatement for the proposition that "[t]his [reasonable person] standard is, without more, incapable of application of the facts of a particular case. It requires further definition, so as to express the opinion of society as to what should be done or left undone by a reasonable man under the circumstances of the particular case." Note that the quo e is absolute: the general standard always requires "more" to apply it to any particular case. Which component of the trial tribunal, the judge or jury, generally provides the "more" and thus particularizes the standard? Is there something about the facts of this particular case that makes it appropriate to instruct the jury with a more specific standard of care?

(3) Functions of the judge and jury in negligence cases: Fleming James has examined the roles of the judge and jury in a negligence case:

> The jury system plays an important part in the administration of accident law. This means that procedural rules and devices which allocate power between court and jury may have great bearing on the way accident law actually works. And it also means that the practical implications of many a rule of substantive law can scarcely be appreciated without an understanding of just how the rule affects that allocation of power...[T]here is a good deal of reason to believe that much of accident law is now in a period of transition from older notions based on individual blame or fault towards some form of social insurance roughly comparable to workmen's compensation. And it is in such a time of flux, when legal theory is apt to be laggard, that the jury is likely to play a particularly significant role - one which calls for frequent reexamination and re-appraisal....

## THEORETICAL DIVISION OF FUNCTION

It is a commonplace today that questions of law are for the court and questions of fact for the jury, whatever the historical vicissitudes of this notion may have been. It is just as commonplace, at least in the profession, that this statement has never been fully true in either of its branches, and tells us little or nothing that is helpful... [l]t will be more helpful for our purpose to disregard the statement and see what jobs the tribunal as a whole has to perform intort cases, then examine the roles which have been assigned by precedent to judge and jury respectively, in connection with performing that job. This will reveal the points at which theory is elastic, and most subject to change.

### Determination of Facts

The tribunal's first job is to determine what the parties did and what the circumstances surrounding their conduct were. This we denote as the facts of the specific case, as distinguished from an evaluation or interpretation of those facts in terms of their legal consequences. To be sure, any such distinction (here as elsewhere in the law), is somewhat theoretical and by no means clear-cut; but if we keep its limitations in mind and remember its rough character, the distinction will be useful enough for present purposes. The questions whether a pedestrian looked for traffic before stepping off the curb, whether at this time defendant's automobile was 50 feet or 200 feet away, whether the traffic signal was red or green, the speed of the car, the distance in which it could be stopped at that speed, whether the driver saw the pedestrian, whether he sounded a horn, and so on, may conveniently be distinguished from such questions as whether the pedestrian should have looked or should have seen the car, whether he should have proceeded with the traffic light as it was, the reasonableness of the car's speed, the adequacy of brakes which could perform as these could, whether the driver should as a reasonable man have foreseen that the pedestrian would continue into danger, and should have blown his horn.

Now the determination of what the facts of a specific case were, in the sense referred to above, may be called the determination of the very prototype of questions of fact which are to be determined by the jury; and so it is, to the extent that any question is. Yet it is at once apparent that in connection with this very process the court has important roles to play, and opportunity to exercise very real control over the jury. All this stems from the basic notion, now universally accepted, that the jury is limited, in making these determinations, to the evidence produced in court and to matters so commonly known and s beyond dispute, that the principle of judicial notice is applied to them. The notion has this consequence because it is the court that determines what evidence may be received, what the proper limits of judicial notice are, and whether sufficient evidence has been produced to warrant the finding of any given fact.

The court limits what the jury may consider. The court decides questions of the admission of evidence. There are of two kinds: those involving notions of relevancy, and those involving the exclusionary rules. Now the concept of relevancy itself is not a legal one, but one involving principles of logic of general application. That is to say, the question whether a given piece of evidence is relevant in the attempt to prove a proposition and the question of the extent of its probative value, are both referable to general principles of logical reasoning and not to any rules of law. Nevertheless, the decision of questions of relevancy invokes the function of the court in the following ways:

> (1) The court determines what the propositions are which need to be proved or which may be proved. Thus, the court limits and selects the evidence which will come before the jury for consideration. If, for example, the court rules that the novice and the experienced driver are both held to the same standard of conduct, it will exclude testimony that the defendant was just learning to drive if that evidence is offered as tending to excuse him from taking a given precaution, and if a timely and proper objection is made....
>
> (2) The court determines what degree of relevance or probative value will satisfy the requirements of the law. General reasoning may reveal whether offered evidence has any relevancy or probative value and if so how much. But there are infinite degrees of relevancy, and itis the court which determines what degree is requisite for admissibility and whether offered evidence will be so confusing or prejudicial that its probative value is outweighed. Thus, the court decides whether a restaurateur may show that his beans were eaten by many patrons without ill effects for the purpose of proving that they were not the cause in fact of plaintiff’s sickness.

The limits imposed by the concept of relevancy are not the only ones. Anglo-American law has developed the great exclusionary rules of evidence and these of course are administered by the court. Thus, the court determines whether evidence of a conversation is offered for a hearsay purpose and if so whether it comes within any exception to the hearsay rule. Moreover, it is often necessary for the court to make a finding, on conflicting evidence, as to whether a fact exists as a preliminary step in ruling on this kind of question of admissibility.

The court determines the sufficiency of the evidence to show-the existence of a fact. When there is direct evidence of the existence of a fact in issue, a jury will in most cases be authorized to find the existence of that fact. Thus, if plaintiff says he looked before he stepped off the curb, or the defendants engineer says he blew his whistle for the crossing, or a tenant testifies that he requested the landlord to make certain repairs in the premises six weeks before the accident, it is the jury's province to decide whether to believe the witness. But even here the court has retained some control. In all cases it may find a direct testimonial assertion of a fact insufficient evidence of that fact's existence where under all the circumstances the testimony is not reasonably credible. A witness's story may be so inherently fantastic as to be incredible. Or it may fly in the face of incontrovertible physical facts. Perhaps the commonest instance of this is the case where a motorist says he looked carefully down the track just before crossing it and saw no train, but was struck at the crossing by a train which was in clear view for half a mile...

Where the question is one of the sufficiency of circumstantial evidence to prove a fact in issue, the courts have exercised far more control although its extent is partly concealed and not, perhaps, often fully realized. This is true because the test for determining whether an inference (from circumstantial

evidence) is a rational one is stated in terms of mathematical precision but is one which allows the very greatest latitude in actual application ... [A]s it is sometimes put, where from the facts most favorable to plaintiff the nonexistence of the fact to be inferred is just as probable as its existence, the conclusion that it exists is a matter of speculation, sun rise, and conjecture, and a Jury will not be permitted to draw it. Thus, the test purports to invoke only the processes of logical reasoning and the mathematics of probability. "Difficulty comes from the fact that anything even remotely adumbrating accurate statistical knowledge about the relative probabilities in even the most commonly recurring situations is completely lacking...

The court creates presumptions and allocates the burden of proof. We have seen how the court determines whether from facts in evidence a rational inference may be drawn of a fact to be proved, and how very much room for discretion in this process lurks behind the false precision of a phrase. But even if such a "purely logical" inference may not be drawn, the court may create a rebuttable presumption on the basis of certain facts that a fact to be proved existed. This may either permit or require a decision that the presumed fact existed, depending on the effect at the that the court determined the presumption to have, and, on what, if any, evidence has been introduced which tends to show the nonexistence of the presumed fact.

Moreover, in all cases the court determines who has the burden of producing evidence in the first place, and at various stages in the trial such as upon the closing of his case by either party. And it is the court which allocates the risk of non-persuasion of the jury.

**Determination of Legal Consequences**

The other main job confronting the tribunal as a whole in accident cases is to evaluate the conduct of the parties, in the light of the circumstances, in terms of its legal consequences. At one end of this function the exclusive role of the court is clear. It alone determines what the broad rules of substantive law are, and which ones may be applicable to the case at hand. Thus, the court decides whether the case is one where liability is absolute or whether it depends on negligence; what, if any, effect contributory negligence will have; how liability will be affected if injury is produced through the intervention of some unforeseeable factor; that negligence consists in conduct involving an unreasonable risk of harm, and the like. But each case also involves a more specific evaluation of the conduct in the concrete situation with which it deals; a determination of specific standards of conduct for the parties under the circumstances of the actual case. It must be decided, for instance, whether this driver should have been proceeding more slowly at this intersection, whether he should have blown his horn, whether he should have anticipated that a pedestrian on the sidewalk would continue on to the crosswalk. Now it is perfectly clear that rules of law could be so formulated and so administered as to exclude the jury from making these evaluations. A court could decide, for instance, that under a given set of circumstances a motorist must blow his horn; that under a different set of circumstances he need not do so. Under such a pair of rules, the theoretical function of the jury would be only to decide which set of circumstances existed in the case before them, and whether the horn was blown; the question whether it should have been blown being decided by the court. On the other hand, it would be perfectly possible so to formulate the rule that the jury is to decide not only what the circumstances and the conduct were but also whether the horn should have been blown.

On the whole the rules of accident law are so formulated as to give the jury considerable scope in deciding what the parties should have done, in each specific case, as well as what they did do. The cardinal concept is that of the reasonably prudent man under the circumstances: what he would have observed; what dangers he would have perceived; what he would have done, and the like. And as a rule, the jury is called upon to determine such questions under broad directions as to what evidence and what kinds of factors they ought to consider in making such decisions. Here again, however (as in the case of what testimonial evidence a jury may believe), the courts set outer limits. A jury will not be permitted to require a party to take a precaution which is clearly unreasonable. Nor may it excuse a party from taking a precaution which all reasonable men would clearly take under the circumstances. Thus, for example, the jury may not require a train to stop before passing over each grade crossing in the country. On the other hand, a pedestrian

> may not be excused from looking at some point when he is about to cross a busy thoroughfare. Since it is the courts which determine what is clearly or undoubtedly reasonable under this rule of limitation, they could so administer it as to leave little or nothing for the jury to decide in this sphere. But here again (also as in the case of what testimonial evidence a jury may believe), the courts have exercised restraint in invoking this limitation, and the trend is probably on the whole towards even greater liberality.
>
> Within these limitations (of what reasonable men could find to be reasonable conduct or its opposite), courts sometimes go further in setting specific standards for the parties in a given case. Where they do, they may derive the standard from any one or more of a number of sources such as from their own notions of what is proper and reasonable; from a prescription of the legislature; from what is customary in a trade, business or profession; from the opinion of experts, and the like. Thus, a court may decide that when coal is piled by an open coal hole in a sidewalk in Boston, no further warning of the situation need begiven. It may hold that the jury is not free to exonerate the failure to take a precaution required by statute. It may refuse to let a jury hold a manufacturer or a railroad to the taking of precautions not generally adopted by the industry. It may rule that a case of malpractice may not be maintained against a doctor unless there is expert medical testimony as to what doctors should do under the circumstances of the case. The adoption of any such rule enlarges the function of the court and narrows that of the jury. Here again the tendency has been away from fixed standards and towards enlarging the sphere of the jury.
>
> It should be noted here that matters of presumption and burden of proof may affect the evaluation of conduct as well as the ascertainment of what conduct was. Thus, a presumption that there was negligence in the setting of a fire by a locomotive spark covers an assumption of some (here unspecified) standard of care in equipment and operation of the train as well as an assumption of substandard conduct in this case. And in evaluating known conduct as reasonable or the opposite, a jury should find against the party having the risk of non-persuasion if their minds are in equipoise as to whether that conduct is reasonable.

Fleming James, Jr., Functions of Judge and Jury in Negligence Cases, 58 YALE L.J. 667, 667-79 (1949).

James extended discussion of the respective roles of judge and jury- the "trial tribunal" in a negligence case divides the necessary functions into two categories, determination of facts and determination of legal consequences. And he also divides the second function - determination of legal consequences - into two components:

> (a) one that "clearly" belongs to the judge: determining which "broad rules of substantive law ... may be applicable to the case at hand"; and
> (b) one that he does not explicitly assign to either judge or jury: "a determination of specific standards of conduct for the parties under the circumstances of the actual case." The determination that this driver was less that reasonably careful under these circumstances.

Both the general and the specific are determination of legal consequences. Both - as James notes - could have been assigned to the judge. The system, however, gives the jury "a considerable scope in deciding what the parties should have done."

It is useful to give titles to each of the trial tribunal's three decisions:

1. factfinding, i.e., a determination of what occurred outside the courtroom that gave rise to the dispute. This is James' first category, "determination of facts."
2. law declaring, i.e., the statement of the law that is applicable to the out-of-court dispute. The judicial component of James' second category, "determination of legal consequences."
3. Jaw applying, i.e., applying the law to the event. The unassigned component of the second category.

Consider how the roles of the judge and jury vary in *Goodman*, *Pokora*, and *McPheters*. How were the three decisions distributed among the trial tribunal's constituent parts in *Goodman*? Does it differ in *Pokora*? That is, does the degree of specificity with which the standard of conduct has been defined affect the allocation of responsibilities within the tribunal? If the applicable standard of conduct has been narrowly defined, do the law declaring and law applying functions tend to merge? Which component of the tribunal was responsible for the law-declaring function in *Goodman*? The law-applying function? Which component was responsible for each in *Pokora*?

(4) Rules vs. standards (pt 1): While the *Goodman* and *Pokora* cases might suggest that there is a sharp distinction between rules and standards, McPheters suggests that they are in fact (end) points on a continuum rather than binary opposites. A specific standard (such as those advocated by Justice Bistline) accords the jury less discretion than a more general standard (such as IDJI 2.20). See also *Zolber v. Winters*, 109 Idaho 824, 712 P.2d 525 (1985); *Coughran v. Hickox*, 82 Idaho 18, 348 P.2d 724 (1960).

(5) Rules vs. standards (pt.2): In *Testo v. Oregon-Washington R.R. & Navigation Co*., 34 Idaho 765, 203 P. 1065 (1921), the court stated that it was plaintiffs duty to make a reasonable use of his senses in order to determine whether a train was approaching before going upon the tracks or, as generally expressed, it was his duty to look and listen....

Is the court correct that the two statements are the same? Is a rule-"look and listen"- the same as a standard -"make reasonable use of his senses"? Is the jury's role the same under the two statements?

(6) *Metz v. Haskell*: Plaintiff was employed by a company that sold and repaired radios and televisions. While plaintiff was delivering two television stands to defendant's motel, he noticed that the wire from the antenna had come loose. Defendant offered plaintiff a ladder; the ladder broke as plaintiff was climbing it to reach the loose wire. Defendant argued- and the trial court decided - that summary judgment was appropriate since, 'as a matter of law ... the ladder involved in this case was a "simple tool, that the "simple tool doctrine" applies, that the defendant owed no duty to inspect, warn or protect and that there was, therefore, no negligence on the part of defendant.'" On appeal, the Idaho Supreme Court adopted a more general approach:

> As a general rule, it may be stated that when one undertakes to furnish another with a tool or instrument for the latter's use, the supplier is under a duty to supply a proper and safe implement and not to be negligent in furnishing one that is defective.

The court rejected defendant's argument "that he was relieved of any obligation to provide a safe ladder by reason of the 'simple tool doctrine'":

> The so-called 'simple tool' rule is based on the ideas that ordinarily the employee has better opportunity than the employer to observe defects and guard himself against them, and that the employer should not be charged with the duty to care for the safety of an employee with respect to a matter in which the employee is in the better position to care for himself ... [where] the defect is one so apparent that the employee is guilty of negligence in using the tool, or where he knew of its condition or had equal opportunity with the employer for knowing it.

The court concludes that the doctrine is not applicable since

> the mere simplicity of the tool does not relieve the supplier of all duty to reasonably inspect the instrument in every situation but depends on the facts and circumstances of each case. The facts indicate that Metz was not in a superior position than Haskell to discover the defect, which contradicts the underlying basis of the rule.

*Metz v. Haskell*, 91 Idaho 160,417 P.2d 898 (1966)

(7) Rules vs. standards (pt. 3): the problem of costs: What are the administrative costs of the alternative judge and jury roles? Under *Goodman*, is a summary judgment more likely than under

*Pokora*? Won't *Pokora* generally require a jury trial? What does this suggest about the relative values of rules (*Goodman*) versus standards (*Pokora*)? The quest for perfect decision making comes at a price since many of the costs of a trial are borne by society -for example, Judges are paid, and courthouses are constructed and maintained with public funds.

(8) **Juries as communitarian lawmakers**: Consider again Holmes' argument in The Common Law. He argues that- in part at least because of the variability of individual juries- an experienced trial judge is more likely to know the community's sense of what is reasonable and thus be able to formulate that sense as a rule. Consider the argument to the contrary by the Idaho Supreme Court:

> One reason for the rule that the existence of negligence ...is not generally a question for the judge is that a jury is composed of members of various ages, occupations and experiences, and is in better position to determine what a reasonably prudent person would do, under stated circumstances, than is a trial judge or an appellate court. It is well known that some people react more quickly, and more intelligently, to impending danger than do others; that old people are apt to be more cautious than are young people, and that human judgments are as diversified as are human beings. Therefore, the best way to get a just determination, as to whether a man or woman acted "as a reasonably prudent person would have acted under like circumstances," is to submit the question to a jury, and get the benefit of the combined opinions of twelve persons on it. It is only when there can be but one possible answer, reasonably made, to that question that a trial judge, or an appellate court, should assume to decide it.

*Adams v. Zalasky*, 59 Idaho 292, 81 P.2d 1090 (1938). See also *Quick v. Crane*, 111 Idaho 759, 727P.2d 1187(1986); *Stowers v. Union Pacific R.R*., 72 Idaho 87,237 P.2d 1041(1951); *Hobbs v. Union Pacific R.R*., 62 Idaho 58, 108 P.2d841 (1941); *Curtis v. Ficken*, 52 Idaho 426, 16 P.2d 977 (1932); *Pilmer v. Boise Traction Co*., 14 Idaho 327, 94 P.432(1908). Cf. *Ryals v. Broadbent Development Co*., 98 Idaho 392, 565 P.2d 982 (1977); *Seppi v. Betty*, 99 Idaho 186, 579 P.2d 683 (1978).

(9) **A bit of history**: The rules vs. standards distinction also has a historical component. Arguably one result of the legal realists- a group that included Cardozo- was to undermine the assumption that rules are determinate and thus produce certainty in the law. In federal constitutional law, the rule-based perspective was associated with the era of substantive due process during which the United States Supreme Court attempted to construct bright lines between activities such as mining and agriculture - which preceded "commerce" - and those economic activities that were in interstate commerce and thus subject to regulation by Congress under the Commerce Clause. The collapse of the rigid and increasingly artificial rules and their replacement with balancing tests are mirrored in the divide between Goodman and Pokora. While the law has generally moved away from rule-based and standard-based decision making, McPheters and Metz demonstrate that the issue has continuing vitality. Consider, for example, a discussion of the historical context in a decision of the Idaho Court of Appeals:

> The appellants next contend that instruction number 23 was prejudicial and erroneous. The instruction given to the jury reads as follows:
>
> The court instructs the jury that neither a pedestrian nor an automobile has a superior right to any part of the public roadway. Each with respect to the other in the use of the roadway is entitled to equality of right, the duties of each a reciprocal; however, while the duty of exercising reasonable care for their own safety and the safety of others is imposed alike on both the pedestrian and the driver, the automobile being a dangerous instrumentality, capable of inflicting fatal injuries, the comparative safety of its driver in case of collision with a pedestrian is to be taken into consideration in measuring the duty of a driver. Therefore, while the rights of a pedestrian and driver of an automobile to use a roadway are equal, and their duties to each other are reciprocal, the one having the greater power to do injury owes to the other a comparatively greater duty to exercise care in the use of that power. The instruction is taken directly from *Jones v. Mikesh*, 60 Idaho 680, at 686, 95 P.2d 575, at 578 (1939). However, the Mikesh case was decided at a time when the defense of contributory negligence was a complete bar to a plaintiff's recovery. The concept of comparative negligence came much later. Further, when Mikesh was written, instructions containing fine distinctions on the law were accepted practice. Modern

> thought considers these fine-line distinctions to be unnecessary. The Supreme Court has commented several times in recent years that "in all but the most intricate negligence cases, the general definition of negligence sufficiently outlines the required standard of care." *McPheters v. Peterson*, 108 Idaho 107, 697 P.2d 447 (1985); [] So here. The general definition of negligence, coupled with the specific statutory duties applicable to the case, should be sufficient. To go further may be inappropriate, but not necessarily error....

*WarTen v. Furniss*, 124 Idaho 544, 861 P.2d 1219 (Ct. App. 1993).

(10) **Appellate courts and negligence**: What is the role of an appellate judge in a negligence case?

> In administering the law of negligence, we use the "reasonable and prudent man" standard to guide the trial court in its determinations of whether or not to submit certain cases to the jury. Such cases as are submitted to the jury are accompanied by charges exhorting the jurors to consider the evidence concerning the negligence issue on the basis of the same standard. Indeed, when the only issue before an appellate court is whether or not the trial court was right in submitting the case to the jury at all on the basis of the evidence of negligence adduced, the appellate court must also seek recourse to this standard. In each instance a process of evaluating human conduct occurs. That evaluation is conducted on the basis of familiarity with more or less normal human experience. The trial judge refuses to let the case go to the jury at all if, in his opinion, twelve laymen could not reasonably disagree among themselves that the defendant's conduct was not negligent. When the plaintiff assigns as error on appeal the trial court's direction of a verdict for the defendant on this ground, the appellate court has to go through the same process of evaluating human conduct on the basis of their notions (quite often vicarious) of human experience. If they allow the appeal, it is because they disagree with the trial court's evaluating process. And the same phenomenon is involved if the trial court does let the case go to the jury and the defendant appeals from judgment entered on the verdict for the plaintiff on the ground that it was error to submit the question of negligence to the jury in the first place. Here, often enough, the appellate court may agree with the defendant that no jury of laymen could reasonably infer that the conduct in issue was negligence; and if it does so, it reverses the trial court with an order to direct a verdict for the defendant.
>
> Some very amusing cases have arisen in this connection, one of the most striking of which is *Bennett v. Illinois P. & L. Corp*. [355 Ill. 564, 189 N.E. 899 (1934)]. There a power company had been stretching wire along a road and had left a huge wire spool standing alongside the roadway, just off the line of travel. Plaintiff's horse was frightened by the spool and ran away, the plaintiff sustaining damage as a consequence. The only issue involved was whether or not the defendant had been negligent in leaving the spool where it was. The trial court apparently thought a jury of laymen might reasonably so conclude and let the case go to the jury, which brought in a verdict for the plaintiff, judgment being entered thereon. At any rate, the case was finally disposed of by the Supreme Court of Illinois, its4-3 decision holding that the case was improperly submitted to the jury. Of course, this seems ridiculous at first blush, for if three out of seven state supreme court judges are of the belief that a jury of laymen might reasonably draw the inference that the defendant had been negligent, then one would suppose off hand that the matter was properly left to the jury in the first place.
>
> But that is not true at all. Paradoxical as this decision may seem, it is absolutely defensible. The state supreme court is not acting as a jury of laymen. t is, rather, making the last guess on whether or not the evidence of alleged negligence would justify the inference by a group of laymen that the defendant's conduct actually had amounted to negligence or, put another way, of whether or not a group of laymen could reasonably differ among themselves over this matter. This guess is a terribly important judicial function- of the very essence of the administration of the law of negligence. Indeed, the determination of this issue at the judicial stage is usually called an "issue of law," although a little clear thinking will reveal that it is simply an evaluation process no different from that which the jury indulges in when it is permitted to do so. What really distinguishes the judicial function in dealing with the simple negligence issue is the realization that it is not safe to let all simple negligence cases go to the jury because of the realization that jurors'

> collective reactions are apt to be based on such psychological factors as sympathy, the color of the female plaintiff's hair, the fact that the defendant is a "big corporation," and the like. Only when the "professionals" involved believe that the evidence adduced could reasonably support the inference of negligence (regardless of what ultimate inference these "professionals" themselves might draw, were they sitting on the case without a jury) should they let the case be finally disposed of by the "tyros." Then whatever the jury does -and for whatever reasons- the judges can salve their consciences with the knowledge that the evidence could reasonably be interpreted to support the inference of either negligence or no negligence.
>
> In the Bennett case the four judges constituting the majority of the Illinois Supreme Court apparently were convinced that a miscarriage of justice would occur if a jury were permitted to conclude that the defendant's conduct in that case was actionable negligence. Another way of saying this is that they were convinced, as professionals and experienced jurists, that the defendant's conduct was not sub-standard conduct and that no group of laymen in the jury-box should be permitted to conclude otherwise. The three dissenting judges differed from them in only this respect - that, on the basis of their professional experience and observations, this conclusion was not so obvious. Their dissent did not necessarily mean that if they had been in the jury-box, or if they were acting as judges without a jury, they would have drawn the inference that the defendant was negligent. Far from it. All they meant was that they, as professional jurists, could not be sure that the inference of negligence would be unreasonable. Here was an honest difference of opinion among the professionals of last resort, distinguishable from the 5-4 decision of the United States Supreme Court only by the fact that this evaluation process occurred at a relatively uncomplicated and lowly level -one not charged with grave social and political considerations.

Charles 0. Gregory, Breach of Criminal Licensing Statutes in Civil Litigation, 36 CORNELL LAW QUARTERLY 622, 623-25 (1951). See also LEON GREEN, JUDGE AND JURY 350-417 (1930); Leon Green, The Submission of Issues in Negligence Cases, 18 UNIVERSITY OF MIAMI LAW REVIEW 30 (1963); RESTATEMENT (SECOND) TORTS§§ 3288, 328C.

## 2. STATUTES

NOTES

(1) **Statutes and negligence**: A statute may be relevant to the decision in a common law tort action for negligence in a variety of ways. For example, a statute might create a cause of action by imposing a duty on a class of people to behave in a certain way toward another class of people, it might preclude certain types of recovery, or it might limit damages. Sometimes the role of a statute is less clear cut. Recall *Stevens v. Fleming*, the statute in the first chapter of these materials that introduced negligence. One issue in that case was what role the Uniform Fire Code should play in the case since it was not applicable to the building involved. Did its formal inapplicability make the statute irrelevant to the case? Was it evidence of what a reasonable person might have done when they remodeled the structure? Of the type of changes that might have been made that would have made the structure safer? Of the "the burdens associated with undertaking a particular caution," as the court phrased one side of the balancing test?

This section is concerned with the use of statutes to particularize the standard of care that is, to specify what a reasonable person would do in a particular situation. There are two situations in which statutes are relevant to determining the standard of care.

(2) Statutes explicitly creating a cause of action: The legislature may explicitly provide for civil liability for the violation of a statutory standard. For example, an early Idaho statute provided:

> A bell of at least twenty pounds weight must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road or highway, and be kept ringing until it has crossed such street, road or highway ... under penalty of

> one hundred dollars for every neglect, to be paid by the corporation operating the railroad ....The railroad is also liable for all damages sustained by any person, and caused by its locomotives, trains, or cars, when the provisions of this section are not complied with.

(emphasis added).

In *Wheeler v. Oregon Railroad & Navigation Co*., 16 Idaho 375, 102 P.347 (1909), the court held that this statute "does not rest the liability for damages on the contingency that the injury sustained was the result of the failure to ring the bell ...but declares absolutely that where the bell is not rung ...and damages are sustained, the company is liable." Does this mean that the railroad is strictly liable?

The court continued its analysis of the statute by noting that it "must be conceded in this case that the defendant was guilty of negligence by failing to comply with the law of this state in ringing a bell ...at the time of approaching the crossing where the accident occurred, and is liable in this case for the injury, unless it appears that the injury received by the plaintiffs child was the result of contributory negligence." See also *Wallace v. Oregon Short Une R.R*., 16 Idaho 103, 100 P. 904 (1909) (statute providing that the killing or maiming of any domestic livestock by a railroad is prima facie evidence of negligence).

The court has recently described such statutes:

> We have held that a statute that recognizes the right to recover damages for negligence cannot be the basis of a negligence per se claim. In Stott ex rei. *Dougall v. Finney*, 130 Idaho 894,896,950 P.2d 709,711 (1997), the plaintiff brought an action to recover damages for injury to her real property allegedly caused by the failure of an earthen dam constructed by the defendants on their property. On an appeal from a jury verdict on behalf of the defendants, the plaintiff contended that the trial court erred by failing to give a negligence per se instruction based upon Idaho Code § 42-1204. That statute provides that the "owners or constructors of ditches, canals, works or other aqueducts ...must carefully keep and maintain the same ...in good repair and condition, so as not to damage or in any way injure the property or premises of others." In upholding the district court, we held, "I.C. § 42-1204 does not create a negligence per se action, but only codifies that ditch owners and constructors can be held liable for damages occurring to others as a result of negligence." 130 Idaho at 896, 950 P.2d at 711. Similarly, a statute that creates a civil cause of action cannot be the basis of a negligence per se claim. The statute creating the cause of action defines the conduct constituting the tort and the applicable standard of care.

*Steed v. Grand Teton Council of the Boy Scouts of America*, 144 Idaho 1123, 172 P.3d 1123 (2007).

(3) Statutes that particularize the standard of care: the doctrine of negligence per se: The term "negligence per se" has come to mean the use of a statute to particularize the standard of care. Before it became a term of art, however, it simply referred to negligence that was obvious:

> Where the danger is exceedingly small and trivial, it may not be negligent at all to disregard it. Where it is exceedingly great and obvious, it would be negligence per se to incur the hazard .... In other cases, it would be open to question whether incurring the hazard would be consistent with ordinary care, and in cases of this kind the question of ... negligence is one for the determination of the jury.

*Carson v. City of Genesee*, 9 Idaho 244, 250, 74 P. 862, 863 (1903) (quoting *Samples v. City of Atlanta*, 95 Ga. 110,22 S.E. 135, 136 (1894)).

(4) Administrative regulations and municipal ordinances: In addition to statutes that have been enacted by the legislature, the negligence per se doctrine is applicable to "[r]egulations and orders enacted by administrative authorities pursuant to statutory authority having the force and effect of law." *Anderson v. Blackfoot Livestock Commission Co*.,85 Idaho 64, 375 P.2d704 (1962) (state agency's regulation). See also *Walton v. Potlatch Corp*., 116 Idaho 892, 781 P.2d 229 (1989); *Arrington v. Arrington Brothers Construction, Inc*., 116 Idaho 887, 781 P.2d 224 (1989); *Sanchez v. Galey*, 112 Idaho 609, 733 P.2d 1234 (1987) (relying a federal OSHA regulation). The doctrine is also applicable to city or

county ordinances. *Stephens v. Stearns*, 106 Idaho 249, 678 P.2d 41 (1984) (building code enacted as city ordinance).

(5) Statutes that are the basis of negligence per se-the statutory purpose doctrine: Generally, the legislature will enact a penal statute and say nothing about its effect on civil liability. Should the fact that one party to a tort action has violated such a statute (and therefore is subject to potential penal sanctions) have any bearing on the tort suit?

Penal statutes are a determination by the highest lawmaking body that certain conduct is so socially unacceptable that it should be illegal. In some situations, this legislative conclusion seems relevant to the determination that must be made in assessing civil liability for allegedly negligent conduct. For example, driving a vehicle after dark without lights violates a statute and is subject to penalties; it also seems relevant to the question of what a reasonable person would do under the circumstances, other penal statutes seem inapplicable. The violation of a statute prohibiting driving on Sundays, for example, does not seem relevant to the question of what a reasonable person would do because the no driving-on-Sunday statute was intended to accomplish goals other than making roads safe.

To assist in making decisions on which statutes should be used in negligence actions in a principled manner, the courts have developed an analytical schema known as the statutory purpose doctrine. In Idaho, the doctrine requires:

> Several criteria [to] be met before negligence as a matter of law will be found [in the violation of a statute or regulation]. First, the statute or regulation must clearly define the required standard of conduct, *Brizendine v. Nampa & Meridian Irrigation District*, 97 Idaho 580, 548 P.2d 831 (1976); second, the statute or regulation must have been intended to prevent the type of harm defendant's act or omission caused, *Stephens v. Stearns*, 106 Idaho 249, 678 P.2d 41 (1984);third, the plaintiff must be a member of the class of persons the statute or regulation was designed to protect, Stephens; and fourth, the violation must have been a proximate cause of the injury, *Leliefeld v. Johnson*, 104 ldaho 357, 659 P.2d 111 (1983).

*Sanchez v. Galey*, 112 Idaho 609,733 P.2d 1234 (1987). *See also Kinney v. Smith*, 95 Idaho 328, 508 P.2d 1234 (1973).

(a) The elements of the statutory purpose doctrine- the type of statute: There is a threshold consideration that the court did not note -perhaps because it was too obvious: since torts are focused on safety, a statute that is not concerned with health or safety is not relevant to a determination that a defendant breached her duty by failing to act as a reasonable person would have acted. This is the no-driving-on-Sunday statute.

Although the Idaho's traditional statement of the elements of the doctrine does not include consideration of the type of statute, the court has recognized that the statute must be a health or safety statute. In *Griffith v. Schmidt*, the court noted in passing that "the maximum speed contained in I.C. § 49-681 which states, '[N]o person shall drive a vehicle at a speed in excess of such maximum limits:*** (b) Fifty-five (55) miles per hour in other locations [outside urban districts],' is a safety statute and the violation of this positive inhibition is negligence per se." *Griffith v. Schmidt*, 110 Idaho 235, 715 P.2d 905 (1986).

(b) The elements of the statutory purpose doctrine- conduct as conduct: The role second element- the requirement that the statute "clearly define the required standard of conduct"- is to ensure that the statute is more specific than the general standard of care. If the statute says only that the actor must be reasonably careful, it adds nothing to the jury's evaluation of the breach element. This issue has been examined in several cases.

> (i) *Brizendine v. Nampa Meridian Irrigation District*: landowners brought a negligence action for damages resulting from flooding caused by a break in the defendant's canal. On appeal, the defendant contended that the trial court erred by imposing negligence per se for violating a statute which provided that an irrigation district "must carefully keep and maintain ... its

canals] in good repair and condition, so as not to injure the property or premises of others." The court agreed:

> A standard of conduct may be defined by legislation or administrative regulation.... Proof of a violation of a statute which defines a standard of conduct may establish negligence per se. That is, proof of an unexcused violation of a statute, if the statute is designed to protect the plaintiffs class against the harm incurred, is conclusive on the issue of negligence.... However, I.C. § 42-1204 defines the duty owed by an irrigation district, no[t]the standard of care by which the trier of fact determines whether the defendant has breached his duty.... I.C. § 42-1204 imposes a duty to "carefully keep and maintain [canal banks] in good repair and condition"; the statute does not define a standard of care by which the trier of fact may determine whether a defendant has failed to "carefully keep and repair" its canal banks.

*Brizendine v. Nampa Meridian Irrigation District*, 97 Idaho 580, 548 P.2d80 (1976). What might the statute have included if it were to have been the source of a particular standard of care?

> (ii) *Johnson v. Emerson*: For a case that fails to recognize this principle, see *Johnson v. Emerson*, 103 Idaho 350,647 P.2d 806 (Ct. App. 1982) (holding that the state's "general rule" statute -"No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing" - would serve as the basis of a negligence per se instruction).
>
> (iii) Ambiguous statutes: lf the statute does not specify the conduct that is required, then it does not assist in particularizing the general, due-care-under-the circumstances standard. As the court noted in *Easterbrook*, "to constitute negligence as a matter of law, a statute or regulation must clearly define the required standard of conduct." For example, in *Ahles v. Tabor*, 136 Idaho 393, 396, 34 P.3d 1076, 1079 (2001), the statute did not provide a clear standard of because the statutory distinction between "roadway" and "highway" "cannot be easily ascertained, contributing to the vagueness of the standard of conduct expressed therein."

(c) The elements of the statutory purpose doctrine- type of risk: An example of the third element- the requirement that the statute be intended to prevent the type of risk that defendant's conduct entailed- is found in *Stephens v. Stearns*, 106 Idaho 249, 678 P.2d 41 (1984). Plaintiff was injured when she fell on a stairway in her apartment. The stairway lacked a handrail as required by the Uniform Building Code, which had been adopted by a Boise ordinance. The code requirement for handrails was intended to reduce the risk of falls.

In contrast, a statute that makes it a misdemeanor to tamper with an electric meter should not have been used as the basis for e negligence per se instruction since it was intended to prevent the theft of electric service rather than injury resulting from electrocution. *Orthman v. Idaho Power Co*., 134 Idaho 598,7 P.3d 207 (2000).

Similarly, in *Jones v. Starnes*, 150 Idaho 257, 245 P.3d 1009 (2011), the court held that a city ordinance requiring abutting landowners to "keep the sidewalk ...free and clear from snow, wood, leaves, weeds, litter, debris, or other obstructions or impediments of whatsoever kind" did not apply to groups of people who were fighting outside a bar.

(d) The elements of the statutory purpose doctrine - class of interests:

Statutes are generally given a broad construction in determining whether the plaintiff fall within the class of interests that the statute seeks to protect. For example, in *Arrington v. Arrington Brothers Construction, Inc*., 116 Idaho 887, 781 P.2d 224(1989), the court held that, "[s]ince the Occupational Safety and Health Act is remedial legislation, and preventative in nature, the Act must be construed liberally in favor of workers whom it was designed to protect."

Similarly, in *Stephens v. Stearns*, plaintiff was injured when she fell on a stairway that lacked a handrail as required by the applicable building code. In upholding a negligence per se instruction, the court noted that "the ordinance in question was designed to protect users of stairways." *Stephens v. Stearns*, 106 Idaho 249, 678 P.2d 41 (1984).

In *O'Guin v. Bingham County*, 142 Idaho 49, 122 P.3d 308 (2005), the court held that a state regulation requiring municipal solid waste facilities to prevent access to the facilities by unauthorized persons was applicable in a case arising from the death of two trespassing children.

(6) "Causation" and "clarity": The court's enumeration of the elements of negligence per se in *Sanchez v. Galey* concludes with the requirement that "the violation [of the statute] must have been a proximate cause of the injury." The statement is superfluous if the court means that the defendant's breach must be the "proximate" cause of the injury before a defendant can be held liable because the statement simply restates the third (cause in fact) and fourth (scope of liability) elements of the prima facie case for negligence. In other cases, the court has focused on whether the statute "clearly define[s] the required standard of conduct" when it does not mean that the statute cannot be ambiguous as discussed in note (5)(b)(iii) above. For example, the court in *Stem v. Prouty* blended both phrases, noting that Prouty argued that "because site engineering is not clearly defined as required in the state, Stem cannot show that failure to obtain a building permit was the proximate cause of the accident." The facts of these cases, however, suggests that rather than causation or clarity the court's concern is the non-mandatory nature of the statute.

Stem worked for a company (Custom Rock Tops) that rented part of a commercial building from Prouty. When Prouty had purchased the building, he added a third overhead door to improve forklift access to the rented premises. Stem was helping to load a forklift when its driver back it over a water meter cover broke under the weight of the forklift. The forklift tipped over, pinning Stem to the ground and resulting in the amputation of his right leg. Stem sued Prouty alleging that the premises was unsafe because the cover was not designed to be used the type of area in which the accident occurred. He argued inter alia that Prouty had been negligent per se: he had failed to obtain a building permit when he added the third overhead door and, had he done so, "site engineering would have occurred, which would have revealed the inadequacy of the water meter covers on the Premises, and Prouty would have been require to replace the meter covers before his application could be approved by Garden City, thereby preventing Stem's accident." The court rejected Stem's argument because "site engineering is a discretionary matter. The applicable building codes requiring a building permit do not mandate site engineering .... This Court finds that Stem cannot prove the elements of negligence per se because the site engineering is not a clearly defined requirement of the building codes." *Stem v. Prouty*, 152 Idaho 590, 272 P.3d 562 (2012). *See also Easterbrook v. State*, 863 P.2d 349, 124 Idaho 680 (1993) (a non-mandatory statute cannot be the basis for negligence per se); *Lawton v. City of Pocatello*, 126 Idaho 454, 886 P.2d330 (1994) (same). But *see Munns v. Swift Transportation Co*., 138 Idaho 108, 111, 58 P.3d 92, 95 (2002).

(7) Excuses for noncompliance: Are there situations when the violation of a relevant statute may be excused?

(a) *Bale v. Penyman*: The Idaho Supreme Court offered a list of justifications for not complying with a statute

> It is generally held that in civil actions for damages, where injury occurs as a proximate result of a violation of a statute enacted for the protection of motorists, such violation constitutes negligence per se. []It must be recognized that certain circumstances furnish an excuse or justification for the negligence presumed to arise on proof of violation of a statute or ordinance .Such circumstances may generally be classified in four categories: (1) Anything that would make compliance with the statute impossible; (2)Anything over which the driver has no control which places his car in a position violative of the statute; (3) An emergency not of the

> driver's own making by reason of which he fails to obey the statute; (4) An excuse specifically provided by statute. [)

*Bale v. Perryman*, 85 Idaho 435, 380 P.2d 501 (1963). *See also Ricketts v. Eastern Idaho Equipment Co.*, 137 Idaho 578, 51 P.3d 392 (2002) (statute provided an exception for a vehicle "disabled in such a manner and to an extent that itis impossible to avoid stopping and temporarily leaving the vehicle"); *Chard v. Bowen*, 91 Idaho 521, 427 P.2d 568 (1967) (statutory violation excused where it resulted from "exigencies of traffic beyond the control of the driver"); *Hamilton v. Carpenter*, 49 Idaho 629, 290 P. 724 (1930) (a "reasonable attempt" to avoid a collision with an oncoming vehicle justified crossing the center line).

How would *Tedla* be decided in Idaho? Does it fit within any of the exceptions specified by the Court? *See Hooker v. Schuler*, 45 Idaho 83, 260 P. 1027 (1927) (essentially the same facts as *Tedla*).

(b) ***Nettleton v. Thompson***: An invitee brought a negligence action against homeowners for damages allegedly resulting from a fall on an unsafe stairway. The invitee claimed that the homeowners' failure to comply with the Uniform Building Code (USC) was negligence per se. The district court had held the failure excused by the homeowner's ignorance of the code requirements. The court of appeals began its analysis by noting that,

> [b]ecause of the potentially harsh results which may flow from application of this doctrine, the Idaho Supreme Court has recognized that an excused violation of a law does not constitute negligence per se. See State ex rei. *McKinney v. Richardson*, 76 Idaho 9,277 P.2d 272 (1954); []. The Court's recognition of this principle thus creates a rebuttable presumption of negligence per se for violation of a law in the absence of excuse or justification. [) The burden of proving excuse of a violation rests with the violator .... cf. *Bale v. Perryman*, 85 Idaho 435, 380 P.2d 501 (1963) (violation may be explained by defendant showing conduct was excusable).

The defendants argued that their ignorance of UBC requirements constituted an excuse. The court disagreed:

> Generally, a defendant may establish excuse or justification for violation of a statute or ordinance if the defendant's conduct could nevertheless be said to fall within the standard of reasonable care under the circumstances. See ...*Nichols v. Sonneman*, 91 Idaho 199, 418 P.2d 562 (1966); *Bale v. Perryman*, 85 Idaho 435, 380 P.2d 501 (1963).
>
> Furthermore, whether a defendant's per se negligence is excused is a question for the jury to decide. *Stephens v. Stearns*, 106 Idaho 249, 678 P.2d 41 (1984). We agree with these standards. However, the decisions of the Idaho Supreme Court indicate that, in order to warrant an excuse instruction, the defendant must establish that his or her conduct was objectively reasonable under the circumstances. For instance, in *Bale v. Perryman*, the plaintiff brought an action to recover damages incurred in a motor vehicle accident in which he attempted to pass a truck driven by the defendant. In determining that the plaintiff was negligent per se, the Court found that the only evidence presented by the plaintiff to show that his negligent driving should be excused was his subjective belief that the other driver would not tum into his line of travel. []
>
> Implicit in all these decisions is the notion that proof of excuse must be established by more than the violator's ignorance of the law or the violator's subjective belief that his or her conduct was in accord with a reasonable standard of behavior. Rather, these decisions indicate that excuse can only be established by evidence that the individual had an objectively reasonable explanation for violating the law. This reasoning is persuasive; it would be incongruous to permit an alleged tortfeasor to subjectively define the scope or extent of the duty owed under the law. Judge Burnett specially concurred:
>
> I write separately to emphasize that negligence per se is not a doctrine of absolute liability. It differs from common law negligence only insofar as it replaces a general duty of reasonable care with a more specific duty of obedience to a legislative command. As noted in the

> lead opinion, negligence per se is subject to exceptions where performance is impossible, or nonperformance is otherwise justified. Thus, an exception might exist where a defendant has no actual or imputed knowledge of the facts invoking application of a legislative standard. In this case, however, the Thompsons had actual or imputed knowledge of the variations in stair width and the lack of a stair handrail in their home. These facts were discernible, and they invoked application of the Uniform Building Code, as adopted by the municipal ordinance.

*Nettleton v. Thompson*, 117 Idaho 308, 787 P.2d 294 (Ct. App. 1990).

(c) *Teply v. Lincoln*: Plaintiffs were injured when defendant's vehicle slid across the centerline of the highway and struck their automobile. Defendant testified that the pickup's rear end had begun to slide on the slick road without warning and that he had not been able to stay on his side of the highway. Over plaintiff's objections, the trial court had instructed the jury that

> A violation of a statute is negligence unless compliance with the statute was impossible or something over which the party had no control placed him in a position of violation of a statute or an emergency not of the party's own making caused him to fail to obey the statute.

Noting that the only evidence offered to explain defendant's violation of the statute requiring approaching drivers to pass one another on the right was the icy conditions of the road, the court of appeals reversed a jury verdict for defendant: "we hold that the evidence of icy roads in this case was insufficient, as a matter of law, to excuse [defendant's] statutory violations." *Teply v. Uncoln*, 125 Idaho 773, 874 P.2d 584 (Ct. App. 1994). See also *Haakonstad v. Hoff*, 94 Idaho 300,486 P.2d 1013 (1971).

(8) IDJI 2.22 -Violation of statute or ordinance - negligence per se

> There was a certain statute in force in the state of Idaho at the time of the of the occurrence in question which provided that:
>
> [quote or paraphrase the applicable statute.]
>
> A violation of the statute is negligence, [unless (compliance with the statute was impossible) (or) (something over which the party had no control placed the individual in a position of violation of the statute) (or) (an emergency, not of the party's own making, caused the individual to fail to obey the statute) (or) (an excuse specifically provided for within the statute existed)].
>
> Comment: Change the term "statute" to "ordinance" as required. *See Sanchez v. Galey*, 112 Idaho 609 (1987), on issue whether violation of administrative regulation may constitute negligence per se.

(9) Effect of satisfying the statutory purpose doctrine --judge and jury functions: What is the role of the judge and jury when there is a violation of a relevant statute? Is the jury still required to determine the reasonableness of the defendant's conduct?

In *Walton v. Potlatch Corporation*, the Idaho Supreme Court held that OSHA regulations could provide the basis for a negligence per se instruction to the jury. Justice Bakes dissented:

> Furthermore, the effect of a negligence per se instruction is to deprive a litigant of his right to a jury trial on the question of the reasonableness of his conduct which is the subject of the negligence per se instruction. Thus, two essential elements of a prima facie negligence case - duty and breach - are "taken away from the jury." [] By such a negligence per se instruction the jury, in effect, is directed not to consider the reasonableness of the person's acts, the court having concluded that by violating a "positive statutory prohibition" the person's conduct is unreasonable, and therefore negligent, as a matter of law. Given the strong public policy in favor of jury trials, as rooted in Art. 1, § 7, of the Idaho Constitution, negligence per se instructions should only be approved where a party has clearly violated a positive statutory prohibition....[B]y an over-expansive application of the doctrine of negligence per se ...Potlatch's right to trial by jury

> on the reasonableness of its conduct has been denied, I believe in violation of Art. 1, § 7, of the Idaho Constitution. *Steed v. Young*, 115 Idaho 247,766 P.2d 717 (1988).

*Walton v. Potlatch Corp*., 116 Idaho 892, 781 P.2d 229 (1989) (Bakes, J., dissenting).

Article I, § 7 of the Idaho Constitution provides:

> The right of trial by jury shall remain inviolate; but in civil actions, three-fourths of the jury may render a verdict, and the legislature may provide that in all cases of misdemeanors five-sixths of the jury may render a verdict. A trial by jury may be waived in all criminal cases not amounting to felony, by the consent of both parties, expressed in open court, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions the jury may consist of twelve or any number less than twelve upon which the parties may agree in open court. Provided, that in cases of misdemeanor and in civil actions within the jurisdiction of any court inferior to the district court or in district court, the jury shall consist of not more than six.

There are two very different problems with Justice Bakes' argument. First, does his argument claim too much? That is, is a negligence per se instruction ever permissible if one accepts Bakes' argument? Second, and alternatively, is he simply incorrect? That is, does the Idaho Constitution guarantee a party a jury determination of all elements of a prima facie case?

Is it sufficient that the jury is required to determine whether the defendant violated the statute, or must the jury also determine that the statutory violation was unreasonable?

(10) Effect of not satisfying the statutory purpose doctrine: A statute that does not satisfy the elements of the statutory purpose doctrine is not negligence per se. It may, nonetheless, still be relevant to the question of the appropriate standard of care in other ways. For example, an ordinance that did not apply to a particular class of persons might still be useful in determining what is reasonable. Thus, although city ordinances generally do not apply to the state, a city building code might be useful in demonstrating what a reasonable builder would have done. *See Caesar v. State*, 101 Idaho 158, 610 P.2d 517 (1980) (Bistline, J., dissenting). Similarly, the fact that state transportation department regulations were not mandatory means that the regulations will not serve as the basis for a negligence per se instruction but does not prohibit their introduction on the general question of the reasonableness defendant's conduct. *Tomich v. City of Pocatello*, 127 Idaho 394,901 P.2d 501 (1995). What role might the Uniform Fire Code play in the *Steven v. Fleming* [chapter 1]? Did its formal inapplicability make the code irrelevant to the case? Was it evidence of what a reasonable person might have done when they remodeled the structure? Of the type of changes that might have been made that would have made the structure safer?

(11) Legislative preclusion of the use of a statutory standard -*Griffith v. Schmidt*: Just as a legislature may specifically provide that a statute creates liability in a common-law tort action, so it may preclude the use of a statute in a tort suit. Sometimes the legislature's actions are ambiguous. In 1977, the legislature re-codified the motor vehicle statutes. The recodification included I.C. § 49-686(2) which provides that violation of maximum speed limitations "shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence on the part of the defendant as the proximate cause of an accident." Prior to 1977, former I.C. § 49-701 contained maximum speed limits and specifically set out that the violation of the maximum speed limit was prima facie evidence that the speed was not reasonable or prudent. The court had repeatedly interpreted this provision to create a rebuttable presumption of negligence. Did the change in statutory language that accompanied the recodification change the effect of the statute?

In *Griffith v. Schmidt*, while there was a dispute on the plaintiff's speed, the evidence was uncontroverted that she was exceeding the posted speed limit of 55 m.p.h. at the time of the collision. She argued that the change in the statute's language was intended to abrogate the common law that violation of the maximum speed limit is negligence per se. This argument was accepted by the trial court when refusing to instruct the jury that plaintiffs excessive speed constituted negligence. The Idaho Supreme Court disagreed:

> We are persuaded that the maximum speed contained in I.C. § 49-681 which states, "[N]o person shall drive a vehicle at a speed in excess of such maximum limits: * * * (b) Fifty- five (55) miles per hour in other locations [outside urban districts]," is a safety statute and the violation of this positive inhibition is negligence per se. []We [also hold]that a plaintiff in a civil action is not relieved from proving proximate cause even though the negligence found is a result of the violation of the maximum speed limits set out in I.C. § 49-681. In the present case the evidence was uncontroverted that plaintiff was exceeding the maximum speed limit of 55 m.p.h. Therefore, the trial court erred in refusing to instruct the jury that plaintiffs speed constituted negligence as a matter of law. Only the issue of whether such negligence proximately caused the accident should have been submitted to the jury.

*Griffith v. Schmidt*, 110 Idaho 235, 715 P.2d 905 (1986).

(12) Compliance with statutory requirements: Thus far the materials have focused on noncompliance with a statute. Should compliance with a statute be relevant?

(a) *Farris v. Union Pacific Railroad*: A mother and her three children were killed when their automobile was struck by defendant's train. Decedent's heirs brought a wrongful death action, contending in part that defendant had failed to install warning devices at the crossing beyond those required by statute or other regulations. The railroad was granted summary judgment on its claim that it had complied with all relevant statutory and regulatory standards and that compliance with these standards precluded the imposition of common law liability. Noting that the United States Supreme Court had held in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), that the federal regulatory standards did not preempt state tort law, the Idaho Court of Appeals turned to the state statute, which provided that

> Nothing in this subsection [mandating the erection of stop signs at grade crossings] shall be construed as granting immunity to any railroad company as to liability, if any, for an accident which might occur at a crossing where stop signs are erected and in place, but liability shall be determined as provided by law.

Relying upon this explicit statement, the court held that traditional negligence principles governed the railroad's potential liability. *Farris v. Union Pacific R.R*., 124 Idaho 932, 866 P.2d 189 (Ct. App. 1993).

(b) *Probart v. Idaho Power Co*.: At the time he died, Gerald Probart, a crane operator, and a third employee were moving a35foot long steel beam from one side of a building onto Balsam Street, underneath a transmission line, and onto Pole Line Road. Probart was steadying one end of the beam when the boom came into contact with the high voltage transmission line; he was electrocuted. Plaintiff alleged that the power company was negligent in failing to have its lines a sufficient distance above the roadway and in failing to insulate the transmission lines. Alternatively, plaintiff alleged that the conditions at the site of the accident had changed thus rendering the lines unsafe. The area where the accident occurred had been developed as an industrial and urban residential district the appellants uninsulated high voltage transmission line carried 12,500 volts; the line was at least 21 feet, 9 inches above the ground at the site of the accident. The jury returned a verdict for plaintiff in the sum of $50,200. Defendant appealed, contending that it had complied with a detailed safety code established by the United States Department of Commerce, National Bureau of Standards. The code had been adopted by the Idaho Public Utilities Commission. The Idaho Supreme Court reversed, holding that

> Where a safety code is adopted by the state and constitutes a guide for electric companies, the construction and maintenance of a line in accordance with such code, constitutes prima facie evidence of the absence of negligence. []
>
> .... In order for the [plaintiffs] to prevail, they must go farther and prove some actionable negligence on the part of the company. In this respect the only further evidence submitted related to the building activity generally throughout Pocatello and vicinity; that in recent years many building contractors had resorted to the use of cranes and derricks of various sizes and heights and that such machinery had been operated over and along the streets and highways and used in the construction of various buildings. Such contractors in the movement of their machines over

> and along the streets and highways always lowered the boom except when such machinery was used to move material and that when so used, with two exceptions, no contact with the wires of the company was had; on the two occasions contact was made no injury or damage resulted and no report was ever made to the company and it did not otherwise have knowledge of such instance; this is the only additional evidence in the record which it is asserted constitutes active negligence on the part of the company because it failed to anticipate and meet the particular hazard even though it had met the minimum standards of due care with reference to the construction and maintenance of such lines by compliance with the requirements of the order of the Public Utilities Commission in every respect.
>
> The burden was on respondents to show the negligent character of the failure to either insulate the wires or to place them at a greater height; neither the failure to insulate nor to place such wires at a height in excess of 20 feet warrants a presumption or an inference of negligence; unless there is a showing of negligence in some other respect, no issue of negligence is raised ....

*Probart v. Idaho Power Co*., 74 Idaho 119, 258 P.2d 351 (1953). Should compliance with a statute constitute non-negligence per se? Should compliance be relevant? What effect should compliance with a statute have?

Is there a difference between a statute that requires specified conduct and one that merely allows that conduct? Ought the two statutes to be treated differently? See, e.g., *Wilson v. Piper Aircraft Corp*., 282 Or. 61, 577 P.2d 1322 (1978).

(c) *Fleenor v. Oregon Short Line R.R*.: Plaintiff sought to recover for the death of her husband who was struck by defendant's train as he crossed the tracks in Nampa. On appeal from a jury verdict for plaintiff, the defendant

> complains of the action of the court in allowing evidence to be introduced showing that the railroad company did not provide a flagman or any gates for the F street crossing.... No ordinance of the city of Nampa was shown requiring any such thing, but the fact that the city had no ordinance requiring the railroad company to maintain gates or station a flagman at this crossing would not relieve the company from the charge of negligence in failing to do so, if, in fact, the relative situations of the track and crossing and the extent of its use were such as reasonable care and diligence on the part of a reasonably prudent person would demand such precaution for the protection of the traveling public. []
>
> The question as to whether the railroad company was guilty of negligence in not maintaining gates at this crossing or keeping a flagman there was properly a question of fact to go to the jury, under all the circumstances of the case and the necessity and requirements of the peculiar use of this crossing and the extent of that use by the public. Such a duty rests upon a different principle from that of ringing a bell or blowing a whistle. The latter is required by positive mandate of the statute, and a failure to do so is negligence per se. *Wheeler v. Oregon Railroad & Navigation Co*., 16 Idaho 375, 102 P. 347 (1909). While the duty to maintain gates and keep a flagman at a crossing is not enjoined by statute and under some, and perhaps ordinary, circumstances is not required as an act of due diligence and reasonable precaution, still under other facts and a different situation a failure to do so would constitute negligence at common law, irrespective of statutory requirement. []

*Fleenor v. Oregon Short Line R.R*., 16 Idaho 781,102 P.897 (1909). Why is compliance with the law generally not dispositive of the breach issue? Should defendant be allowed to prove that she was driving the speed limit and thus was not negligent as a matter of law despite the fact that the road was a sheet of ice? Cf. *Chatterton v. Pocatello Post*, 70 Idaho 480,223 P.2d 389 (1950) ("Negligence cannot be predicated on a compliance with the law").

# [C] PROOF PROBLEMS

## 1. GENERAL CONCERNS

### McDONALD v. SAFEWAY STORES, INC.

Supreme Court of Idaho
109 Idaho 305, 707 P.2d 416 (1985)

HUNTLEY, J.- On April17, 1981, at approximately 1:00 p.m., Alta McDonald entered a Twin Falls Safeway Store to make a purchase. As she walked down the aisle, her foot went out from under her and she fell, landing on her right hip.

Safeway had been conducting an ice cream demonstration since 10:00a.m. that day. The substance that Mrs. McDonald slipped on was cream colored and appeared to be melted ice cream. As a result of the fall, Mrs. McDonald suffered severe injuries, requiring the replacement of a total hip transplant which she had received shortly before the fall. Thereafter, Alta McDonald brought the action for damages for injuries she had sustained, her husband joining with a claim for loss of consortium, services, care, comfort and companionship. A jury trial resulted in a special verdict finding Safeway's negligence at 100% and awarding Alta McDonald damages of $196,000 and Donald McDonald damages of $35,000.

Safeway first assigns error to the trial court's denial of its motion for summary judgment, asserting that reasonable minds could not differ on the issue of whether the actions of the Safeway employees were reasonable under the circumstances. For reasons which follow we conclude that the trial court properly denied the motion.

The complaint alleged, in part:

> That on or about Friday, April17, 1981, at some time prior to plaintiff Alta McDonald's arrival at said store defendant negligently caused and/or permitted a slippery substance consisting of melted ice cream to be deposited and to remain on the floor of said store in a place allowed for the passage of plaintiff and other customers and shoppers.
>
> ***
>
> That defendant knew or reasonably should have known that slippery substances, including ice cream, would foreseeably be dropped by passing shoppers and would accumulate on the floor and would endanger the safety of persons walking on the floor. The melted ice cream had been dispensed negligently by the defendant and had been negligently allowed to remain on the floor for such a period of time immediately preceding the accident that persons of ordinary prudence in the position of defendant knew or reasonably should have known of the same, and in the exercise of ordinary care would have remedied the same, prior to the happening of the accident herein alleged. In spite of defendant's notice of the presence of the melted ice cream on the floor, defendant negligently failed and omitted to remove the slippery substance within a reasonable time and failed to take any precaution to prevent injury to plaintiff and other invitees that foreseeably would be injured. The accident and injury hereinafter alleged were proximately caused by the negligence of defendant in causing the ice cream to be dispensed in a manner in which it was foreseeable that it would cause injury to others, and in causing and permitting the melted ice cream to remain on said floor and in failing to take reasonable precautions to prevent injury to plaintiff or to warn of the dangerous, unfit or unsafe conditions.

In its memorandum opinion denying Safeway's motion for summary judgment, the trial court stated:

> In most supermarket slip and fall cases the plaintiff merely slips on an item or slick spot, the presence of which cannot be explained by anyone. Normally, the hazard exists during the normal business operation of the supermarket. Naturally, in those cases, the focus of attention is on the knowledge, actual or constructive, of the market that the hazard involved was on the floor.
>
> Here we have a substantially different situation. Three separate [sic] demos were being conducted on the premises of Safeway where food and napkins were being handed out to customers, including infants. This, giving plaintiff the benefit of all inferences, could have created an unreasonable risk of harm to people, even if the store had very efficient clean-up procedures. The mode of operation of the ice cream demo on a very busy Good Friday, combined with the abnormally large crowds and other demos, in and of itself could constitute an act of negligence on the part of defendant. It is also possible that Safeway should have taken super extraordinary supervisory precautions considering the mixture of ice cream and infants.
>
> A jury question is presented regarding Safeway's negligence.

Safeway argues that the McDonalds' claim of negligence was based on two distinct theories, the first being that the Safeway employees had actual or constructive knowledge of the dangerous condition and failed to remedy it and the second being that by permitting three separate demonstrations on a busy sales day and furnishing ice cream to infants, Safeway created a foreseeable risk of harm to its customers. Safeway contends that it was entitled to an order of summary judgment on the negligence claim regardless of the theory upon which the McDonalds relied.

Summary judgment is appropriate only where the pleadings, depositions and affidavits show that there is no genuine issue of material fact. Further, all facts and inferences must be construed in favor of the party opposing the motion. [] Clearly, as to the first theory of negligence, the record before the trial court permitted the reasonable inference that Safeway knew or should have known of the dangerous condition, that it had sufficient time to remedy the situation and that in the exercise of reasonable care, its employees should have cleaned the spill.

Safeway contends that Idaho law does not permit a plaintiff to recover under the second negligence theory, that is, negligent creation of a foreseeable risk of harm. That theory does not require that the owner or possessor of land have actual or constructive knowledge of the dangerous condition. Safeway insists that in dispensing with the knowledge requirement, the second theory is inconsistent with Idaho law regarding the liability of an owner or possessor of land for injuries to an invitee. In support of this proposition Safeway cites *Tommerup v. Albertson's, Inc*., 101 Idaho 1, 607 P.2d 1055 (1980), wherein we stated:

> The law is well settled in this state that to hold an owner or possessor of land liable for injuries to an invitee caused by a dangerous condition existing on the land, it must be shown that the owner or occupier knew, or by the existence of reasonable care, should have known of the existence of the dangerous condition.

In *Tommerup*, the plaintiff-appellant Mrs. Tommerup, had slipped and fallen on a cupcake wrapper which apparently had been discarded in the parking lot near the doorway of a grocery store. The record was devoid of evidence indicating that the condition which caused Mrs. Tommerup's injury was anything other than an isolated incident. In Tommerup, we distinguished the "isolated incident" situation from circumstances where an alleged tortfeasor is charged with having actively created a foreseeable risk of danger in its course of business, stating:

> Appellants cite *Jasko v. F.W. Woolworth Co*., [], in support of this argument. That case, however, is readily distinguished on its facts. In Jasko, the plaintiff was injured in the defendant’s store when she slipped on a slice of pizza which was on the terrazzo floor. An associate manager of the store testified that 500-1000 individuals per day purchased one or more slices of pizza at the pizza counter. There were no chairs or tables by the counter. Many customers stood in the aisle and ate the pizza from the wax paper sheets upon which they were served. When pizza was being consumed, porters "constantly" swept up debris from the floor.

> In reversing an order granting defendant's motion for summary judgment, the Colorado Supreme Court held defendant's method of selling pizza was one which led inescapably to such mishaps as that of the plaintiff, and in such a situation conventional notice requirement (i.e. actual or construction knowledge of the specific condition) need not be met.

The court there stated:

> The practice of extensive selling of slices of pizza on wax paper to customers [to] consume it while standing creates the reasonable probability that food would drop to the floor. Food on a terrazzo floor will create a dangerous condition. In such a situation, notice to the proprietor of the specific item on the floor need not be shown....

The court further stated:

> The mere presence of a slick or slippery spot on a floor does not in and of itself establish negligence, for this condition may arise temporarily in any place of business. [Citation omitted.] Nor does proof of a slippery floor, without more, give rise to an inference that the proprietor had knowledge of the condition. [Citation omitted.] But we are not dealing with an isolated incident. []

The facts of the instant case more closely approximate those of Jasko, than those of *Tommerup*. Certainly, the trial court could not have concluded as a matter of law that the presence of the ice cream on the floor was merely an isolated incident. Hence, it did not err in denying Safeway's motion for summary judgment.

DONALDSON, C.J., AND SHEPARD, BAKES, & BISTLINE, JJ., concur.

NOTES

(1) In *McDonald*, what was the basis upon which defendant was found to have breached its duty to plaintiff? Was plaintiff required to prove constructive or actual notice of the presence of the ice cream on the floor for an unreasonable length of time? What served as a substitute for such a requirement? Compare the approach of the McDonald court to that of the *Brooks* court.

(2) Professors Morris provide a handy list of what the plaintiff’s attorney must establish in order to get to the jury:

> (a) what defendant did or did not do, i.e., defendant's actual conduct;
> (b) how dangerous the conduct was;
> (c) defendant's opportunity to discover the danger;
> (d) the availability of safer alternatives;
> (e) defendant's opportunity to discover the safer alternatives;
> (f) that defendant's conduct fell short of the care required under the circumstances. CLARENCE MORRIS & C. ROBERT MORRIS, MORRIS ON TORTS 80 (2d ed. 1980).

The Morrisses preface their list with the statement that "[t}he substantive law of negligence points to the goals of proof of negligence." What are the substantive points which underlie each of the six points? In considering the cases in this and subsequent sections, determine which of these elements the plaintiff is having difficulty proving.

(3) ***Miller v. Village of Mullan***: Plaintiff fell and broke her leg when a board in the sidewalk broke as she stepped on it. The walk was quite old and was broken in places,

but no one claims that any holes or breaks were visible at the end or near where this board broke and Mrs. Miller received her injuries. After the accident it was discovered that the board was well rotted on the under side and that the sill or cross-piece on which the boards rested at this point was also rotten and had not been sufficient to support the board with the added weight of Mrs. Miller. No contention is made that there was any patent or visible defect in the crossing at the point where the injury occurred. The cause of action appears to have been prosecuted on the theory that the crossing contained a latent defect, namely, rotten and decayed boards and sills, which an ordinary pedestrian could not, and would not be expected to, discover, but which it was the duty of the village authorities to discover and repair. Itis not contended that the authorities had any actual notice of the defect at this place, but it is contended, and there is some evidence to support the contention, that this was an old crossing, and that it was somewhat decayed and out of repair toward the other end from where the accident occurred. Respondents insist that although this was a latent defect, the village authorities are chargeable with constructive notice of the same, and that their failure to have it repaired before this accident is negligence for which the municipality is liable.

Without negligence there can be no recovery. Negligence may arise out of a failure to act on actual and positive knowledge of a defect or danger in a street or sidewalk, or it may equally arise out of constructive knowledge on the part of the proper village or city authorities that a defect or danger exists.

Since it is not contended that the village had actual notice of the decayed and defective condition of the walk at the place where this injury was sustained, the recovery must be had, if at all, on the grounds of constructive notice. The walk was built prior to the incorporation of the village, but no contention is made that the walk was not properly constructed in the first place. In order to hold the village liable, it should be shown that the defect was so obvious or had existed for such a length of time as to indicate that the authorities knew of the danger and had known it a sufficient length of time to have repaired it. [] It is common knowledge that the board sidewalks used in the villages and most of the cities of this state will rot and decay in course of time, but the length of time in which they will become dangerous and unsafe is so indefinite and uncertain and subject to so many influences, either advancing or retarding the process of decay, that no reasonable estimate can be made as to the specific time at and after which a walk will become unsafe. Climatic conditions vary greatly indifferent localities and walks are also constructed in different ways. [] One walk might be fairly good after ten years' use, while another might become wholly unsafe in less time.

This kind of a case is clearly distinguishable from cases involving the duty to inspect and keep in safe condition coal-holes and trap-doors in sidewalks and bridges and culverts within the city limits. In these latter cases the nature of the place demands a higher degree of care and vigilance, and more frequent inspection than is required for the ordinary sidewalk or street crossing.

In the case at bar, many witnesses testified to passing over this crossing daily and that they had never noticed any defect at or near the place of the accident. Some said the walk as a whole was in fairly good condition, while others said it had holes in it and was in a decayed condition on the side of Pine street next to the electric light plant, and the cause for this was given as being on account of wagons crossing, principally on that side. It seems that teams could not cross on the side next to the candy store. The street commissioner testified that he inspected this crossing about one month prior to the accident and that it was in "very fair condition," and that he discovered no danger or defects.

If this court should hold that the municipalities of this state are chargeable with notice of the time when and conditions under which a wooden sidewalk or cross-walk ceases to be safe for pedestrians on account of age and use where no patent or obvious defect is apparent, it would subject them to a hazard, care and expense that but few of them could afford. [] If, on the contrary, a walk has been used for so long that it is in a general state and condition of decay and

> disrepair, and is allowed to remain in such condition, notice of such condition will be imputed to the municipality, and if so bad as to be dangerous, such failure to repair or improve it will become negligence. In order to impose liability in such case as this, the condition of the walk must be such that danger may reasonably be apprehended at any time, and therefore reasonable diligence and prudence would require that it be guarded against. []

*Miller v. Village of Mullan*, 17 Idaho 28, 104 P. 660 (1909). What must be foreseeable? How specific must the foreseeability of the danger be?

In *LeDeau*, the court states, "It is clear ... that the accident did not occur by reason of anything which the appellant or its agents or employees did." Might the same be said of the village in *Miller*? In both cases, defendant constructed something that plaintiff was using when injured. In neither case did plaintiff allege that the construction was itself faulty. Rather, plaintiff argued that defendant had a duty to act to protect plaintiff, whether as a result of the terrain in *LeDeau* or the passage of time in *Miller*. Should this affect the analysis of the breach issue?

(4) The ice cream that would not melt: The first trial in *McDonald v. Safeway* had resulted in a hung jury. At the end of the second trial, the attorney representing Mrs. McDonald began his closing argument to the jury by placing a small table in front of the jury box. On the table, he placed a clock and a thermometer. He put a paper plate on the table. He pulled out a sack, from which he removed a carton of the very brand of vanilla ice cream that had caused the injury to Mrs. McDonald. He opened the carton, removed a tablespoonful of ice cream and splattered it onto the paper plate. He then began his closing arguments. He never looked at the ice cream or the clock and never said anything about it. There was enough preservative in the ice cream that it had a consistency more like putty than ice cream. After more than an hour, the ice cream was still visibly solid on the plate. He finished and removed the table (still with the ice cream, clock and thermometer on it) and put it behind plaintiffs' counsel's table. The store's attorney argued for 30 or 45 minutes. When it was time for rebuttal, out came the table, with the ice cream still about as hard as it had been.

On appeal, the Idaho Supreme Court affirmed the verdict for plaintiff but noted, "We strongly admonish counsel against such antics and would order a declaration of mistrial but for the fact that a complete review of the record reflects that the effect and purpose of the experiment was only to establish that even a small chunk of ice cream requires an hour or two to melt at room temperature." McDonald v. Safeway Stores Inc., 109 Idaho 305, 707 P.2d416(1985). Are there appropriate alternatives for presenting the evidence to the jury?

**BROOKS V. WAL-MART STORES, INC.**
2018 WL 1872059

BEVAN, J.: This is an appeal from a grant of summary judgment dismissing an action originally brought by Diane Brooks ("Brooks") against Wal–Mart Stores, Inc., ("Wal–Mart") based on injuries Brooks received when she slipped and fell on a puddle of water near a Rug Doctor self-service kiosk (the "kiosk") inside the Wal–Mart on Overland Road in Boise, Idaho. Brooks bases her claims on premises liability and negligent mode of operation, alleging Wal–Mart knew or should have known that water could spill or leak onto the floor near the kiosk. Wal–Mart moved for summary judgment, arguing that Brooks failed to establish Wal–Mart had actual or constructive notice of the condition that caused her injury. This is because there was no evidence showing where the liquid came from, how long it had been on the floor, or what it was. The district court agreed. Because we find material issues of fact exist, we reverse the district court.

A. The rental process at Wal–Mart.

> In August 2011, Wal–Mart and Rug Doctor entered into a Vendor Agreement which allowed Rug Doctor to place its carpet cleaning machines into Wal–Mart stores and offer them for rent to Wal–Mart customers. Through the Vendor Agreement, Wal–Mart directs that the machines be offered to customers through an automated self-serve rental process which required no

involvement from Wal–Mart's employees. Thus, the process was self-serve and unsupervised. No Wal–Mart employee had a responsibility to interact with either Rug Doctor's account manager, Spencer Hinkle ("Hinkle"), or customers renting or returning Rug Doctor machines at the kiosk.

The machines are serviced approximately every two weeks by Hinkle. Hinkle testified that he serviced sixty-eight total accounts in the Treasure Valley, nine of which were Wal–Mart stores. The self-service mode of operation was utilized only at Wal–Mart; in all other locations a store employee was involved in the rent-and-return process.

Rug Doctor split the rental and cleaning product fees with Wal–Mart. In the typical arrangement with other stores, Hinkle would provide training to store employees who were involved in the rental and return process. Hinkle testified that he provided no training to the Overland Wal–Mart personnel, nor was he ever asked by anyone at that location to provide training. Thus, no employee was responsible to inspect the Rug Doctor machines to determine if they were clean or dirty upon return; no Wal–Mart employee was responsible to determine if a Rug Doctor machine still had liquid in it when rented or returned; and no Wal–Mart employee was responsible to inspect the Rug Doctor machines to determine if they leaked.

B. Wal–Mart's slip-and-fall policy

Wal–Mart adopted a slip-and-fall policy, entitled "Slip, Trip and Fall Guidelines" which was in place at the time Brooks fell. This policy required employees to keep an eye out for safety-type issues in areas they worked. Specifically, Wal–Mart's maintenance associates were tasked with the specific responsibility of performing "safety sweeps" of high traffic areas and cleaning up spills throughout the day. All other Wal–Mart associates were tasked with performing visual "safety-sweeps" as they performed their regular job duties in the areas they were assigned. Thus, Wal–Mart operated on a clean-as-you-go method with employees directed to observe and remove spills or other safety issues.

C. The accident

On July 24, 2013, Brooks went to Wal–Mart on Overland Road in Boise, Idaho to buy bags of wood chips for her yard. Brooks entered the store through the main doors on the east end of the store and asked a cashier for assistance. A cashier directed Brooks to Customer Service. Brooks proceed down the action alley—a high traffic area/aisle which runs perpendicular to the cash registers and connects the store's front two entrances—to Customer Service. A Wal–Mart employee then escorted Brooks back through the action aisle towards the garden center. While walking down the action alley, Brooks' left foot started to slide, she slipped, and ultimately fell in the area of the self-serve Rug Doctor and Primo Water kiosks. As a result of her fall, Brooks suffered an injury to her left knee that required surgery.

Prior to her fall, Brooks did not see any liquid on the floor. After her fall, Brooks saw the liquid and was lying in it while Wal–Mart employees were assisting her. Neither Brooks nor Wal–Mart employees could find the direct source of the liquid; however, in a subsequent investigation, Wal–Mart documented that Brooks slipped on a puddle of water that had apparently originated from the Rug Doctor kiosk.

Brooks' fall was captured on video. The surveillance video shows that approximately seven minutes before Brooks' fall, a Wal–Mart customer had rented a Rug Doctor machine and lifted it into a shopping cart. The video does not show liquid coming directly from the machine; however, that can be related to the quality of the video and glare on the flooring. The video does show the customer and another person tilting the machine back-and-forth while lifting it into a shopping cart. Brooks' fall was in nearly the precise location where the customer was tilting and moving the machine into the shopping cart.

The video also shows that a Wal–Mart employee and several customers travelled within the same area or path that Brooks travelled within the seven minutes after the Rug Doctor machine was rented before Brooks' fall. During this interval no customers reported any spills and no employees noticed the hazard.

D. Procedural Background

Brooks filed a complaint on November 19, 2014 alleging claims of negligence against Wal–Mart for failure to maintain the premises and to adequately warn Brooks of the dangerous condition. In an amended complaint filed on July 7, 2015, Brooks included a claim of negligent mode of operation against Wal–Mart, Rug Doctor, Inc., and Rug Doctor, LLC.

On March 2, 2016, Wal–Mart filed a motion for summary judgment seeking dismissal of Brooks' claims, arguing her allegations were based on speculation rather than objective evidence. Rug Doctor filed a similar motion on the same date. On April 11, 2016, the district court granted summary judgment in favor of Wal–Mart but denied the same relief to Rug Doctor. The court determined that Rug Doctor machines could leak or spill liquid onto the floor of the Wal–Mart store which would create a potentially dangerous condition, finding issues of fact remained as to whether it was foreseeable that a Rug Doctor machine could cause an injury, and whether Rug Doctor exercised its duty to use reasonable care to avoid Brooks' injury. The court also found that there were triable issues of fact as to whether it was reasonably foreseeable to Rug Doctor that the machine would or could leak or spill liquid during the self-serve rental process. The court, however, refused to apply these findings to Wal–Mart.

The court found Brooks failed to offer evidence that established Wal–Mart had actual or constructive notice of the dangerous condition and that the liquid on the floor near the kiosk was not a continuous or foreseeable condition. Brooks timely filed a motion for reconsideration on April 25, 2016, arguing that because the district court found reasonable minds could differ whether or not Rug Doctor's self-serve rental process could create a hazardous condition in her claim against Rug Doctor, then Wal–Mart, too, should be held liable for choosing the operating method and introducing the potentially hazardous rental process into its store. In its order denying reconsideration, the district court determined (1) that Brooks failed to present evidence that Wal–Mart was a direct and immediate cause of Brooks' injury; (2) that Wal–Mart did not breach the general duty of care; and (3) that Wal–Mart's decision to use the self-service model is not what caused the liquid to be on the floor. The district court dismissed Brooks' claims against Wal–Mart with prejudice on October 17, 2016. Brooks timely filed her notice of appeal.

**III. ANALYSIS**

A. Introduction.

A cause of action for common law negligence in Idaho has four elements: "(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual loss or damage." *Griffith v. JumpTime Meridian, LLC*, 161 Idaho 913, 915, 393 P.3d 573, 575 (2017) (internal quotations and citation omitted). In general, "[e]very person has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him, and to do his work, render services or use his property as to avoid such injury." *Stephens v. Stearns*, 106 Idaho 249, 256, 678 P.2d 41, 48 (1984) (internal quotations and citations omitted). Generally, "[w]hether a duty exists is a question of law." *Cumis Ins. Soc'y, Inc. v. Massey,* 155 Idaho 942, 948, 318 P.3d 932, 938 (2014).

When a negligence cause of action is based on premises liability, the element of duty depends on the status of the injured person in relation to the landowner, i.e., invitee, licensee (social guest), or trespasser. Shea, 156 Idaho at 548, 328 P.3d at 528 (citing *Peterson v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266, 1269 (1998)). An invitee is defined as one who enters the premises of another with the owner's express or implied consent for the mutual benefit of the

> entrant and the owner, or for a purpose connected with the business in which the owner is engaged. *Holzheimer v. Johannesen*, 125 Idaho 397, 400, 871 P.2d 814, 817 (1994).
>
> Wal–Mart concedes that Brooks had the status of an invitee on the Wal–Mart premises. Landowners are charged with a superior knowledge of their premises and the possible dangers located there, as compared with their invitees. *Antim v. Fred Meyer Stores, Inc*., 150 Idaho 774, 778, 251 P.3d 602, 606 (Ct. App. 2011). Traditionally, there are two kinds of duties a landowner owes to an invitee: "to keep the premises reasonably safe, and to warn of any concealed dangers which the landowner knows of or should have known of upon reasonable investigation. ..." *Stem v. Prouty*, 152 Idaho 590, 594, 272 P.3d 562, 566 (2012) (emphasis added) (citation omitted). Typically, a landowner's duty to keep the premises reasonably safe and to warn of hazards arises only when the landowner or occupier "knew, or by the exercise of reasonable care should have known, of the existence of the dangerous condition." *All v. Smith's Management Corp*., 109 Idaho 479, 481, 708 P.2d 884, 886 (1985) (citing *Tommerup v. Albertson's, Inc*., 101 Idaho 1, 607 P.2d 1055 (1980)).

B. The trial court erred in granting summary judgment where triable questions of fact existed.

> 1. A genuine issue of material fact exists whether or not Wal–Mart should have known of the existence of a dangerous condition by choosing a self-service operating method which required no employee involvement by Wal–Mart.
>
> The trial court found, both at summary judgment and when denying Brooks' motion for reconsideration, that Brooks had failed to establish that Wal–Mart should have known that the Rug Doctor kiosk created a dangerous condition. We disagree.
>
> The trial court analyzed the issue much like the trial court in *All v. Smith's Management Corp*., supra, where the court granted a directed verdict because the plaintiff failed to prove that the defendants "knew of the existence of the specific pothole into which she fell, or how long the pothole was in existence prior to the accident." 109 Idaho at 480–81, 708 P.2d at 885–86. This Court reversed the trial court's determination, holding that to establish a prima facie case against the owners and possessors of a parking lot, the plaintiff was only required to establish that the owners or possessors had actual or constructive notice of a foreseeable dangerous condition.

Similarly, the trial court here held:

> [T]here is no evidence that there was frequently or commonly water or other liquids on the floor near the Rug Doctor kiosk. Therefore, the dangerous condition which allegedly caused Plaintiff's injuries is an isolated incident.
>
> ... Plaintiff argues that Wal–Mart failed to acquire any knowledge with regard to potential hazards the Rug Doctor machines could cause. The Court does not find that this failure, taking all inferences in Plaintiff's favor, creates constructive knowledge of this hazardous condition. Because the Court is addressing an isolated event, Wal–Mart's constructive knowledge should match the event, not all possible events. Therefore, the fact that Wal–Mart did not make itself aware that Rug Doctor machines could leak does not impute to Wal–Mart the knowledge of the puddle in which plaintiff slipped.
>
> By focusing on Wal–Mart's lack of actual notice in this case, the court overlooked Wal–Mart's possible negligent conduct in purposefully failing to even inquire, in any way, regarding the Rug Doctor machines' potential to leak or otherwise create an unreasonable risk of harm to Wal–Mart's customers. Whether Wal–Mart should have exercised due care to familiarize itself of these risks in its chosen, self-service operation is a triable question of fact that the jury must resolve.

This Court previously made this point in Tommerup, wherein we stated:

"The owner is not an insurer of such (invitees) .... Nor is there any presumption of negligence on the part of an owner or occupier merely upon the showing that an injury has been sustained by one while rightfully upon the premises. The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. (*Mautino v. Sutter Hospital Association*, 211 Cal. 556, 296 P. 76 (1931))." *Martin v. Brown*, 56 Idaho at 382, 54 P.2d at 1158. (emphasis ours) [.]

Because the true ground of liability is the superior knowledge of the owner or possessor, we fail to see any justification for holding him liable for injury caused by defects about which he had no knowledge, when the lack of knowledge was not due to a failure by the owner or possessor to use ordinary care.
101 Idaho at 3–4, 607 P.2d at 1057–58 (emphasis added).

Thus, as a matter of law, Wal–Mart must possess "superior knowledge" of the operating methods utilized in its stores. As noted, the very purpose for the "true ground" of premises liability mandates that property owners not stick their heads in the sand and simply ignore potential risks to their customers. If that were the case, the superior knowledge which underpins premises law's standards would be merely an illusion. We decline to hold that landowners can purposefully choose to remain ignorant of potential hazards on their property.

As we pointed out above, Wal–Mart and Rug Doctor created an agreement which allowed Wal–Mart to profit from the rental of Rug Doctor machines in its premises, while at the same time failing to gain any knowledge whatsoever about the potential for the Rug Doctor machines to pose a hazard, through leaking water or other substances, to Wal–Mart's customers who traversed the busiest part of the store—the action alley.

On these facts the trial court denied summary judgment for Rug Doctor, finding that [w]hile there are many potential sources of the liquid on which Plaintiff slipped, the Court must take the inferences in Plaintiff's favor. ... This confluence of location, timing and the admission of leaking machines create a circumstantial piece of evidence the Court simply can't disregard or weigh as a scintilla or less. The jury could view the video, hear testimony of the kiosk manager, and consider evidence as to whether the Rug Doctor machine could have leaked at that location and conclude Rug Doctor LLC caused the puddle in which Plaintiff slipped.

Such facts apply similarly to Wal–Mart's failure to educate itself as to foreseeable risks due to its own chosen operating method. "At this point ... what needs to be proved is [Wal–Mart's] actual or constructive knowledge of its own operating methods relating to the ... foreseeable dangerous condition." All, 109 Idaho at 481, 708 P.2d at 886 (emphasis added). Whether Wal–Mart failed to exercise due care when it adopted an automated self-serve rental process for the Rug Doctor machines is a triable question of fact that precluded summary judgment in this case. As such, a jury may have properly considered the following evidence, which is, for our purposes, construed in Brooks' favor:

• Wal–Mart stores are the only locations where a self-service operating method is utilized in the Rug Doctor account manager's territory. Fifty-nine other accounts utilize employees to check-in and check-out such machines;
• The Rug Doctor machines can leak from their nozzles or from the bottom or if hoses break down from normal wear and tear;
• The machines can be returned with water remaining in them, which can spill when machines are lifted, tilted and placed into a shopping cart;
• The rental process for Rug Doctor machines at Wal–Mart is self-serve and unsupervised. Thus, no Wal–Mart employee inspects the machines upon return to determine if they are clean or dirty;
• No Wal–Mart employee is responsible to determine if a Rug Doctor machine still had liquid in it when returned;

• The Rug Doctor account manager never provided any training to the Overland Wal–Mart personnel, nor was he ever asked by anyone at that location to provide training;

• Wal–Mart fails to document when or if floor sweeps occur. While employees are trained to be constantly on alert for spills or other hazards, Wal–Mart does not document when or where spills occur, or why.

This case presents the unique circumstance where the landowner placed a product that could potentially leak fluid in the busiest part of its store, and then refused to request any help from the manufacturer regarding training or other information that would alert the landowner to potential safety hazards inherent in the machinery or the operating method that it implemented. Here, in making such a decision, Wal–Mart profited from their sharing arrangement with Rug Doctor. However, Wal–Mart ignored the fact that carpet cleaning machines are not like Red Box© DVD kiosks, which can be left alone and ignored. These machines can leak or spill or come back with water still in them. A jury could have considered whether such actions amounted to a breach of Wal–Mart's standard of care, which required Wal–Mart to be aware of and manage foreseeable hazards, particularly where Wal–Mart sits in a position of superior knowledge vis-à -vis Ms. Brooks. Given these facts, a reasonable jury could have reached the conclusion that Wal–Mart should have known its operating method for managing Rug Doctor machines could have created a dangerous condition.

Wal–Mart argues, and the district court agreed, that this situation presented an isolated incident for which Wal–Mart had no actual or constructive notice as a matter of law. We will not go so far. Whether the incident was isolated or not, Brooks' burden to establish constructive notice is mired in facts that preclude summary judgment against her. "[C]onstructive knowledge is that knowledge which reasonable diligence would have disclosed. ..." *State v. Carlson*, 50 Idaho 634, 637, 298 P. 936, 937 (1931). Wal–Mart's negligence need not be tied to whether the event in this case was isolated. Like the reference to all potholes in All, not just the one the plaintiff fell in, the particular spill at the Overland store is not the sole issue; rather, one question is whether Wal–Mart created a dangerous condition when it placed potentially leaky machines on its premises and then failed to act reasonably in managing those machines. A jury may find that Wal–Mart's actions were not negligent, but it may find that they were. Therefore, the district court's grant of summary judgment is reversed.

2. Brooks is not relieved from establishing that Wal–Mart had constructive notice in this case.

Brooks argues that she is relieved of having to establish that Wal–Mart had constructive notice of the dangers inherent in its operating method. The facts here do not support her argument.

a. Idaho law is settled regarding an invitee's burden in isolated cases.

Brooks argues that the potential dangers from the Rug Doctor machines are so readily apparent as to be "continuous," and/or "easily foreseeable." As such, she opines she is relieved of the duty to prove that Wal–Mart had notice of the dangerous condition at all. We disagree.

This Court has recognized that when the operating methods of a proprietor are such that "dangerous conditions are continuous or easily foreseeable, the logical basis for the notice requirement dissolves" and "actual or constructive notice of the specific condition need not be proved." All, 109 Idaho at 481, 708 P.2d at 886. Therefore, under Brooks' theory, she is not required to prove actual or constructive notice of the specific condition. In All, we distinguished a plaintiff's obligation to prove constructive notice from continuous or easily foreseeable dangerous conditions. We stated:

In *Tommerup*, the dangerous condition was a cupcake wrapper which had been discarded near the parking lot. The record was devoid of evidence indicating the condition was anything but an isolated incident. In Tommerup, and most recently in McDonald, we distinguished

the nonrecurring or isolated incident situation—where actual or constructive notice of the specific condition must be shown—from circumstances where the plaintiff shows that the operating methods of the landowner or possessor are such that dangerous conditions are continuous or easily foreseeable.

All, 109 Idaho at 481, 708 P.2d at 886 (internal citations omitted). See also *Tommerup*, 101 Idaho at 4, 607 P.2d at 1058 (quoting *Jasko v. F.W. Woolworth Co*., 177 Colo. 418, 420, 494 P.2d 839, 840 (1972)) (en banc) ("the Colorado Supreme Court held defendant's method of selling pizza was one which led inescapably to such mishaps as that of the plaintiff.") (emphasis added).

While the jury will consider on remand whether Wal–Mart failed to exercise due care in the way it adopted and managed its operating methods, the facts here do not lead "inescapably" to the conclusion that Brooks' fall was due to continuous spills from the Rug Doctor machines, nor was her fall easily foreseeable as a matter of law. As noted above, the jury may find that Wal–Mart's failure to avail itself of training or other information about the machines is such that Wal–Mart will be deemed to have constructive knowledge of the danger—but this is not the same as ruling as a matter of law that such self-service operations remove Brooks' burden to show constructive notice in cases like this one.

b. The record here is insufficient to establish that Brooks' fall was more than an isolated occurrence.

"'The mere presence of a slick or slippery spot on a floor does not in and of itself establish negligence, for this condition may arise temporarily in any place of business. ... Nor does proof of a slippery floor, without more, give rise to an inference that the proprietor had knowledge of the condition.'" Tommerup, 101 Idaho at 4, 607 P.2d at 1058 (quoting Jasko, 177 Colo. at 421, 494 P.2d at 840–41.).

The record in the instant case through circumstantial evidence may lead a jury to conclude that the liquid in which Brooks fell came from the Rug Doctor machine due to the rental of a machine by another customer about seven minutes before Brooks' fall. Nevertheless, that alone is insufficient to establish that the condition which caused Brooks' injury was anything other than an isolated incident. Therefore, it remains incumbent upon Brooks to carry her burden of proof as to Wal–Mart's constructive notice.

3. Issues of fact also preclude summary judgment based on Wal–Mart's constructive notice of the hazardous condition in this case.

Brooks also argues that material issues of fact exist to preclude summary judgment as to Wal–Mart's constructive notice of the spill itself. We agree.

In addition to issues of fact regarding Wal–Mart's imputed constructive notice due to its operating method, Brooks has established a genuine issue of material fact that Wal–Mart had constructive notice of the liquid in front of the Rug Doctor kiosk at the time Brooks fell. Brooks has shown that Wal–Mart associates could have seen the liquid based on their training and clean-as-you-go maintenance policy.

First, video surveillance shows a Wal–Mart employee walking by the area approximately five and a half minutes before Brooks fell. Wal–Mart's floor safety policy requires Wal–Mart associates to be constantly on alert, look for hazards, and correct any hazards quickly. Based on Wal–Mart policy, because an employee walked down the action alley opposite the Rug Doctor kiosk the employee should have discovered the liquid as part of a routine visual sweep of the area. Viewing this reasonable inference in a light most favorable to Brooks, a jury could find that this Wal–Mart employee, exercising reasonable care, could have discovered the hazard.

Second, the record reflects that the Wal–Mart associate escorting Brooks to the garden center failed to see the liquid and failed to warn her. Brooks testified as follows:

Q. Did the Walmart [sic] associate that was walking with you ever make a comment about, "Be careful, there's a puddle of water in front of you?"

A. Not a word.

Because Brooks testified she was looking up and around and not at the floor when she fell, Wal–Mart contends that Brooks should have been watching where she was walking to avoid injury. While this is certainly a good argument for the jury, such a claim carries little weight at the summary judgment stage. See *Van Brunt v. Stoddard*, 136 Idaho 681, 690, 39 P.3d 621, 630 (2001) (generally, a plaintiff's conduct affecting his comparative responsibility is a question for the jury).

For Wal–Mart to argue that Brooks should have seen the liquid is to disregard the statement of its own employee who was escorting Brooks. The associate, presumably trained to spot hazards, failed to notice the liquid on the floor despite the testimony of the store manager that every Wal–Mart employee is trained to watch for safety issues. The associate stated "I was walking with [Brooks] over to the garden center to help her with a purchase of bark, on our way to garden the customer fell down near the rug doctor. I saw water on the floor." It follows that if Brooks should have seen the liquid, then the associate, who is not only more familiar with the store, but also has a higher duty to maintain the premises in a safe condition, should have seen the liquid prior to Brooks' fall. The presence of two employees in the area creates a legitimate question of fact concerning Wal–Mart's failing to notice the hazard.

Third, as noted above, Hinkle, Wal–Mart's Rug Doctor account manager, stated that there are conditions under which the machines may leak. He testified, in his experience, "[water] could leak from the tank, [it] could leak from the bottom." He also agreed that water could leak if "[the machine] is tilted on it's [sic] side or upside down or [the] bottom tank [is] overfilled." Additionally, he described that Rug Doctor machines could foreseeably leak water in the following ways: from a worn nozzle on the bottom of the machine; from the attachment for the upholstery tool; from a worn coupler; from hoses if not correctly attached; or from an incorrectly installed reservoir bucket.

In addition to evidence that suggests it is foreseeable Rug Doctor machines may leak, approximately seven minutes before the incident occurred Wal–Mart's surveillance video shows a customer rented a Rug Doctor machine at or near the exact location where Brooks fell. In the process, the machine had to be tilted back-and-forth, so it would fit into a shopping cart. While there are many potential sources of the liquid on which Brooks slipped, we must take the inferences in Brooks' favor and apply the lesser standard of proof required to survive a motion for summary judgment than is required at trial. Liberty Bankers Life Ins. Co., 159 Idaho at 685, 365 P.3d at 1040.

Under this standard, the location of the fall, the timing, and the evidence that Rug Doctor machines can leak creates a genuine issue of material fact that Wal–Mart had constructive notice of the spill in this case.

4. Brooks failed to raise the adoption of foreign law before the district court; therefore, the Court will not consider the issue in this case.

Brooks' argument that this Court adopt Washington law and extend a mode of operation approach to premises liability is an argument raised for the first time on appeal.

Brooks argues that this Court should adopt Washington law to modify the traditional rules of premises liability by bringing them in line with the modern techniques of self-service merchandising. In doing so, Brooks maintains that the notice requirement should be eliminated "if

the particular self-service operation of the defendant is shown to be such that the existence of unsafe conditions is reasonably foreseeable." *Pimentel v. Roundup Co*., 100 Wash.2d 39, 50, 666 P.2d 888, 893 (1983). This argument is unavailing because Brooks did not ask the district court to adopt Washington's exception to the requirement that she prove actual or constructive notice. "[A]ppellate courts will not consider new arguments raised for the first time on appeal." *English v. Taylor*, 160 Idaho 737, 741, 378 P.3d 1036, 1040 (2016) (internal quotations and citation omitted). Because Brooks did not ask the district court to adopt Washington law she is therefore precluded from asking this Court to do so.

Alternatively, Brooks asks this Court to make new law, holding premises owners responsible for the risks associated with the self-serve operating methods they choose. Brooks asserts that retailers should not be allowed to plead conscious ignorance as a defense when their own operating method leads to an injury on their premises. Insofar as we have discussed Wal–Mart's general duty to exercise ordinary care in being aware of potential risks due to its operating methods, Brooks has prevailed on this point. To the degree that Brooks requests that we make new law and equate the term "easily foreseeable" as a matter of law to allegedly flawed operating methods, we decline to do so. These arguments were likewise not raised below; therefore, we will not consider them for the first time on appeal.

**IV. CONCLUSION**

We vacate the district court's order granting summary judgment and remand this case for further proceedings consistent with this Opinion. Costs on appeal are awarded to Appellant.

Chief Justice BURDICK and Justices HORTON and BRODY, concur.

JONES, Justice, dissenting.

I respectfully dissent from the majority's holding that the district court erred in granting summary judgment in favor of Wal–Mart. Specifically, I disagree with the majority's conclusion that there was a material question of fact regarding whether Wal–Mart should have known of the existence of a dangerous condition by using an automated self-serve rental process for the Rug Doctor machines. The majority's holding departs from existing premises liability laws and imposes a new standard for the duty of care owed by landowners that elect to offer self-service operations on their premises. I believe this holding ignores the reality that any item in a store can be construed as "self-service." On a daily basis, stores are inundated with patrons who move items, drop things, spill liquids, or create any number of other hazards. Any of these actions can be done wholly independent of any store employee. Accordingly, I see no need to impose a new standard in instances involving a self-serve kiosk.

"Every person has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him, and to do his work, render services or use his property as to avoid such injury." *Stephens v. Stearns*, 106 Idaho 249, 256, 678 P.2d 41, 48 (1984). The duty of care owed to a person depends on their status on the land. *Holzheimer v. Johannesen*, 125 Idaho 397, 399, 871 P.2d 814, 816 (1994). It is undisputed that Ms. Brooks was an invitee in this case. It is well established the standard of care owed to an invitee is "the duty to keep the premises in a reasonably safe condition, or to warn of hidden or concealed dangers." *Id*. at 400, 871 P.2d at 817 (citing *Bates v. Eastern Idaho Reg'l Med. Center*, 114 Idaho 252, 253, 755 P.2d 1290, 1291 (1988)). "To establish a prima facie negligence case, the invitee also must show that the landowner knew, or in the exercise of reasonable care should have known, of the alleged dangerous condition." *Shea v. Kevic Corp*., 156 Idaho 540, 548, 328 P.3d 520, 528 (2014). "For a nonrecurring or isolated incident, the invitee must show actual or constructive notice of the specific condition." *Id*. (internal citation omitted).

The majority distinguishes the circumstances of this case from ordinary premises liability based on the fact that the landowner placed a product that could potentially leak fluid on its property, "and then refused to request any help from the manufacturer regarding training or other

> information that would alert the landowner to potential safety hazards inherent in the machinery or the operating method that it implemented." In doing so, the majority fails to consider that countless items in a store have the potential to leak fluid or create a hazardous condition in the immediate surrounding area. The fact that a self-service machine was allegedly involved in this case simply does not alter the duty of care that is owed by the owner of the premises.
>
> I would follow existing Idaho law and hold that the duty of care owed by Wal–Mart is "the duty to keep the premises in a reasonably safe condition, or to warn of hidden or concealed dangers." Holzheimer, 125 Idaho at 400, 871 P.2d at 817. According to this standard, Ms. Brooks would have been required to establish that Wal–Mart "knew, or in the exercise of reasonable care should have known, of the alleged dangerous condition." Shea, 156 Idaho at 548, 328 P.3d at 528; See also *All v. Smith's Mgmt. Corp*., 109 Idaho 479, 481, 708 P.2d 884, 886 (1985) ("to hold an owner or possessor of land liable for injuries to an invitee caused by a dangerous condition existing on the land, it must be shown that the owner or occupier knew, or by the exercise of reasonable care should have known, of the existence of the dangerous condition.").
>
> However, there was no evidence demonstrating that there were frequent spills from the Rug Doctor machine, or any reason to believe that a spill was imminent. In fact, this was the only spill alleged to have occurred from the Rug Doctor machine. Further, there was no evidence that anyone informed Wal–Mart of the spill, nor was there evidence that any Wal–Mart employee saw the spill and failed to clean it up. Instead, the evidence supports a finding that this was an isolated and unexpected incident. In sum, I see no reason to deviate from traditional premise liability laws merely because Ms. Brooks alleged that the water spilled from a "self-service" kiosk rather than a more traditional source. I believe the district court properly granted summary judgment in favor of Wal–Mart, holding that Ms. Brooks failed to provide evidence that Wal–Mart knew or should have known about the spill in which she slipped. I would affirm.

NOTES

(1) **Slips and falls**: The main cases involve comparatively simple factual situations. For a case that demonstrates some of the complexities that can be involved in a simple slip-and-fall case, see *Herrick v. Breier*, in which the case turned on consideration of the coefficient of friction between shoes and floor and whether the surface had been properly treated. Defendant argued that there was nothing unusual about the composition of the floor and that the it had no notice of any problems. Defendant buttressed these contentions introduced testimony of a person who sells and installs such floors and of a salesman who sells the cleaning compound. The court agreed that plaintiff had failed to prove that her fall was the result of any breach of duty by defendant:

> The mere assertion of a possibility of a faulty application will not support a verdict of negligence in the face of direct evidence that the material was properly applied, and that it had no material effect in making the surface of the floor slick or slippery.
>
> If the floor was unusually slick or slippery it thus was not because of any negligent act or omission on the [defendant] in caring for the building but because of the inherent nature of the material of which the floor was made. [Plaintiffs] have failed to show the presence of any foreign substance which could have caused the floor to be unsafe, the remaining question is whether or not the jury was justified in finding and concluding from the fact that Mrs. Herrick did fall while walking upon the floor that such floor was unsafe and that its maintenance in the manner here alleged was of itself negligence.

The court reversed the jury verdict for plaintiff. *Herrick v. Breier*, 59 Idaho 171,82 P.2d90(1938). See also *Antrim v. Fred Meyer Stores, Inc*., 150 Idaho 774, 251 P.3d 602 (Ct App. 2011) (extended discussion of constructive notice).

(2) Statutes and notice: Plaintiff contended that defendant allowed his sheep- which were infected with scab, a highly infectious disease -to run free and mix with plaintiff's sheep. This was in violation of a statute requiring anyone herding sheep to report the presence of scab within fifteen days to the deputy

sheep inspector. Defendant argued that he was unaware that his sheep were infected. The court rejected this argument: "The law presumes that every man knows the condition of his sheep and requires him to report the existence of scab within fifteen days after it makes its appearance." *North & Douglas v. Woodland*, 12 Idaho 50,85 P. 215 (1906). Does the presumption of knowledge transform the action into strict liability?

**ROBINSON v. WILLIAMSEN IDAHO EQUIPMENT CO**.

Supreme Court of Idaho
94 Idaho 819, 498 P.2d 1292 (1972)

McQUADE, C.J.- [The Robinsons (appellants) purchased a truck for use in their roofing business. The truck was equipped with a Marion hydraulic scissors hoist to lift roofing materials on the truck bed to roof height. The hoist was purchased through Williamsen Idaho Equipment the local distributor of Marion products.

[Three weeks after receipt of the truck, it tipped over while being used to lift a load of gravel. Respondent's employee thought that the tipping was caused by an unequal distribution of the load on the truck bed. The truck was repaired, and appellants were charged $1,000. Two weeks later the truck tipped over again as sacks of gravel were being unloaded onto a roof. Respondent again repaired the truck at a cost of $1,800. The next day the truck tipped a third time.

[Appellants brought a negligence action against respondents. At trial, appellants introduced undisputed evidence from which it was possible to conclude that the cause of the accident was the lack of a flow control device to prevent one cylinder of the hydraulic hoist from losing fluid relative to the other cylinder.] Taken in its entirety, the substantiated testimony at trial established that the accidents resulted from the interplay of uneven loading and the loss of hydraulic fluid in one cylinder causing it to depress.

The parties stipulated that there existed flow control devices for hydraulic hoists in 1965 and 1966, but respondent's representative, whose exposure to Marion hoists dated to 1959, testified that he was unaware of them during those years. However, he also indicated at several points in his testimony that he knew the cylinders on the Marion hoist could extend at different rates, or that one could sink relative to the other. Stated simply, he revealed that he knew the effect if not the cause of the problem. He further testified that [he] was actually informed of the manner in which they intended to use the hoist.

Appellants' expert concluded without contradiction that a Marion hoist of the type sold, would be unsafe to operate when used for the kind of work contemplated by appellants. He further stated without refutation that the design characteristic which rendered it unsafe would not be common knowledge, or even known by most owners of such equipment. On this point, respondent's representative conceded that to his knowledge appellants had received no special warnings, or even qualifying instructions, on use of the hoist at the time of purchase.

The unsafe condition of the hoist when used for the intended purpose was, in tum, attributable to a design characteristic of which respondent's representative was aware but which he lacked requisite knowledge to alter. He was unaware of flow control devices at the time because none of the Marion hoists contained them. There is no evidence in the record to show that he was informed or was presented the reasonable opportunity in the conduct of the business to be informed, of the design of hoists marketed by other manufacturers, which contained such devices. This Court has held that the supplier of a tool or instrument for use by another is under a duty to exercise reasonable care, commensurate with the facts and circumstances, to see that the implement is proper and safe for the purpose. In this case, however, respondent was not capable of remedying the defect of which it was aware. We concur with the trial court that respondent breached no duty of care toward appellants by failing to perform an act not reasonably within its capability.

NOTES

(1) What is the holding? Which element or elements from the Morrisses list did plaintiffs' attorney fail to establish in Williamsen? How might the attorney have met plaintiffs proof obligations on this question?

(2) *Robinson v. Williamsen* Idaho Equipment Co., part 2: In a section of the decision not reproduced above, the court held that Williamsen had a duty to warn plaintiff of the risk:

> [If a seller] knows or has reason to know that the product is likely to be unsafe when used for the purpose for which it is supplied and has no reason to believe that the persons for whose use the product was supplied will realize its unsafe condition, then the supplier has a duty to exercise reasonable care adequately to warn them of the unsafe condition or of the facts which make the product likely to be dangerous.

The duty, the court writes, applies to a seller "who knows or has reason to know" that the product is unsafe for the purposes for which it is sold. Thus, a product- not defective in manufacture or design- may be defective for failure to warn of risks which arise from known or foreseeable uses. The reasonableness of a warning is measured by the risk.

## 2. RES IPSA LOQUITUR

### C.C. ANDERSON STORES CO. v. BOISE WATER CORP.

Supreme Court of Idaho
84 Idaho 355, 372 P.2d 752 (1962)

TAYLOR, J. -Approximately 1:30 a.m., June 12, 1959, a break occurred in defendant's ˙ [appellant's] ten-inch water main on 9th street, between Idaho and Bannock streets, in Boise. Water from the ruptured main flowed down Idaho street, over the sidewalk, and into the store building owned and occupied by plaintiff [respondent], damaging merchandise and other property therein.

The main had been laid in 1890, about four and one-half feet beneath the surface of the street. The pipe was purchased by defendant under the trade name of Kalomine, which was composed of wrought iron alloyed with a small amount of lead to inhibit corrosion and was coated on the outside with asphalt. Defendant maintained 223 miles of main, of which approximately 12 1/2 miles were of the Kalomine pipe. The trenches for the Kalomine pipe were dug in soil consisting of a mixture of gravel and silty-clay loam and backfilled with sand.

The defendant's records indicate two prior "serious" breaks in its mains, one of which occurred in a wooden pipe and the other in a "relatively new steel pipe." The manufacturer of the Kalomine pipe guaranteed it to withstand hydrostatic pressure of five hundred pounds per square inch and represented that the pipe was still in service in places where it had been laid for over one hundred years. The break occurred on the underside of the pipe where it had been weakened by corrosion, and consisted of a split about eighteen inches long. Asked the cause of the corrosion, defendant's engineer testified:

> I know of no scientific way you could say what caused the failure in that particular pipe, it could be a mixture of possibly manufacturing impurities, electrolytic corrosion, rust on the outside of the pipe.

Other portions of the pipe in the area of the break appeared to be in good condition. Four strips were cut from the pipe in the immediate area of the break; one from each of the bottom quarters and one each from the top quarters of the pipe. These strips were subjected to tests for tensile strength by the Gem State Testing Laboratory, from which it was determined that the portions from the upper quarters of the pipe had a tensile strength in excess of 37,000 pounds per square inch, and the pieces from the

bottom quarters in excess of 30,000 pounds per square inch. Based on the tests the defendant's engineer testified that the bottom portions of the pipe tested would withstand hydrostatic pressure of924 pounds per square inch, and the top sections 1100 pounds per square inch.

The normal pressure maintained by defendant in its mains varied from seventy to eighty pounds per square inch and dropped below that pressure during hours of heavy withdrawal. The maximum pressure placed in the pipe immediately before the break, as recorded by an automatic pressure gauge maintained by defendant, was 78 pounds per square inch on June 2nd, 1959. The pressure was 76 pounds at the time of the break, and as a result of the break the pressure dropped to 55 pounds per square inch.

Through the telephone answering service, subscribed to by defendant, the city police notified defendant's designated employee of the break at 2:08a.m. At approximately 2:15a.m. such employee and another commenced closing off the flow of the broken section. This was done by means of seven valves in the downtown grid. At, or about, 2:45a.m. the pressure was restored, indicating the water had been cut off from the section in which the break occurred.

The foregoing indicates that defendant was not negligent in applying excessive pressure to the pipe, nor in failure to act promptly and effectively after notice of the break. Plaintiff offered no contradictory evidence and does not seriously contend that defendant was negligent in that regard.

This appeal is from a judgment entered upon a verdict in favor of the plaintiff; from order denying defendant's motion for judgment notwithstanding the verdict; and from order denying defendant's motion for a new trial.

Defendant contends the doctrine of res ipsa loquitur is not applicable and that the trial court erred in submitting the doctrine to the jury and permitting the jury to apply it in this case. The essentials of the doctrine are: (1) that the agency or instrumentality causing the injury was under the control and management of the defendant, *Splinter v. Nampa*, 74 Idaho 1, 256 P.2d 215 (1953); (2) that the circumstances were such that common knowledge and experience would justify the inference that the accident would not have happened in the absence of negligence. *Walker v. Distler*, 78 Idaho 38, 296 P.2d 452 (1956).

In this case it is conceded that the pipe which ruptured, and the water therein was under the control and management of the defendant. In the application of the second required element of the doctrine, consideration must be given to other established fundamental principles.

The defendant is not an insurer against injury to others arising out of the installation, maintenance or operation of its water system. Its liability for such injury depends upon negligence. *Dunn v. Boise City*,48 Idaho 550, 283 P.606 (1929); *Yearsley v. City of Pocatello*, 69 Idaho 500, 210 P.2d 795 (1949), 71 Idaho 347,231 P.2d 743 (1951); [] The burden of establishing such negligence rests upon the plaintiff. [] The application of the doctrine of res ipsa loquitur does not shift the burden of proof to the defendant. It merely shifts to the defendant the obligation to produce evidence to explain or rebut the inference of negligence raised by the application of the doctrine. []

> In our opinion, res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict.... When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff.

*Sweeney v. Erving*, 228 U.S. 233.

Plaintiff contends the defendant was bound to take notice that its mains would deteriorate from time and use and was required to take such measures as ordinary care would dictate, to guard against

rupture therein, citing *Dunn v. Boise City*, 48 Idaho 550,283 P. 606 (1929). That case involved damage caused by the rupture of timbers used in the construction of a wooden flume. The court there said:

> The city was not an insurer of the condition of its drainage system but was bound to use ordinary care and skill in constructing and maintaining it. It was likewise bound to take notice of the liability of the timbers to decay from time or use, and to take such measures as ordinary care would dictate to guard against the breaking of the flume across the Boise Water Company's canal because of the decay of timbers used in its construction.

The *Dunn* case was followed in *Yearsley v. Pocatello*, 69 Idaho 500, 210 P.2d 795 (1949), in which it was said that the city was bound to take notice that pipes in its water system were liable to deteriorate from time and use and must take such measures as ordinary care would dictate to guard against leakage resulting from such deterioration. However, it was, nevertheless, held in the Yearsley case:

> Third, that the city is not liable for damages occasioned by a latent defect in the absence of notice, express or implied, of such defective condition, i.e., the municipality must have had actual notice or the defect actually existed for such a length of time, or under such circumstances that it should have known thereof.

The conclusion to be drawn from defendant's evidence as to the cause of the rupture is at that there could have been a defect in the manufacture of the pipe, or some of the asphalt coating could have been rubbed, knocked off, or damaged in the shipping, handling, or installation of it, which reasonable inspection at the time of installation would have revealed; and that such defective condition permitted corrosion to weaken the pipe to the extent that it ruptured. The inference of negligence, which the doctrine of res ipsa loquitur permits to be drawn from the circumstances, is a reasonable one and is justified in this case. *O'Connor v. Black*, 80 Idaho 96, 326 P.2d 376 (1958); []

The only requirement as to notice is such as is compatible with the application of the doctrine, namely, defendant is bound to take notice that its mains will deteriorate from time and use. To the extent that the Yearsley cases go beyond this in regard to notice, they are hereby modified to conform herewith.

Judgment affirmed.

KNUDSON, McQUADE AND McFADDEN, JJ., AND OUVER, D.J., CONCUR.

## KRINITT V. IDAHO DEP'T OF FISH & GAME[14]

Supreme Court of Idaho
159 Idaho 125, (2015)

EISMANN, J.- This is an appeal from a judgment dismissing the Plaintiff's action for wrongful death after the district court granted the Defendants' motion for summary judgment. Because there are genuine issues of material fact regarding the liability of the Defendants, we vacate the judgment and reverse the order granting the motion for summary judgment.

### I.
### Factual Background

This lawsuit arose out of a fatal helicopter crash that occurred on August 31, 2010, in Kamiah, Idaho. The Idaho Department of Fish and Game (Department) had contracted with Leading Edge

[14] This case was argued on appeal in the Courtroom at the University of Idaho College of Law (Moscow).

Aviation, LLC, to fly two Department employees from Clarkston, Washington, to the Selway River in Idaho in order to collect data on salmon spawning. The pilot of the helicopter was Perry J. Krinitt, Jr., the son of the Plaintiff. The two Department employees were Larry Barrett and Danielle Schiff.

The helicopter had a "bubble canopy" with seating for three abreast and two bubble doors, one on each side. The bubble doors had windows that bulged outward so that passengers could look down. The bubble doors also increased the amount of room for the passengers. The pedestal with the flight instruments was located in front of the center seat.

For the flight, the pilot was going to sit in the center seat, Mr. Barrett was going to sit in the left seat, and Ms. Schiff was going to sit in the right seat. During the survey of the river, Mr. Barrett would be looking for the salmon spawning beds and Ms. Schiff would be recording his observations with paper and pencil. She had a metal clipboard that was about nine inches by twelve inches by three-fourths of an inch thick. The top was hinged so that paper or other items could be stored in the clipboard. Prior to the flight, the pilot briefed Mr. Barrett and Ms. Schiff, and during the briefing he told them that they must at all times maintain control of any items they had with them in the helicopter and that Ms. Schiff was responsible for the clipboard.

The pilot intended to fly to Selway Falls, Idaho, and refuel before flying along the Selway River. At about forty minutes into the flight, the pilot radioed that they were landing in Kamiah, Idaho, which was an unscheduled stop about 35 miles from Selway Falls. The pilot did not state why they were landing there. A man who was installing a sprinkler system at a retirement home in Kamiah looked up when he heard the helicopter and soon saw it appear over a ridge flying toward him. Its flight path was slightly to his left, so he could not see the right side of the helicopter. He noticed that as it came over the ridge, it began to descend like it was going to land. He watched for a while, and then resumed digging.

Upon hearing a loud bang, he looked up at the helicopter and saw something coming off the tail rotor. The helicopter began rotating back and forth on its axis. It rotated counterclockwise far enough for him to see the right side, and he saw that the right door was open about as far as it would go with someone in the doorway holding it open. It appeared to him as if the person was contemplating jumping. The helicopter then rotated clockwise so that he could not see the right side, and when it rotated counterclockwise again the right door was closed. He estimated that the helicopter was 300 to 400 feet in the air when he heard the loud bang. It continued descending, while rotating back and forth, until it was about 150 to 200 feet in the air. At that point it fell straight down and crashed. The pilot and Ms. Schiff were killed in the crash, and Mr. Barrett died shortly after the crash from his injuries. An investigation revealed that Ms. Schiff's clipboard had struck the tail rotor, causing the tail rotor assembly to separate from the helicopter.

The Plaintiff filed this wrongful death action contending that the accident was caused by the negligence of the Department or its employees. The Defendants moved for summary judgment, and, after briefing and argument, the district court granted the motion. The Plaintiff then appealed.

## II.
## Did the District Court Err in Granting Summary Judgment?

A trial court may grant a motion for summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). In an appeal from a summary judgment, this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment. *Infanger v. City of Salmon*, 137 Idaho 45, 46-47, 44 P.3d 1100, 1101-02 (2002). All disputed facts are to be construed liberally in favor of the nonmoving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Id*. at 47, 44 P.3d at 1102.

In its decision granting summary judgment, the district court found that the Plaintiff's evidence was lacking because it did not show who had possession of the clipboard when it left the cabin. The court also stated that the evidence showed that the clipboard hitting the tail rotor was an unforeseeable accident. The court erred in these determinations.

With respect to who had possession of the clipboard when it left the cabin, the court stated as follows:

> No one knows how or exactly when the clipboard left the helicopter and subsequently hit the tail rotor of the aircraft. There is no evidence indicating how or exactly when the clip board [sic] left the cockpit of the helicopter, or who had control over the clipboard just prior to the door being opened.
>
> The plaintiff has not offered any facts to show that Ms. Schiff or Mr. Barnett [sic] had exclusive control over the clipboard.
>
> . . . .
>
> There is no evidence, only suspicion, that the clip board [sic] was in Ms. Schiff's possession when the door was opened.

The undisputed facts are that Ms. Schiff had possession of the clipboard before the helicopter took off and that she was going to use it while writing down the observations of Mr. Barrett. Before she climbed into the helicopter, she set the clipboard on her seat. Prior to getting into the helicopter, the pilot instructed her to maintain control at all times of her items of property and that she was responsible for the clipboard. There is no evidence that anyone else was going to use the clipboard. As stated above, in ruling on the motion for summary judgment, the court was required to draw all reasonable inferences in favor of the Plaintiff. The most reasonable inference from the facts is that Ms. Schiff would have retained control of the clipboard during the flight. With respect to when the clipboard left the cabin, the witness on the ground saw the helicopter making a normal landing approach. He resumed his work, and then heard a loud bang. When he looked up again, he saw something coming off the tail rotor, and the helicopter began rotating back and forth on its axis. The wreckage documentation issued by the National Transportation Safety Board stated that the debris field was about 1,500 feet in length; that the two tail rotor blades were fractured about twelve inches from the tail rotor hub; that crush damage to one of the blades showed that the damage occurred before the blade fractured; and that the 18-inch-long sections of the tail rotor blades that broke off were some of the earliest components in the debris field. The main parts of the metal clipboard were recovered in a similar location in the debris field, and the three main parts of the clipboard exhibited creasing, tearing, and red paint transfer marks, all of which were consistent with the clipboard being struck by the tail rotor blades. The reasonable inference is that the clipboard left the helicopter just prior to it hitting the tail rotor blades, which caused the loud noise that the man on the ground heard.

With respect to how the clipboard left the helicopter, it could only do so if the door was opened. During oral argument on the motion for summary judgment, the Defendants' counsel stated that it was undisputed that "the clipboard exited the helicopter on the right-hand side." Jim Pope, Jr., the owner of Leading Edge Aviation, stated that during June or July 2010, the right door of the helicopter had come open while he was flying it. He said that upon landing, he had his mechanic make adjustments to the door, that the helicopter was flown about 80 hours 5 afterwards, and that there were no further inadvertent door openings. During his deposition, Mr. Pope was asked how far the door would open when it opened inadvertently, and he answered, "Inch and a half to two inches." When asked about closing the door when it inadvertently opened, he responded, "It is as easy to close as a lid on a laptop."

Mr. Pope also explained that with the door handle in the closed position, the shoulder of the person sitting next to the door would effectively block the handle from inadvertently moving forward and allowing the door to open. He was alone in the helicopter when the door had come open in June or July and was sitting in the left seat (there were apparently duplicate flight controls—tail rotor pedals, collective lever, and cyclic stick—for the left seat). One of the experts testified that "there appears to be no explanation for the door opening in flight other than by the action of the passenger sitting in the seat

closest to the door." Thus, there was evidence in the record that the clipboard could not have left the helicopter unless Ms. Schiff opened the door and failed to maintain control of the clipboard.

The district court also stated that the clipboard hitting the tail rotor if it went out the door was not foreseeable. The court wrote:

> Mr. Pope, a helicopter pilot and owner of this helicopter, in his deposition, testified that having a clipboard fall out of this helicopter and engage with the rear rotor was not foreseeable. The court mischaracterized Mr. Pope's testimony. He did not testify that he did not foresee that a clipboard that went out the door could damage the helicopter. What he stated was that he did not fathom that someone would fail to keep control of a clipboard in the helicopter.
>
> Q. You testified you didn't realize a metal clipboard was a hazard until after the accident, but you also testified that you didn't want things going out of the aircraft. You never put two and two together before the accident?
>
> A. I did not recognize the clipboard as big of a hazard because the assumption of it being in direct operational control of one of the observers and crew members. I did not fathom that it would come away from the operational control of the operator.
>
> . . . .
>
> A. But as a crew member I trust a person to—that's their whole job is to hang onto that, and I trust in their abilities to do that.

The court later added:

> In addition, the cause of the accident was not foreseeable. It would be expected that any object dropped from a height would fall towards the ground. If an object was dropped from a helicopter preparing to land it would be expected that the object would be forced towards the ground at a rate greater than gravity due to the downward thrust of air from the rotors immediately above the cockpit.
>
> There is nothing in the record to support this statement. The court apparently was under the misconception that the helicopter was hovering about 300 to 400 feet in the air and slowly descending straight down when the clipboard left the cabin. Instead, as the eyewitnesses testified, the helicopter was apparently making a landing approach, descending with forward air speed, when the clipboard hit the tail rotor. Although the record does not indicate an estimate of its forward airspeed, it was clearly not hovering.
>
> Immediately following the above quote, the court stated, "How the clipboard got from the cockpit all the way back to the rear rotor is unknown." To the contrary, how it occurred is obvious and undisputed. As explained by one of the experts in his conclusion, the "[a]luminum clipboard was blown back along the right side of the aircraft and drawn into the tail rotor causing failure of the tail rotor blade, tail rotor gear box, and subsequent loss of control of the aircraft." During oral argument on the Defendants' motion for summary judgment, their counsel stated that nobody disputed that "a metal clipboard struck one of the blades of the tail rotor disabling the tail rotor, which then led to a succession of events that caused the tail rotor disassembly to disengage from the tail boom and basically render the helicopter unflyable at that point in time." Thus, there is no basis for the court's conclusion that how the clipboard could have hit the tail rotor was unknown.

Implicit in the district court's analysis is that the Plaintiff was required to prove his case with direct evidence. The court stated: "There is no evidence indicating how or exactly when the clip board left the cockpit of the helicopter, or who had control over the clipboard just prior to the door being opened." (Emphasis added.) What the district court failed to recognize however, is that "[c]ircumstantial evidence is competent to establish negligence and proximate cause." *Splinter v. City of Nampa*, 74 Idaho 1, 10, 256

P.2d 215, 220 (1953). The circumstantial evidence indicates that Ms. Schiff failed to maintain control of the clipboard.

**III.**

**Did the District Court Err in Holding that the Doctrine of Res Ipsa Loquitur Was Inapplicable?**

The Plaintiff argued the doctrine of res ipsa loquitur in opposing the Defendants' motion for summary judgment. The district court held that the doctrine was inapplicable, stating:

> The plaintiff has not offered any facts to show that Ms. Schiff or Mr. Barnett [sic] had exclusive control over the clipboard. The pilot was also in the cockpit and had access to the clipboard. Therefore, res ipsa loquitur does not apply to the undisputed facts of this case.

In so holding, the district court erred.

"The doctrine of res ipsa loquitur is a means of establishing negligence through circumstantial evidence. . . . [Its function] is to replace direct evidence of negligence with a permissive inference of negligence." *Harper v. Hoffman*, 95 Idaho 933, 934, 523 P.2d 536, 537 (1974) (footnotes omitted). For the doctrine to apply, two elements must exist: "the agency or instrumentality causing the injury must be under the exclusive control and management of the defendant and the circumstances must be such that common knowledge and experience would justify the inference that the accident would not have happened in the absence of negligence." *Christensen v. Potratz*, 100 Idaho 352, 355, 597 P.2d 595, 598 (1979).

In this case, the evidence was sufficient to show that the clipboard was under the exclusive control and management of the Defendants' employee. As discussed above, the evidence shows that it was Ms. Schiff's clipboard, that she was going to use it during the flight, and that the pilot told her prior to takeoff that she was responsible for the clipboard and was to maintain control of it at all times. If she had given the clipboard to anyone, it would most reasonably have been given to Mr. Barrett. However, because both the Plaintiff's and the Defendants' experts stated that the clipboard came out the right-side door of the helicopter, it is unlikely that Mr. Barrett would have had it immediately before it exited the door. He would have had to have thrown it out the door from the left side of the helicopter.

The court's statement that "[t]he pilot was also in the cockpit and had access to the clipboard" is unavailing. When the clipboard came out of the helicopter, the pilot was making a landing approach. Most likely, he would have had his left hand on the collective lever and his right hand on the cyclic stick. There is absolutely no evidence or logical inference supporting a conclusion that he would have been holding the clipboard.

For res ipsa loquitur to apply, it is not necessary to conclusively show that the pilot would not have had possession of the clipboard. As stated in 57B Am. Jur. 2d Negligence § 1235 (2004):

> Evidence conclusively showing the control or management of the instrumentality causing the injury is not required. It may be established by either direct or circumstantial evidence, and by such reasonable and logical inferences as may be drawn therefrom. The evidence must afford a rational basis for concluding that the cause of the accident was probably such that defendant would be responsible for any negligence connected with it. That does not mean that the possibility of other causes must be altogether eliminated, but only that their likelihood must be so reduced that the greater probability lies at the defendant's door.

(Footnotes omitted.)

With respect to the second element, common knowledge and experience would justify the inference that the clipboard would not have gone out of the helicopter but for the failure of Ms. Schiff, or Mr. Barrett in the unlikely event that he had the clipboard, to maintain control of the clipboard. Even if the door of the helicopter had accidentally come open, there is nothing to indicate that Ms. Schiff could not

have maintained control of the clipboard. A jury could conclude that the accident would not have happened but for her negligence.

...

**VI.**
**Conclusion**

We vacate the judgment and reverse the order granting the Defendants' motion for summary judgment. We award the Plaintiff costs on appeal.

NOTES

{1) Elements of the doctrine -"the agency or instrumentality causing the injury was under the control and management of the defendant": What is required to establish "control"?

(a) *Hansen v. City of Pocatello*: Plaintiff was injured when she stepped on the lid of a water meter box embedded in the sidewalk. The lid flipped up and she fell into the hole. She filed suit claiming that the city was negligent, relying in part of res ipsa loquitur. The supreme court affirmed a verdict for the city:

> In her complaint, Hansen alleged the City was liable to her under a theory of res ipsa loquitur. She cited *Le'Gall v. Lewis County*, 129 Idaho 182, 923 P.2d 427 (1996), in support of this claim. Res ipsa loquitur applies when "the agency or instrumentality causing the injury is under the exclusive control and management of the defendant, and the circumstances of the case are such that common knowledge and experience would justify the inference that the accident would not have happened in the absence of negligence." *Id*. at 187,923 P.2d at433 (quoting *Jerome Thriftway Drug, Inc. v. Winslow*, 110 Idaho 615,618,717 P.2d 1033, 1036 (1986)). The burden shifts to the defendant in such instances to rebut an inference of negligence.
>
> The district court correctly declined to apply res ipsa loquitur. The water meter lid was not under the exclusive control of the City; it was located on a public sidewalk. Further, the evidence disclosed that water meter lids can be readily removed by passersby. Thus, res ipsa loquitur does not apply.

*Hansen v. City of Pocatello*, 145 Idaho 700, 184 P.3d 206 (2008). Is it the access by others than the owner to the box that distinguishes *Hansen* from *C.C. Anderson*?

(b) *Jerome Thriftway Drug, Inc. v. Winslow*: Plaintiff, owner of one part of a building complex in Wendell, brought suit against the owner of another part of the complex, arguing that defendant was responsible for the fire that destroyed the complex. Plaintiff, Hamilton Drug, appealed a summary judgment:

> Hamilton Drug asserts that the court erred in ruling prior to trial that the doctrine of res ipsa loquitur was not applicable and that the court erred in failing to instruct the jury on that doctrine. We disagree and hold that the necessary conditions for application for the principle of res ipsa loquitur were not present in the instant case.
>
> The cause of fire cannot be established by application of the doctrine of res ipsa loquitur, but if there is substantial evidence that an instrumentality in the exclusive control of the defendant did cause the fire the doctrine of res ipsa loquitur is available to raise the presumption of negligence. [] Hamilton's premise was clearly that the fire was electrically caused and that it started in the department store. However, Fire Chief Hosack and defense witness Beland testified that the fire damage was so extensive that the point of origin could have been burned up and lost. Beland testified that he saw no evidence of a point of origin of the fire and that "obviously if you don't find the point of origin, how do you find the cause." Hence, we hold that the "instrumentality causing the injury" was not established and in fact no instrumentality could be identified as having caused the fire.

> However, even assuming that the electrical system did cause the fire, exclusive control of that system was not established. A common wall existed between the department store and the doctors' offices, and the drug store and department store also shared a common wall. Electrical wiring ran above the common wall from the electrical meters outside the building complex.
>
> Hence, we hold that there is no justification for the conclusion that negligence is the most likely explanation for this fire because there was no showing of the instrumentality that caused the damage, much less any showing of exclusive control. Our common knowledge and experience, or that of a jury, would not justify the inference that the accident would not have happened in the absence of negligence in that there are many possible causes for a building fire in the absence of negligence.

*Jerome Thriftway Drug, Inc. v. Winslow*, 110 Idaho 615,717 P.2d 1033 (1986).

(c) *Splinter v. City of Nampa*: Plaintiffs building was destroyed in an explosion that occurred as a deliverer was delivering a load of butane. Plaintiff sued the city in addition to the butane company, contending that the city had been negligent in requiring the placement of the butane delivery pipes adjacent to a coal chute. Plaintiff contended that this allowed any butane that leaked during delivery to flow into the basement. Plaintiff, however, was unable to pinpoint the cause of the explosion. Plaintiff appealed a judgment notwithstanding the verdict; the court affirmed, noting in passing: "It must be born in mind that this is not a case for the application of the doctrine of res ipsa loquitur. The city had no control over the maintenance or operation of either the tank, or any of the fittings or appliances in the building." *Splinter v. City of Nampa*, 74 Idaho 1,256 P.2d 215 (1953). See also *Maloney v. Winston Bros*., 18 Idaho 740, 111 P. 1080 (1910).

(2) Elements of the doctrine - "the circumstances were such that common knowledge and experience would justify the inference that the accident would not have happened in the absence of negligence":

(a) *Western Stockgrowers Association v. Edwards*: In August 1990, a grass fire started on Bureau of Land Management lands in southern Idaho. The fire burned several thousand acres and damaged fences owned by plaintiff. Defendant was driving through area on the day the fire began and admitted that his vehicle started the fire. Plaintiff did not, however, call Edwards as a witness, relying instead on witnesses who had seen Edward's vehicle near the point at which the fire started. Following plaintiffs case in chief, defendant moved for a directed verdict, asserting that plaintiff had failed to prove that he had breached any duty. The trial court granted the motion. On appeal, the court of appeals affirmed. The evidence, the court concluded, was insufficient to establish res ipsa loquitur.

> At trial, there was no evidence presented regarding the actual cause of the fire, whether related to some mechanical problem of the car or otherwise. Evidence was presented, however, that on the day of the fire, the weather was hot, dry and at least mildly windy. One witness testified that dry plants grew in the road on which Edwards had been driving. Because a variety of circumstances could start a fire in such a situation, many of which would not require negligence, the doctrine of res ipsa loquitur is not applicable. We do not believe that common knowledge and experience justifies making such an inference of negligence, and we affirm the order of the district court in this regard.

*Western Stockgrowers Association v. Edwards*, 126 Idaho 939, 894 P.2d 172 (Ct. App. 1995).

(b) *S.H. Kress & Co.v. Godman*: Upon arriving at work, plaintiff employee found a cold store. When he investigated further, he discovered that the boiler was not lit and that he could not restart it. He called defendant and requested a repairer. Upon inspection of the boiler, defendant determined that the water line was leaking and that the electrical switch controlling the gas flow into the boiler was turned off. He replaced the water line, turned the electricity back on, and restarted the boiler. Two hours later the boiler exploded. At trial, plaintiff’s expert testified that the explosion was caused by a defective regulator valve located inside the boiler. The defect could not be discovered without disassembling the boiler. The expert also testified that an external pressure relief valve failed to operate because it was corroded. Plaintiff argued that the defendant had a duty to inspect the external safety features of the boiler. Plaintiff also sought to have the jury instructed on res ipsa. The supreme court agreed with the trial court's refusal

to charge the jury on the doctrine: "In this case there are other probable explanations of the cause of the boiler's explosion including [plaintiff's] negligence in the control of maintenance of the boiler. For this reason, the trial court correctly concluded that the doctrine of res ipsa loquitur is inapplicable to the facts of this case." *S.H. Kress & Co. v. Godman*, 95 Idaho 614, 515 P.2d 561 (1973). See also *Wing v. Clark's Air Service, Inc*., 106 Idaho 806, 683 P.2d 842 (1984); *Christensen v. Potratz*, 100 Idaho 352, 597 P.2d 595 (1979).

(c) *Walker v. Distler: In C.C. Anderson*, the court noted that res ipsa was based upon the fact "that the circumstances were such that common knowledge and experience would justify the inference that the accident would not have happened in the absence of negligence." Does this mean that the doctrine is never applicable to circumstances which are beyond the common range of experience? In a medical malpractice case, the Court noted that the doctrine was generally inapplicable in such cases "because the causative factors are not ordinarily within the knowledge or experience of the laymen composing the jury." Nevertheless, the doctrine can be applied

> in cases where common knowledge alone may not be sufficient to enable a layman to say the accident is of a kind which ordinarily does not occur in the absence of negligence. In such cases the evidence produced is considered and, if it furnishes a sufficient basis for information from which a lay jury can reasonably conclude that the accident is of a kind which normally does not occur unless someone is negligent, the doctrine is applied.

*Walker v. Distler*, 78 Idaho 38, 296 P.2d 452 (1956).

(d) A role for expert testimony? As society and technology become increasingly complex, more things are outside common experience. Is there a role for experts in bridging the gap? Generally, the answer is that "in cases 'where common knowledge alone may not be sufficient to enable a layman to say the accident is of a kind which ordinarily does not occur in the absence of negligence,' expert testimony may be admissible" to "give a foundation for the trier of fact to reasonably conclude that the accident would not have occurred in the absence of negligence." *Brizendine v. Nampa Meridian Inigation District*, 97 Idaho 580, 548 P.2d80 (1976) (quoting *Walker v. Distler*, 78 Idaho 38, 296 P.2d 452 (1956)). The case resulted from the District's canal breaking through its banks and flooding plaintiffs' property. The plaintiffs presented the testimony of three experts who testified on a number of potential causes within the District's control, e.g., inadequate design or construction, gopher holes, etc.

In *Enriquez v. Idaho Power Co*., plaintiff was shocked before he touched an aluminum irrigation pipe that he was preparing to move. His expert testified that the case was a "fascinating engineering problem" and that he had "spent very great attention" to trying to understand how plaintiff was shocked and "finally arrive at the conclusion that the mechanism was a high impedance fault" which permitted electricity to jump to the pipe without actually having contact with the pipe. The court decided that the explanation was insufficient because it required the jurors to apply "specific technical information, which is outside of common knowledge and experience." *Enriquez v. Idaho Power Co*., 152 Idaho 562, 272 P.3d 534 (2012).

(3) Effect of the doctrine: What is the effect of the doctrine in Idaho? That is, does it give rise to a presumption of negligence or a permissible inference of negligence? What is the difference between the two?

(a) *Jerome Thriftway Drug, Inc. v. Winslow*:

> Res ipsa loquitur, it applicable, creates an inference of the breach of an imposed duty and replaces direct evidence with a permissive inference of negligence. The principle only applies when the agency or instrumentality causing the injury is under the exclusive control and management of the defendant, and the circumstances of the case are such that common knowledge and experience would justify the inference that the accident would not have happened in the absence of negligence. []

*Jerome Thriftway Drug, Inc. v. Winslow*, 110 Idaho 615, 717 P.2d 1033 (1986).

(b) IDJI 2.26- Res Ipsa Loquitur:

> If the plaintiff proves that the instrumentality or mechanism which caused the injury or damage in this case was under the control or management of the defendant, and further proves that in the normal course of events the injury or damage would not have happened in the absence of negligence, then you may find from these facts that the defendant was negligent in causing the injury or damage in this case.

(c) *Skaggs Drug Centers, Inc. v. City of Idaho Falls*: The city in its role as owner of the local water system argued that the application of res ipsa effectively imposed strict liability. The court responded:

> We disagree. The City is not an insurer for injury to others arising out of the installation, maintenance or operation of its water system; its liability depends solely upon negligence. The application of the doctrine of res ipsa loquitur does not, theoretically or practically, transform liability for negligence into insurance or absolute liability. Its only function is to replace direct evidence of negligence with a permissive inference of negligence. It warrants, but does not compel, a finding of negligence. It furnishes circumstantial evidence of defendant's negligence where direct evidence may be lacking. The burdens of proof of the parties remain the same the plaintiff, with the aid of the inference, must prove his case by a preponderance of the evidence; if the plaintiff presents sufficient evidence to get to the jury, the defendant is obligated to produce evidence to explain or rebut plaintiff's prima facie case. lf he fails to do so, he will in most instances suffer a verdict against him. In all cases, however, the preponderance of the plaintiff's evidence is a question for the trier of facts.
>
> The City vigorously contends that the methods of preventing leaks caused by rusting, namely, soil testing and periodically digging down to inspect the pipes, are impractical due to the high cost and shortage of manpower. This ultimate issue is clearly for the jury to determine and is a question of fact, not of law. This court will not disturb the findings of the jury if there is substantial evidence to support such a verdict, even though the evidence is conflicting.
>
> Because the question of negligence is for the jury to determine, the City urges that this court modify the rule established in *C.C. Anderson Stores Co. v. Boise Water Corporation*, []; *Yearsley v. City of Pocatello*, []; and *Dunn v. Boise City*, [], that the operator of a water system is bound to take notice that water pipes will deteriorate with time and use. The City contends that this court has held it is negligence for the water supplier to fail to take such steps as will prevent damage from leakage resulting from such deterioration. The trier of facts, not this court, has determined that the City's actions, or lack of the same, constitute negligence. The City claims that "The in this case clearly shows there is no practical way for a water supplier to obtain knowledge of the extent of depreciation in certain parts of the water system." Again, however, the question of practicality has been decided adversely to the City by the jury. The City's own expert testified that rusting is a normal process and eventually occurs in all iron water pipe. This is sufficient to charge the jury that a water supplier is on notice that a pipeline is subject to deterioration.

*Skaggs Drug Centers, Inc. v. City of Idaho Falls*, 90 Idaho 1,407 P.2d695 (1965). Why isn't res ipsa strict liability? How is it different than strict liability? Is the difference one of degree or kind? Does the court's response in Skaggs indicate another unspoken function of the jury? Leon Green has written that the greatest function (of the jury] in our government [is]that of an absorber of the discontent of citizens whose everyday affairs are subjected to the control of courts. In this it serves as prime political function in democratic [] government. What discontent, however inflamed, can be long sustained against a jury which, with its verdict given, dissolves into the citizenship at large? LEON GREEN, JUDGE AND JURY 376 (1930).

## 3. CUSTOM

**LOW v. PARK PRICE CO.**

Supreme Court of Idaho
95 Idaho 91, 503 P.2d 291 (1972)

DONALDSON, J. -The defendant, Highway Motor Company, dba Park Price Motors, operates an automobile repair garage in Pocatello, Idaho. On December 2, 1969, Cal Dale Low, the son of plaintiff-appellant Dale K. Low, brought the latter's car to the respondent's garage for repairs. In order to make these repairs, it was necessary to remove the engine from the appellant's car. Having removed the engine, the respondent stored the car in an unfenced area between the garage and an adjacent street. While the vehicle was stored in this location, its transmission disappeared. On or about December 18, the respondent told the appellant that the transmission had been stolen. Exactly when and by whom the transmission was removed are facts which remain unknown.

The respondent disclaimed any obligation to compensate the appellant for the loss of his transmission. The appellant then commenced this action for conversion and, in the alternative, for negligence. The parties stipulated that the lost transmission had a reasonable market value of five hundred dollars.... After a nonjury trial, the district court entered judgment in favor of the respondent garage owner and denied the appellant car owner's motion for a new trial. This appeal followed.

In its defense at trial, the respondent-bailee introduced testimony as to the currently prevailing custom and usage regularly observed by other service garages in the area. The appellant contends initially that the court erred in admitting such evidence because, he submits, the customary practices of the Pocatello garage owners constituted negligence as a matter of law and indicated a deliberate disregard of a known high risk of theft. In certain cases, where negligence or the absence of it appears as a matter of law, proof that the act or omission of the defendant did or did not conform to general usage or custom is immaterial. [] What everyone else does may be so clearly negligent in itself that it may be excluded from evidence. [] But these are the "extreme cases." [] As a general rule, the customs of the community, or of others under like circumstances, are factors to be taken into account in determining whether conduct is negligent. [] We do not think this is one of the extreme cases where it may be said that the defendant's practices, or those customarily adhered to by others similarly situated, are negligent as a matter of law. Therefore, the evidence of custom was properly admitted in this case. But the appellant further contends that the trial court erroneously reasoned that simply because the respondent had adhered to the customary practices among garage owners in the area, the respondent was, for that reason - and for that reason only - not negligent. "In determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account, but are not controlling where a reasonable man would not follow them." [RESTATEMENT {SECOND) OF TORTS § 295A {1965)] In other words, "custom or usage does not determine ordinary care, but the standard is what a reasonably prudent man under like circumstances would do."*Albrethson v. Carey Valley Reservoir Co*., 67 Idaho 529, 186P.2d 853 {1947). Or, as Justice Holmes succinctly stated the rule: 'What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." *Texas & Pacific Ry. v. Behymer*, 189 U.S. 468, 470 {1903); [] A good summary of the law is contained in comments band c to § 295A of the Restatement (Second) of Torts {1965):

> **b. *Relevance of custom***. Any such custom of the community in general, or of other persons under like circumstances, is always a factor to be taken into account in determining whether the actor has been negligent. Evidence of the custom is admissible, and is relevant, as indicating a composite judgment as to the risks of the situation and the precautions required to meet them, as well as the feasibility of such precautions, the difficulty of any change in accepted

> methods, the actor's opportunity to learn what is called for, and the justifiable expectation of others that he will do what is usual, as well as the justifiable expectation of the actor that others will do the same. If the actor does what others do under like circumstances, there is at least a possible inference that he is conforming to the community standard of reasonable conduct; and if he does not do what others do, there is a possible inference that he is not so conforming. In particular instances, where there is nothing in the situation or in common experience to lead to the contrary conclusion, this inference may be so strong as to call for a directed verdict, one way or the other, on the issue of negligence. Thus, even in the absence of any applicable traffic statute, one who drives on the right side of a private way is under ordinary circumstances clearly not negligent in doing so, and one who drives on the left side is under ordinary circumstances clearly negligent. On the same basis, evidence of the past practices of the parties to the action in dealing with each other is admissible, and relevant, as indicating an understood standard of conduct, or the reasonable expectation of each party as to what the other will do.
>
> c. When custom not controlling. Any such custom is, however, not necessarily conclusive as to whether the actor, by conforming to it, has exercised the care of a reasonable man under the circumstances, or by departing from it has failed to exercise such care. Customs which are entirely reasonable under the ordinary circumstances which give rise to them may become quite unreasonable in the light of a single fact in the particular case. It may be negligence to drive on the right side of the road, and it may not be negligence to drive on the left side when the right side is blocked by a dangerous ditch. Beyond this, customs and usages themselves are many and various. Some of them are the result of careful thought and decision, while others arise from the kind of inadvertence, neglect, or deliberate disregard of a known risk which is associated with negligence. No group of individuals and no industry or trade can be permitted, by adopting careless and slipshod methods to save time, effort, or money, to set its own uncontrolled standard at the expense of the rest of the community. If the only test is to be what has always been done, no one will ever have any great incentive to make any progress in the direction of safety. It follows, therefore, that whenever the particular circumstances, the risk, or other elements in the case are such that a reasonable man would not conform to the custom, the actor may be found negligent in conforming to it; and whenever a reasonable man would depart from the custom, the actor may be found not to be negligent in so departing."

[] [As] Judge Learned Hand stated [in The T.J. Hooper, 60 F.2d 737,740 (2d Cir. 1932), cert. denied, *Eastern Transportation Co. v. Northern Barge Corp*., 287 U.S. 662 (1932)]:

> Indeed, inmost cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

[]

Turning to the case at bar, we note that since the respondent has shown that it has done what others do under like circumstances, there is at least an inference that it is conforming to the community's idea of reasonable behavior.[]Where there is nothing in the evidence or in common experience to lead to a contrary conclusion, the inference arising from conformity to custom may be so strong that the issue of negligence may be determined as a matter of law. [] We conclude that this is such a case. The appellant-bailor failed to introduce any evidence to overcome the inference of reasonable care arising from the respondent-bailee's evidence; and there is nothing in common experience to lead to the conclusion that the respondent’s conduct was negligent. Therefore, even though the burden of persuasion is on the respondent-bailee, in this case the bailee proved, by a preponderance of the evidence, its freedom from negligence.

The appellant's remaining assignment of error - to the effect that the court erred in refusing to allow the appellant to ask one of the garage-owner witnesses what his profits amounted to for the preceding year- is without merit. In making this inquiry, the appellant sought to disprove the witness's

assertion that he could not afford to hire a night watchman. The district court correctly concluded that the information sought to be elicited was immaterial. Whether the garage owner could afford to hire a night watchman is immaterial to the question of whether ordinary care requires a night watchman. Of course, the cost of the suggested precaution would be relevant in determining whether the reasonable man would employ it. [] But in this case, the appellant did not seek to establish the cost of employing a night watchman; rather, the appellant sought to show that the witness's profits were such as to indicate that he could currently afford to take such a precaution against theft.

Judgment affirmed.

McFADDEN, SHEPARD, AND BAKES, JJ., AND MARTIN, D.J., CONCUR.

NOTES

(1) When is evidence of custom inadmissible? Why was the evidence admissible in this case? How might plaintiff's attorney have rebutted the persuasiveness of the custom evidence?

(2) **A definition**: "Custom" has been defined as "a fairly well defined and regular usage or way of doing a specific thing, among a group of people such as a trade, calling or profession." Fleming James Jr. & David K. Sigerson, Particularizing Standards of Conduct in Negligence Trials, 5 VAND. L.REV. 697, 709-10 {1952).

(3) **Effect of custom**: Proving that a statute satisfies the statutory purpose doctrine means that plaintiff has proved that defendant is negligent as a matter of law if she violated the statute. Does proof of custom operate in the same manner? Is the violation of the custom negligence per se?

**(a)** ***Hansen v. Standard Oil Co*.**: In Hansen, defendant employed plaintiff to weld a crack in a gasoline storage tank that it had sold to a third party. Plaintiff was injured when gasoline vapors in the tank exploded. At trial, plaintiff had testified that "he understood it was the custom for oil companies ...to properly prepare a used tank and make it safe for welding." Relying upon his understanding of the customary practices, plaintiff had failed to prepare the tank. On appeal, defendant argued that plaintiff was contributorily negligent. The court rejected this argument, noting that "custom" was "the ordinary manner in which certain work is done." It concluded:

> Considering the right to rely on a custom ...as a way of going things and as bearing on the question of contributory negligence, there are two stages, first, was there a custom or usage or general course of conduct ... and if there was, second, was it acting like a reasonably prudent man for [plaintiff] to rely on such custom. First as to the question of fact, plaintiff so testified without objection and was not contradicted, and second, whether reliance was justifiable or not was for the jury. []The custom or usage so relied on herein was not so dangerous as to be rejected as a matter of law, as in *Rumpel v. Oregon Short Une Ry*., 4 Idaho 13, 35 P. 700 (1894). *Hansen v. Standard Oil Co*., 55 Idaho 483,44 P.2d 709 (1935).

**(b)** ***Albrethson v. Carey Valley Reservoir Co***.: Plaintiff alleged that defendant had allowed water to seep from its canal, rendering the land plaintiff farmed too wet for crops. On appeal, the Idaho Supreme Court rejected defendant's argument that the trial court had erred in refusing to give an instruction on custom; the court simply noted that "custom and usage does not determine ordinary care, but the standard is what a reasonably prudent man under like circumstances would do."*Albrethson v. Carey Valley Reservoir Co.,* 67 Idaho 529, 186P.2d853 (1947).

***(c)*** ***Bicandi v. Boise Payette Lumber Co***.: Parents of a child who drowned in the defendant's mill pond contended that the defendant was negligent in failing to fence the pond. The court rejected this argument: "Mill ponds are, and for many years have been, in common use in Idaho. Logs have been, and are kept and floated therein, as is alleged to have been done by [defendant], and it is not customary to enclose them. [Defendant's] failure to maintain a sufficient fence, to keep boys away

from the pond does not render it liable." *Bicandi v. Boise Payette Lumber Co*., 55 Idaho 543, 44 P.2d 1103 (1935).

What weight does the court give to the custom?

## 3. PROFESSIONAL MALPRACTICE (CUSTOM, Part 2)

### a. Medical Malpractice

#### i. Prelitigation Screening Panels

(1) The traditional standard of care: Prior to 1976, the Idaho courts employed the traditional "same-or-similar locale" standard in medical malpractice cases. In *Flowerdew v. Warner*, for example, defendant treated plaintiff for an injury to his back that resulted from a fall. The court affirmed a directed verdict for the doctor, holding that "[t]here was no evidence that defendant's treatment was not incompliance "with the standards of practice of an osteopathic physician in the community." Plaintiffs witnesses were all medical doctors who had no knowledge of osteopathic practice:

> The general rule is that a practitioner of one of the healing arts, while remaining within the scope of his field of practice, is entitled to have the standard of treatment he gave a patient tested by the rules and principles of the school of medicine to which he belongs, and not by those of some other school.

*Flowerdew v. Warner*, 90 Idaho 164, 409 P.2d 110 (1965).

(2) The 1976 legislature adopted the following statutes applicable to medical malpractice actions. As with many statutes, the legislature introduced the substantive provisions of the statute with the following statement of the purposes of the legislation:

> It is the declaration of the legislature that appropriate measures are required in the public interest to assure that a liability insurance market be available to physicians and hospitals in this state and that the same be available at reasonable cost, thus assuring the availability of such health care providers for the provision of care to persons in this state.
>
> It is, therefore, further declared to be in the public interest to encourage nonlitigation resolution of claims against physicians and hospitals by providing for prelitigation screening of such claims by a hearing panel as provided in this act.
>
> § 6-1001: Hearing panel for prelitigation consideration of medical malpractice claims -Procedure - The Idaho state board of medicine, in alleged malpractice cases involving claims for damages against physicians and surgeons practicing in the state of Idaho or against licensed acute care general hospitals operating in the state of Idaho, is directed to cooperate in providing a hearing panel in the nature of a special civil grand jury and procedure for prelitigation consideration for personal injury and wrongful death claims for damages arising out of the provision of or alleged failure to provide hospital or medical care in the state of Idaho, which proceedings shall be informal and nonbinding, but nonetheless compulsory as a condition precedent to litigation. Proceedings conducted or maintained under the authority of this act shall at all times be subject to disclosure according to chapter 3, title 9, Idaho Code. Formal rules of evidence shall not apply, and all such proceedings shall be expeditious and informal.
>
> § 6-1002: Appointment and composition of hearing panel- The board of medicine shall provide for and appoint an appropriate panel or panels to accept and hear complaints of such negligence and damages, made by or on behalf of any patient who is an alleged victim of such negligence. Said panels, shall include one (1) person who is licensed to practice medicine in the state of Idaho. In cases involving claims against hospitals, one (1) additional member shall be a then

serving administrator of a licensed acute care general hospital in the state of Idaho. One (1) additional member from each such panel shall be appointed by the commissioners of the Idaho state bar, which person shall be a resident lawyer licensed to practice law in the state of Idaho and shall serve as chairman of the panel. The panelists so appointed shall select by unanimous decision a layman panelist who shall not be a lawyer, doctor or hospital employee but who shall be a responsible adult citizen of Idaho. All panelists shall serve under oath that they are without bias or conflict of interest as respects any matter under consideration.

§ 6-1003: Informal proceedings -There shall be no record of such proceedings and all evidence, documents and exhibits shall, at the close thereof, be returned to the parties or witnesses from whom the same were secured. The hearing panel shall have the authority to issue subpoenas and to administer oaths; provided, the parties requesting the presentation of such proof shall provide the funds required to tender witness fees and mileage as provided in proceedings in district courts. Except upon special order of the panel, and for good cause shown demonstrating extraordinary circumstances, there shall be no discovery or perpetuation of testimony in said proceedings.

§ 6-1004: Advisory decisions of panel -At the close of proceedings the panel, by majority and minority reports or by unanimous report, as the case may be, shall provide the parties its comments and observations with respect to the dispute, indicating whether the matter appears to be frivolous, meritorious or of any other particular description. If the panel is unanimous with respect to an amount of money in damages that in its opinion should fairly be offered or accepted in settlement, it may so advise the parties and affected insurers or third-party payors having subrogation, indemnity or other interest in the matter.

§ 6-1005: Tolling of limitation periods during pendency of proceedings --There shall be no judicial or other review or appeal of such matters. No party shall be obliged to comply with or otherwise [be] affected or prejudiced by the proposals, conclusions or suggestions of the panel or any member or segment thereof; however, in the interest of due consideration being given to such proceedings and in the interest of encouraging consideration of claims informally and without the necessity of litigation, the applicable statute of limitations shall be tolled and not be deemed to run during the time that such a claim is pending before such a panel and for thirty (30) days thereafter.

§ 6-1006: Stay of other court proceedings in interest of hearing before panel - During said thirty (30) day period neither party shall commence or prosecute litigation involving the issues submitted to the panel and the district or other courts having jurisdiction of any pending such claims shall stay proceedings in the interest of the conduct of such proceedings before the panel.

§ 6-1007: Service of claim on accused provider of health care - At the commencement of such proceedings and reasonably in advance of any hearing or testimony, the accused provider of health care in all cases shall be served a true copy of the claim to be processed which claim shall set forth in writing and in general terms, when, where and under what circumstances the health care in question allegedly was improperly provided or withheld and the general and special damages attributed thereto.

§ 6-1008: Confidentiality of proceedings- Neither party shall be entitled, except upon special order of the panel, to attend and participate in the proceedings which shall be subject to disclosure according to chapter 3, title 9, Idaho Code and closed to public observation at all times, except during the giving of his or her own testimony or presentation of argument of his or her position, whether by counsel or personally; nor shall there be cross-examination, rebuttal or other customary formalities of civil trials and court proceedings. The panel itself may, however, initiate requests for special or supplemental participation in particular respects and of some or all parties; and communications between the panel and the parties, except only the parties' own testimony on the merits of the dispute, shall be fully disclosed to all other parties.

§ 6-1009: Representation of parties by counsel- Parties may be represented by counsel in proceedings before such panels, though it shall not be required.

§ 6-1010: Fees for panel members¨The Idaho state board of medicine shall provide, by uniform policy of the board, for the payment of fees and expenses of members of panels, such payment to be made from the state board of medicine fund created in section 54-1809, Idaho Code. Panel members shall serve upon the sworn commitment that all related matters shall be subject to disclosure according to chapter 3, title 9, Idaho Code.

§ 6-1011: Limit on duration of proceedings - Panel's jurisdiction -There shall be no repeat or reopening of panel proceedings. In no case shall a panel retain jurisdiction of any such claim in excess of ninety (90) days from date of commencement of proceedings. Ifat the end of such ninety (90) day period the panel is unable to decide the issue before it, it shall summarily conclude the proceedings and the members may informally, by written communication, express to the parties their joint and several impressions and conclusions, if any, albeit the same may be tentative or based upon admittedly incomplete consideration; provided, by written agreement of all parties the jurisdiction of the panel, if it concurs therein, may be extended and the proceeding carried on for additional periods of thirty (30) days.

NOTES

(1) What are the precise steps with which a plaintiff must comply? How does the plaintiff initiate the process?

(2) In 1990, the legislature amended the Idaho Public Records Act to provide a centralized listing of what public records were available to the public. In conjunction with this recodification, the prelitigation screening panel statute was amended by deleting the following confidentiality provision: "confidential, privileged and immune from civil process and evidence of them or results, findings or determinations thereof shall be inadmissible in any civil or other action or proceeding by, against or between the parties thereto or any witness therein." See Act of Apr. 15, 1990, ch. 213, 1990 Idaho Sess. Laws 480. The new provision references I.C. § 9-340, which provides in part: "The following records are exempt from disclosure: .... (32) The records, findings, determinations and decision of any prelitigation screening panel formed under chapter 10, title 6, Idaho Code."

**ii. Proving a Breach of the Standard of Care**

In addition to creating hearing panels, the 1976 legislature modified the proof requirements applicable to medical malpractice litigation:

It is the declaration of the legislature that appropriate measures are required in the public interest to assure that a liability insurance market be available to physicians, hospitals and other health care providers in this state and that the same be available at reasonable cost, thus assuring the availability of such health care providers for the provision of care to persons in the state. It is, therefore, further declared to be in the public interest that the liability exposure of such health care providers be limited and made more definable by a requirement for direct proof of departure from a community standard of practice.

§ 6-1012: Proof of community standard of health care practice in malpractice case
- In any case, claim or action for damages due to injury to or death of any person, brought against any physician and surgeon or other provider of health care, including, without limitation, any dentist, physicians' assistant, nurse practitioner, registered nurse, licensed practical nurse, nurse anesthetist, medical technologist, physical therapist, hospital or nursing home, or any person vicariously liable for the negligence of them or any of them, on account of the provision of or

failure to provide health care or on account of any matter incidental or related thereto, such claimant or plaintiff must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that such defendant then and there negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence of such physician and surgeon, hospital or other such health care provider and as such standard then and there existed with respect to the class of health care provider that such defendant then and there belonged to and in which capacity, he, she or it was functioning. Such individual providers of health care shall be judged in such cases in comparison with similarly trained and qualified providers of the same class in the same community, taking into account his or her training, experience, and fields of medical specialization, if any. If there be no other like provider in the community and the standard of practice is therefore indeterminable, evidence of such standard in similar Idaho communities at said time may be considered. As used in this ad, the term "community" refers to that geographical area ordinarily served by the licensed general hospital at or nearest to which such care was or allegedly should have been provided.

§ 6-1013: Testimony of expert witness on community standard- The applicable standard of practice and such a defendant's failure to meet said standard must be established in such cases by such a plaintiff by testimony of one (1) or more knowledgeable, competent expert witnesses, and such expert testimony may only be admitted in evidence if the foundation therefor is first laid, establishing (a) that such an opinion is actually held by the expert witness, (b) that the said opinion can be testified to with reasonable medical certainty, and (c) that such expert witness possesses professional knowledge and expertise coupled with actual knowledge of the applicable said community standard to which his or her expert opinion testimony is addressed; provided, this section shall not be construed to prohibit or otherwise preclude a competent expert witness who resides elsewhere from adequately familiarizing himself with the standards and practices of (a particular) such area and thereafter giving opinion testimony in such a trial.

NOTES

(1) See Monique C. Lillard, *The Standard of Care for Medical Malpractice Claims in Idaho: Time for Reassessment*, The Advocate (Idaho) 51:5 (May 2008).

(2) See Monique C. Lillard, *The Standard of Care for Health Providers in Idaho*, 44 Idaho Law Review, Symposium Edition, 295-359 (2008).

(3) The legislative goal: The language of the Act's preamble- "It is ...declared to be in the public interest that the liability exposure of ...health care providers be limited"- suggests that the legislature intended to change the common law. Did the legislature succeed? For example, if a physician left a sponge in a patient following surgery, would the patient be able to rely upon res ipsa loquitur to establish the physician's negligence? See *Kolin v. Saint Luke's Regional Medical Center*, 130 Idaho 323, 334, 940 P.2d 1142, 1153 (1997) (res ipsa may not be used in medical malpractice cases); see also *Schmechel v. Dille*, 148 Idaho 176, 219 P.3d 1192 (2009) (negligence per se may not be used in a medical malpractice action).

Consider the following decision:

**MAXWELL v. THE WOMEN'S CLINIC, PA**
Supreme Court of Idaho
102 Idaho 53, 625 P.2d 407 (1981)

DONALDSON, J.: Plaintiffs-appellants Mr. and Mrs. Maxwell brought a medical malpractice suit against defendants-respondents the Women's Clinic, P.A., and Dr. Stromberg. The Maxwells alleged that the defendants improperly and negligently failed to advise Mrs. Maxwell of certain risks of a laparoscopic

tubal ligation surgical procedure and improperly and negligently performed that surgical procedure by burning a hole in Mrs. Maxwell's small intestine necessitating additional surgery. Besides the pain and loss of a portion of the small intestine to Mrs. Maxwell, they alleged that the additional surgery caused Mr. Maxwell to be deprived of his wife's services, comfort, society and companionship during her surgery and extended recovery.

Mr. Maxwell's deposition describes as follows a conversation he had with Dr. Stromberg in which the appellants allege that Dr. Stromberg admitted negligence:

"Q. And would you relay what you remember saying yourself, and what Dr. Stromberg said to you?

A. Dr. Stromberg introduced himself to me and said that they would need to do additional surgery. And I remember saying something about it. And he said, the way I remember it, he said, I obviously messed up on the first one, and another surgery has to be done to repair the damage.....

B.
Q. In testifying here today as to what Dr. Stromberg said to you, do you recall his exact words?

A. No, not exactly. I do remember him saying, I obviously messed up. Other than that, I don't remember too much more about it." (emphasis added). Mr. Maxwell further stated that nobody else overheard the above statement.

Additionally, Dr. Stromberg did not bill the Maxwells for his services in either the laparoscopic tubal ligation or for his assistance during in the exploratory laparotomy performed by Dr. Lung. He explained his non-billing by stating he did not wish to contribute to the Maxwells' financial hardship since he was concerned for their circumstances.

Defendants moved for summary judgment on the grounds that there were no issues of material fact and they were entitled to judgment as a matter of law. In the defendants' memorandum supporting their motion for summary judgment, they argued that the consent form signed by Mrs. Maxwell indicates adequate notice, that a reasonable person in Mrs. Maxwell's position would have undergone the surgery notwithstanding the advice of possible complications and that plaintiffs have failed to provide expert testimony to refute defendants' experts that the operations were within required standards. The defendants also filed affidavits by Dr. Gerhard and Dr. Stromberg, physicians and surgeons practicing in the field of obstetrics and gynecology. Dr. Stromberg asserted in his affidavit that he performed the surgery in a manner consistent with the medical standards of care applicable in Boise, Idaho, at the time the operation was performed, and that the injury which Mrs. Maxwell suffered could have occurred in the absence of negligence on his part. Dr. Gerhard's affidavit stated that based on his review of the medical records that Dr. Stromberg did not deviate from the applicable medical standards and that this injury could have occurred without any negligence on the part of Dr. Stromberg.

Plaintiffs resisted the motion by arguing, among other things, that whether Mrs. Maxwell's consent was informed was still at issue and that the statement attributed to Dr. Stromberg and his non-billing were direct expert testimony.

The district court granted defendants' motion for summary judgment on the basis that plaintiffs offered no medical or expert testimony that the defendants negligently failed to meet the applicable standard of health care practice of the community. Plaintiffs appeal arguing that Dr. Stromberg's statement and actions constitute an admission of medical malpractice and qualify as expert testimony.

*LePelley v. Grefenson*, 101 Idaho 422, 614 P.2d 962 (1980),] held that plaintiffs in a medical malpractice action could not complain about the granting of summary judgment against them when no expert testimony favoring their position had been offered. This Court in LePelley, reviewed the application

of I.C. §§ 6-1012 and 6-1013, which were passed by the Idaho legislature as part of retroactive and prospective medical malpractice emergency legislation. [The court then quoted the legislature's statement of purpose and language from §§ 6-1012 and 6- 1013.]

Therefore, in order to preclude summary judgment in medical malpractice cases, plaintiffs must show that expert testimony has been offered by either the plaintiff or defendant which when viewed in a light most favorable to plaintiffs indicates that the defendant has negligently failed to meet the applicable standard of health care practice of the community. LePelley, []. In the case at bar, the alleged admission of the defendant doctor, equivocal at best, does not satisfy the standards set out in I.C. §§ 6-1012 and 6-1013. Furthermore, both of the medical experts that submitted affidavits stated that injury to the bowel is an inherent and unavoidable risk in laparoscopic tubal ligation which can and does occur in the absence of negligence on the part of the physician performing the surgery. In fact, both experts indicated in affidavits submitted on behalf of the respondents that Dr. Stromberg had performed the operation within the standard of care of the community. Nothing is offered to refute this testimony other than Mr. Maxwell's testimony regarding Dr. Stromberg's alleged statement and Dr. Stromberg's admitted non-billing of the Maxwells. However, this evidence, even when construed in a light most favorable to the Maxwells, does not reasonably infer that Dr. Stromberg negligently failed to meet the applicable standard of health care practice of the community. Therefore, we affirm the district court's granting of summary judgment.

BAKES, C.J., AND SHEPARD, J., CONCUR. BISTLINE, J., DISSENTING: ....

NOTES

(1) What was the shortcoming in plaintiff's proof? What must a plaintiff do to avoid summary judgment?

(2) *Pearson v. Parsons*: In *Pearson v. Parsons*, the court sought to clarify what was required from plaintiff:

> This Court has held that "in order to preclude summary judgment in medical malpractice cases, plaintiffs must show that expert testimony has been offered by either the plaintiff or defendant which when viewed in a light most favorable to plaintiffs indicates that the defendant has negligently failed to meet the applicable standard of health care practice of the community." *Maxwell v. Women's Clinic, P.A*., [].
>
> When viewed in light of the standards set forth in Maxwell ..., the affidavit of Dr. Weeks [plaintiff's expert] was sufficient to raise a genuine issue of material fact and to defeat the motion for summary judgment of Dr. Parsons and Dr. Thueson. A review reveals that when measured by these standards the affidavit fulfilled the requirements of I.C. §§ 6-1012 and 6-1013 and should have been considered by the trial court, even though Dr. Weeks was not board-certified in either pediatrics or surgery.
>
> 1. Dr. Weeks demonstrated that he was judging Dr. Parsons and Dr. Thueson "in comparison with similarly trained and qualified [physicians] in the same community, taking into account his or her training, experience, and fields of medical specialization." I.C. § 6-1012. ("Dr. Parsons and Dr. Thueson did not comply with the applicable standard of practice for physicians of their specialties in Blackfoot, Idaho." Weeks' affidavit, [].)
>
> 2. He was a "knowledgeable, competent expert witness." I.C. § 6-1013. ("I am a practicing doctor of medicine." Weeks' affidavit, [].)
>
> 3. He actually held an opinion about the "applicable standard of practice" and the failure of Dr. Parsons and Dr. Thueson to meet the standard. I.C. § 6-1013(a).
>
> ("[I]t is the opinion of your Affiant ... that the recommendation that a child be back for re-examination should significant improvement not occur in the child's condition and/or should the child become worse, is not the standard which is to be followed by a practicing physician and that

> under the circumstances, a recommendation to bring the child back in twenty-four (24) hours was in error since the twenty-four (24) hour waiting period in an appendicitis case in a juvenile is an excessive amount of time ...that the child should have been brought back in the afternoon of the 24th of December, 1984,for a re-examination and re-test of the blood count of the minor child ... [and] that Dr. Parsons and Dr. Thueson did not comply with the applicable standard[s] ... in the care and treatment they rendered to Emily Pearson on or about December 24, 1984."Weeks' affidavit, [].)
>
> 4. His opinion was rendered "with reasonable medical certainty." I.C. § 6-1013(b). ("[l]tis the opinion of your Affiant, to a reasonable degree of medical certainty...."
> Weeks' affidavit, [].)
>
> 5. He possessed "professional knowledge and expertise coupled with actual knowledge of the applicable ...community standard to which his ...expert opinion testimony is addressed." I.C. §6-1013(c). ("I am also familiar with the standards of the community regarding the diagnosis and treatment of suspected and actual appendicitis." Weeks' affidavit, [].)

*Pearson v. Parsons*, 114 Idaho 334,757 P.2d 197 (1988).

Again: what is plaintiff required to do to defeat defendants motion for summary judgment? What must plaintiffs? experts state in their depositions?

(3) *Grover v. Smith*: Fourteen years later, the court noted that "the question of how to qualify an out-of-area physician to render an opinion in a medical malpractice case 'has plagued the bench and trial bar since the enactment of Idaho's [medical malpractice statute's] requir[ement of] actual knowledge of the local standard of care.'" [quoting *Keyser v. Gamer*, 129 Idaho 112, 117, 922 P.2d409, 414 (Ct. App. 1996)] The court reviewed several cases and concluded that they did not "provide a clear-cut set of rules." Nonetheless, the court was able to discern two points along a continuum: "when the plaintiffs expert failed to contact any local physician" summary judgment is proper; but when "the plaintiffs expert did consult a local physician possessing expertise on the area at issue," summary judgment is not. The court then turned to the applicable statutes. I.C. § 6-1012 requires direct expert testimony to establish the community standard; I.C. §6-1013 requires expert testimony that the health care provider did not meet the applicable standard of care. Thus,

> [e]xperts testifying as to the standard of care in medical malpractice actions must show that they have familiarized themselves with the standard for a particular profession for the relevant community and time. See *Kolln[ v. Saint Luke's Regional Medical Center*,] 130 Idaho [323,] 331, 940 P.2d[1142,] 1150[(1997)]. They must also state how they became familiar with the standard of care for the particular health care profession. ld. An out-of state expert can become familiar with the local standard of care by inquiring of a local specialist or by 'review of a deposition stating that the local standard does not vary from the national standard, coupled with the expert's personal knowledge of the national standard.' *Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 51-52, 995 P.2d 816, 821-22 (2000).

The court then examined the affidavit at issue in detail. The issue, the court stated, was whether taking a medical history from the patient was so fundamental that it was the applicable standard across the state. Plaintiffs expert testified that it was and defendant's suggestion that, if local dentists so chose, community standards of care could fall below minimum statewide standards is not persuasive. At issue in this case is a minimum statewide standard of care, not a lack of advanced technology, conditions unique to the area, or particular specializations with which the expert is unfamiliar. While it may be understood that a small Idaho town may not have the technology used in a big city, thus necessitating a different local standard of care, choosing not to adhere to the basic dental standards established by the Idaho Board of Dentistry is not. Taking a patient's medical history is a minimum requirement that must be met to become a licensed dentist in Idaho.

[Defendant's] contention that professionals in a community could decide to adopt a local standard of care that is inferior to the bare minimum statewide standards is without merit. The court therefore reversed summary judgment for the dentist. *Grover v. Smith*, 137 Idaho 247, 46 P.3d 1105 (2002).

Again: what is plaintiff required to do to defeat defendants motion for summary judgment? What must plaintiff's experts state in their depositions?

### iii. Informed Consent

In addition to the provisions governing the applicable standard of care, the 1976 legislature also adopted a statute specifying the requirements of "informed consent":

> §39-4301: Purpose -The primary purposes of this act are (1) to provide and codify Idaho law concerning consent for the furnishing of hospital, medical, dental or surgical care, treatment or procedures and concerning what constitutes an informed consent for such care, treatment or procedures and (2) to provide certainty and clarity in the law of medical consent in the furtherance of high standards of health care and its ready availability in proper cases. However, nothing in this act shall be deemed to amend or repeal the provisions of chapter 3, title 66, Idaho Code, as the same pertain to medical attendance upon or hospitalization of the mentally ill, nor the provisions of chapter 6, title 18, Idaho Code, pertaining to provision of examinations, prescriptions, devices and informational materials regarding prevention of pregnancy or pertaining to therapeutic abortions and consent to the performance thereof. Nothing in this act shall be construed to permit or require the provision of health care for a patient in contravention of his stated or implied objection thereto upon religious grounds nor shall anything in this act be construed to require the granting of permission for or on behalf of any patient not able to act for himself by his parent, spouse or guardian in violation of the religious beliefs of the patient and/or the parent or spouse.
>
> §39-4302: Persons who may consent to their own care - Any person of ordinary intelligence and awareness sufficient for him or her generally to comprehend the need for, the nature of and the significant risks ordinarily inherent in any contemplated hospital, medical, dental or surgical care, treatment or procedure is competent to consent thereto on his own behalf. Any physician, dentist, hospital or other duly authorized person may provide such health care and services in reliance upon such a consent if the consenting person appears to the physician or dentist securing the consent to possess such requisite intelligence and awareness at the time of giving it.
>
> §39-4303: Persons who may give consent to care for others –
>
> (a) Parent, spouse or guardian. Consent for the furnishing of hospital, medical, dental or surgical care, treatment or procedures to any person who is not then capable of giving such consent as provided in this act or who is a minor or incompetent person, may be given or refused by any competent parent, spouse, or legal guardian of such person unless the patient is a competent adult who has refused to give such consent.
>
> (b) Competent relative or other person. If no parent, spouse or legal guardian is readily available to do so, then consent may be given by any competent relative representing himself or herself to be an appropriate, responsible person to act under the circumstances; and, in the case of a never married minor or mentally incompetent person, by any other competent individual representing himself or herself to be responsible for the health care of such person, provided, however, that this subsection shall not be deemed to authorize any person to override the express refusal by a competent adult patient to give such consent himself.
>
> (c) Attending physician or dentist. Whenever there is no person readily available and willing to give or refuse consent as specified hereinabove in this act, and in the judgment of the attending physician or dentist the subject person presents a medical emergency or there is

substantial likelihood of his or her life or health being seriously endangered by withholding or delay in the rendering of such hospital, medical, dental or surgical care to such patient, the attending physician or dentist may, in his discretion, authorize and/or provide such care, treatment or procedure as he or she deems appropriate, and all persons, agencies and institutions thereafter furnishing the same, including such physician or dentist, may proceed as if informed, valid consent therefor had been otherwise duly given.

(d) Immunity from liability. No person who, in good faith, gives consent or authorization for the provision of hospital, medical, dental or surgical care, treatment or procedures to another as provided by this act shall be subject to civil liability therefor.

§39-4304: Sufficiency of consent --Consent for the furnishing of hospital, medical, dental or surgical care, treatment or procedures shall be valid in all respects if the person giving it is sufficiently aware of pertinent facts respecting the need for, the nature of and the significant risks ordinarily attendant upon such a patient receiving such care, as to permit the giving or withholding of such consent to be a reasonably informed decision. Any such consent shall be deemed valid and so informed if the physician or dentist to whom it is given or by whom it is secured has made such disclosures and given such advice respecting pertinent facts and considerations as would ordinarily be made and given under the same or similar circumstances, by a like physician or dentist of good standing practicing in the same community. As used in this section, the term "in the same community'' refers to that geographical area ordinarily served by the licensed general hospital at or nearest to which such consent is given.

§39-4305: Form of consent - It is not essential to the validity of any consent for the furnishing of hospital, medical, surgical or dental care, treatment or procedures that the same be in writing or any other form of expression; however, when the giving of such consent is recited or documented inwriting and expressly authorizes the care, treatment or procedures to be furnished, and when such writing or form has been executed or initialed by a person competent to give such consent for himself or another, such written consent, in the absence of convincing proof that it was secured maliciously or by fraud, is presumed to be valid for the furnishing of such care, treatment or procedures, and the advice and disclosures of the attending physician or dentist, as well as the level of informed awareness of the giver of such consent, shall be presumed sufficient.

§39-4306: Responsibility for consent and documentation thereof -- Obtaining consent for such health care is the duty of the attending physician or dentist or of another physician or dentist acting on his or her behalf or actually providing the contemplated care, treatment or procedure; however, a licensed hospital and any medical or dental office lay or professional employee, acting with the approval of such a physician or dentist, may perform the ministerial act of documenting such consent by securing the completion and execution of a form or statement in which the giving of consent for such care is documented by or on behalf of a patient. In performing such a ministerial act, the hospital or medical or dental office lay or professional employee shall not be deemed to have engaged in the practice of medicine or dentistry.

NOTE CASES

(1) ***Ballard v. Kerr, 160 Idaho 674, (2016***): This is an appeal from a jury verdict entered in a wrongful death action. Charles Ballard ("Charles") brought suit for wrongful death and medical malpractice against Silk Touch Laser, LLP ("Silk Touch") and its owner Dr. Brian Kerr. In 2010, Charles' wife Krystal Ballard ("Krystal") underwent a liposuction and fat transfer procedure at Silk Touch in Eagle, Idaho. Krystal died less than a week later from septic shock caused by unknown bacteria in her right buttock. Charles' suit alleged that the bacteria that caused Krystal's death were introduced into her body during the procedure at Silk Touch because certain reusable medical equipment was not properly disinfected and sterilized. The Court affirmed the jury judgement for plaintiff, finding, *inter alia* that in this case the standard of care was a question of law. The jury found recklessness. This lengthy case offers insight into the trial process.

(2) ***Lepper v. E. Idaho Health Servs., 160 Idaho 104, (2016)***: This appeal arose from a medical malpractice suit, where Charles and Janice Lepper (the Leppers) alleged the negligence of a hospital (EIRMC) and Dr. Stephen R. Marano, (Dr. Marano), which rendered Charles Lepper a paraplegic. The Leppers appealed a grant of summary judgement in favor of defendants. The supreme court vacated and remanded, holding *inter alia* that in circumstances where not a single medical provider is willing to consult with a plaintiff's expert regarding the standard of care, the standard becomes indeterminable and the plaintiff may then look to other similar localities or communities outside the state.

(3) ***Bybee v. Gorman, 157 Idaho 169, (2014)***: In a medical malpractice case, an affidavit that fails to identify an anonymous consultant does not categorically fail to comply with the foundation requirements for admissibility of an out-of-area expert's testimony under Idaho Code Ann. § 6-1013, and rather, the inquiry remains whether the out-of-area expert demonstrates how he became adequately familiar with the community standard of health care practice.

**SHERWOOD v. CARTER**

Supreme Court of Idaho
119 Idaho 246,805 P.2d 452 (1991)

BOYLE, J. -In this medical malpractice action, we are called upon to determine whether the jury instructions adequately framed the issues and properly stated the law of informed consent.

Plaintiffs, Joe and Carol Sherwood, filed a medical malpractice action against the defendant, Stephen J. Carter, M.D. The jury returned a general verdict in favor of the defendant. Plaintiffs appeal.

[Dr. Carter saw Carol Sherwood in August 1980, when he diagnosed a lump as being cancerous. Dr. Carter performed a mastectomy and referred her to an oncologist for chemotherapy. A few months after the mastectomy, Mrs. Sherwood saw Dr. Roger Tall, a urologist, for an unrelated problem. He discovered and removed a small nodule located on her neck; a biopsy showed that the nodule was cancerous. Approximately one year after Mrs. Sherwood's mastectomy, she saw Dr. Tall and reported a lump under the previous biopsy site. Dr. Tall referred Mrs. Sherwood to Dr. Carter who recommended a biopsy and chemotherapy. Mrs. Sherwood cancelled scheduled biopsies. She next saw Dr. Carter on September 6, 1984, complaining of a large ulcerated sore on the back of her head. Dr. Carter also discovered enlarged lymph nodes in her neck which she stated had been present for several years. Dr. Carter recommended diagnostic procedures and told Mrs. Sherwood that the sore was probably cancerous and was potentially life threatening; he recommended radiation therapy and biopsies. Mrs. Sherwood agreed and signed a consent form. The biopsy was performed on September 19, 1984.In the first week following the surgery, Mrs. Sherwood expressed no complaints. When Dr. Carter next saw Mrs. Sherwood on November 13, 1984, she complained of stiffness in her left shoulder. Dr. Carter found nothing abnormal. Shoulder x-rays were taken by an orthopedic surgeon who advised her that the stiffness was probably caused by tendinitis due to immobilization. Mrs. Sherwood then had a neurologist administer several diagnostic tests; the tests revealed no enervation in the muscles which would have been present had Dr. Carter severed the spinal accessory nerve as alleged by Mrs. Sherwood.

[Mrs. Sherwood alleged that Dr. Carter negligently performed the biopsy and failed to obtain informed consent. Dr. Carter was granted a partial summary judgment on the issue of negligence. The jury returned a verdict in favor of defendant. In this appeal, Mrs. Sherwood asserts that the jury instructions did not correctly present the law of informed consent.] First, Mrs. Sherwood argues the trial court improperly failed to instruct the jury concerning the elements of the plaintiff's prima facia case and the applicable burden of proof. Secondly, she asserts that the trial court erred when it instructed the jury that it must consider what a "reasonable person" would have done in the plaintiff's position. Thirdly, she argues that the trial court erred by giving one instruction which stated that the defendant was to be held to the standard of care of physicians practicing in the "same or like community," and another instruction which stated that the defendant was to be held to the standard of care of physicians practicing in the

"same community." The fourth alleged error is that the trial court failed to instruct the jury on the "patient-based" theory of informed consent.

**II**
**Informed Consent**

It must be kept in mind that the issue of informed consent is governed by I.C. §39-4304. In addition to analyzing I.C. § 39-4304, we will review existing case law from Idaho and other jurisdictions in an effort to clarify the law on the issue of informed consent. In the instant case it is evident from both parties' briefs and our review of the current state of the law that there is considerable need to clarify Idaho law concerning the issue of informed consent.

Ordinarily, the liability of a physician for damages for injuries suffered by a patient in the course of treatment administered by the physician is predicated on the failure of the physician to exercise due care in performing such treatment. [] However, a physician may also be held liable in some circumstances even though the physician is free from personal negligence in the actual treatment of the patient. [](doctrine of informed consent implies a duty which is completely separate and distinct from his responsibility to skillfully diagnose and treat the patient's ills).This would be the case in a situation where the physician treats a patient without the latter's consent or beyond the scope of the consent given, or where the physician fails to inform the patient of the risks of a particular treatment thus preventing the patient from making an informed decision as to whether he or she is willing to undergo the proposed treatment. []; *Cobbs v. Grant*, 8 Cal. 3d 229, 104 Cal. Rptr.505, 502 P.2d 1(1972). Hence the doctrine of informed consent is the general principle of law that a physician has a duty to disclose to his patient those risks of injury which might result from a proposed course of treatment. *LePelley v. Grefenson*, 101 Idaho 422, 614 P.2d 962 (1980); [].

The sufficiency of informed consent is expressly governed by Idaho statutes. Idaho Code § 39-4304 states:

> The most recent Idaho case addressing the issue of informed consent is *Rook v. Trout*, 113 Idaho 652, 747 P.2d 61 (1987). In Rook, this Court held that the first two sentences in I.C. § 39-4304 set forth two "alternative defenses" to a claim of lack of informed consent. Specifically, the Court stated:
>
> The first [sentence] is a codification of the "material information" patient-based standard of disclosure which this Court adopted in *LePelley v. Grefenson*, []. * * * The second, which is found in the second sentence of section 39-4304, grounds the level of disclosure in the then-existing standard of medical care practiced in the community. ***
>
> []

The above cited language has created substantial confusion among the members of the trial bench and bar as a result of what appears to be two inconsistent standards, i.e., "patient-based" versus a "physician-based" standard of disclosure....Most jurisdictions hold that the duty to properly inform the patient is measured by a professional medical standard, i.e., either the customary disclosure practices of physicians or what a reasonable physician would disclose under the same or similar circumstances. Some jurisdictions [hold that] the scope of a physician's duty to disclose risks and alternatives is governed by the individual patient's personal subjective needs....

In *LePelley v. Grefenson*, [], ... this Court stated that it adopted the analysis which the California Supreme Court announced in the case of *Cobbs v. Grant*, []. In Cobbs, ... the California Supreme Court [held that in] regard to complicated procedures that may involve death or serious bodily harm, the California court held:

> [A] medical doctor has a duty to disclose to his patient the potential of death or serious harm, and to explain in lay terms the complications that might possibly occur. Beyond the foregoing minimal

> disclosure, a doctor must also reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances.
>
> In sum, the patient's right of self-decision is the measure of the physician's duty to reveal. That right can be effectively exercised only if the patient possesses adequate information to enable an intelligent choice. The scope of the physician's communications to the patient, then, must be measured by the patients need, and that need is whatever information is material to the decision. Thus, the test for determining whether a potential peril must be divulged is its materiality to the patient's decision.

[]

.... In LePelley, a case in which the informed consent statute contained in I.C. § 39-4301 did not apply, this Court expressly adopted the common law "patient-based" standard in informed consent cases from *Cobbs v. Grant*.... For those cases arising prior to the enactment of the Idaho informed consent legislation contained in I.C. § 39-4301, the common law rule cited in *Cobbs v. Grant* and adopted in *LePelley v. Grefenson* is appropriate.

However, in 1975the Idaho legislature enacted the medical consent law contained in I.C. §39-4301 which significantly changes the complexion of our analysis of the informed consent issue in the instant case. In LePelley, this Court was not considering the case in light of the statute and thus was at liberty to adopt the common law rule of *Cobbs v. Grant*. However, *Rook v. Trout* was clearly subject to the provisions of I.C. § 39-4304 and should have been analyzed with regard to the statute rather than under the common law rule established in *LePelley v. Grefenson* as adopted from California's *Cobbs v. Grant* case.

Hence, because we have a clear, express and unequivocal legislative directive, I.C. § 39-4304, stating the law of informed consent, we must look directly to the language of the Idaho statute to resolve the issue. We cannot continue to be controlled by the common law adoption in *LePelley v. Grefenson*, or to be bound by the analysis of another state's court which did not have an informed consent statute to interpret or apply.

***A. Statutory Construction Standards***

It is a basic rule of statutory construction that, unless the result is palpably absurd, we must assume that the legislature means what is clearly stated in the statute. []....

In carefully studying and reviewing our prior decisions we are of the opinion that the interpretation of I.C. § 39-4304 as set forth in Rook is contrary to the clear meaning and intent of the express language contained in the statute. It is our opinion that the language of I.C. § 39-4304 clearly and expressly establishes an objective medical-community standard, not a subjective patient-based standard as urged by appellants. The first sentence of I.C. § 39-4304 states that consent to medical treatment is valid if:

> the person giving it is sufficiently aware of pertinent facts respecting the need for, the nature of and the significant risks ordinarily attendant upon such a patient receiving such care as to permit the giving or withholding of such consent to be a reasonably informed decision.

The word "ordinary," as defined in Webster's Seventh Collegiate Dictionary means "routine, normal." Black's Law Dictionary (6th ed.) defines "ordinary" as "usual, common, customary, reasonable, not characterized by peculiar or unusual circumstances." Webster's Seventh Collegiate Dictionary defines "ordinarily" as "in an ordinary manner or to an ordinary degree." The word "such" is defined as "of the same class, type or sort: similar." Applying the ordinary and usual meanings of the words used in I.C. § 39-4304, the phrase "such a patient" can logically and reasonably be interpreted to mean a patient within the class of similarly situated patients. As such, the language in the first sentence of I.C. § 39-4304 can logically be interpreted as creating an objective standard of disclosure based on reasonableness with regard to patients who are similarly situated. To interpret the language in the first sentence to be a subjective "patient-based" standard of disclosure is contrary to the ordinary, common and usual meaning

of the words used. Furthermore, and perhaps more important, interpretation of the first sentence as creating a "patient-based" subjective standard clearly conflicts with the express language contained in the second sentence of I.C. § 39-4304.

The second sentence of I.C. § 39-4304 sets forth the standard for determining what are the pertinent facts that should ordinarily be disclosed in order to allow a patient to make a reasonably informed decision. The language in the second sentence states that consent is valid if the disclosure of the pertinent facts are those that, would ordinarily be made and given under the same or similar circumstances, by a like physician or dentist of good standing practicing in the same community.

As defined previously, the word "ordinarily" as used in the second sentence of I.C. § 39-4304, indicates those disclosures that are customarily or reasonably made in "same or similar" circumstances by a physician practicing in the "same community." Hence, the only logical and reasonable interpretation of the language contained in I.C. § 39-4304 is to interpret the statute as creating an objective, professional medical standard for disclosure. To construe the two sentences separately, interpreting the first sentence as establishing a "patient-based" standard of disclosure, ignores the express language of the statute which defines the necessary degree of disclosure as being the same as that which a "like physician" in the "same community" would ordinarily disclose. Accordingly, we hold that I.C. § 39-4304 mandates an objective, professional medical standard for disclosure in informed consent cases.

**B. Standard For Application of Stare Decisis**

We acknowledge that *Rook v. Trout* is of recent origin having been decided by this Court in 1987. We, like those who preceded us, have struggled with the prospect of overruling such recent case law....

We therefore overrule those portions of *Rook v. Trout* which held that I.C. § 39-4304 merely provides alternative defenses to a claim of lack of informed consent, and which held that the statute provides for a subjective patient-based standard of disclosure for informed consent. We hold that I.C. § 39-4304 sets forth and requires an objective, medical-community standard for determining whether a patient has been adequately informed prior to giving consent for medical treatment. A valid consent must be preceded by the physician disclosing those pertinent facts to the patient so that he or she is sufficiently aware of the need for, the nature of, and the significant risks ordinarily involved in the treatment to be provided in order that the giving or withholding of consent be a reasonably informed decision. The requisite pertinent facts to be disclosed to the patient are those which would be given by a like physician of good standing practicing in the same community.

After carefully considering all of the various alternatives available to us and the underlying policies of each, we are persuaded to adopt the objective standard as the fairer test to both the patient and the physician. Applying the objective test is fair to the patient because it requires consideration by the factfinder of what a reasonable person with all of the characteristics of the plaintiff would have done under the same circumstances, *Fain v. Smith*, [], and is likewise fair to the physician-defendant because the physician is not placed in jeopardy of the patient's hindsight. []

BAKES, C.J., CONCURS.

McDEVITT, J., AND WINMILL, D. J., PROTEM., CONCUR IN THE RESULT.

JOHNSON, J., DISSENTING -I dissent from the Court's opinion. If we were writing on a clean slate concerning the proper interpretation of I.C. § 39-4303, I would agree with the view expressed by the majority. However, in my view, the interpretation of this statute set forth in *Rook v. Trout*, [], is a permissible interpretation, and this recent decision should not be overruled. I would reverse and remand for a new trial on the ground that the instructions of the trial court were in error.

NOTES

(1) When is consent "informed" in Idaho? Is the court's reconciliation of the first two sentences of I.C. § 39-4304 convincing? Is it preferable to the court's previous reconciliation in *Rook v. Trout*? What must plaintiff prove to prevail in an informed consent case?

(2) *Anderson v. Hollingsworth*: Defendant performed a procedure intended to reduce the size of plaintiff's stomach as a weight loss treatment. A clamp was left in plaintiff's abdominal cavity, necessitating additional surgery twelve days after the first operation. Additional complications developed with the band that was used to reduce the size of plaintiff's stomach. The band was subsequently removed along with a major portion of plaintiff's stomach. The trial court granted defendant's motion for summary judgment, and plaintiff appealed. The supreme court began its analysis of the informed consent issue by noting that, to establish a claim based on the lack of informed consent, a patient '"must prove three basic elements: nondisclosure, causation and injury.' *Shabinaw v. Brown*, 131 Idaho 747,751,963 P.2d 1184, 1188 (1998) (citing Sherwood v, Carter, 119 Idaho 246, 257, 805 P.2d 452, 463 (1991))." The court then turned to the two "relevant" statutes, I.C. §§ 39-4304, 39-4305. Defendants argued that

> Satisfying §39-4305, by a written, signed consent, fulfills the requirements of §39-4304. They contend that § 39-4305 creates a presumption that the consent given by Anderson was informed, and the only way to rebut this presumption is to show convincing proof that it was secured maliciously or by fraud.

The court disagreed:

> This contention ... is incorrect. This Court has previously held "[t]he convincing proof requirement applies only to challenges regarding whether the patient consented to the furnishing of medical care." *Rook v. Trout*, 113 Idaho 652,658,747 P.2d 61,67 (1987), overruled on other grounds by *Sherwood v. Carter*, 119 Idaho 246, 805 P.2d452 (1991).
>
> A patient challenging the "advice and disclosures" and the "level of informed awareness" is only required to overcome an ordinary presumption as to the sufficiency of consent *Id*. Anderson challenges the disclosures by Decker and Hollingsworth and is only required to overcome an ordinary presumption as to the sufficiency of consent. Therefore, to prove nondisclosure, Anderson must prove that Decker and Hollingsworth failed to meet the objective, medical community-based standard of disclosure for informed consent as set forth in *Sherwood v. Carter*, [].

The court concluded that plaintiff's affidavit was sufficient to raise an issue of whether the consent was informed. This, however, is only the first element of the claim: plaintiff must also prove causation. "To prove causation the plaintiff must show by a preponderance of the evidence that a prudent person in the patient's position would not have consented to the proposed procedure had full and adequate consent of the significant risks been made at the time consent was originally given." This is an objective, reasonable person standard. Here there was no evidence on what a reasonable person would have done. *Anderson v. Hollingsworth*, 136 Idaho 800, 41 P.3d 228 (2001).

Is causation the element which most clearly demonstrates the difference between a patient-based view of consent and an objective, physician-based view? Is "objective consent" an oxymoron?

(3) *Shabinaw v. Brown*, 131 Idaho 747, 963 P.2d 1184 (1998) provides significant detail in a post-Sherwood informed consent case. Shabinaw arose in Moscow, Idaho and was argued by the Legal Aid Clinic of the University of Idaho College of Law, specifically by Academic Success Director Nancy Luebbert when she was a student.

## b. Legal Malpractice

### SAMUEL v. HEPWORTH, NUNGESTER & LEZAMIZ, INC.

Supreme Court of Idaho
134 Idaho 84, 996 P.2d 303 (2000)

KIDWELL, J.- Charles F. Samuel and Valerie A. Samuel (the Samuels) sued the defendant attorneys and law firm seeking damages for attorney malpractice, breach of contract, fraud and misrepresentation. The district court granted summary judgment to the defendants, and the Samuels appealed. We affirm.

#### I. FACTS AND PROCEDURAL HISTORY

Charles Samuel was a seasonal employee of the U.S. Forest Service at the Priest Lake Ranger District in the summer of 1988. During the season, Charles and his family lived in a trailer in a Forest Service group camping area near the ranger station. Several incidents caused friction between Charles and his supervisors. Among other things, Charles believed that his supervisors illegally garnished his wages, unjustly suspected him of stealing several crosscut saws, deliberately furnished him with faulty equipment, unfairly deprived him of tree planting and firefighting assignments, and unreasonably withheld mail and messages addressed to him. Most importantly, Charles believed that the Forest Service, together with the Bonner County Sheriff's Office, was spying on him and his family using hidden listening devices and night vision equipment.

When Charles and his wife Valerie decided to sue the Forest Service, local attorney Bruce Greene referred them to the Twin Falls law firm of Hepworth, Nungester & Lezamiz (the Hepworth firm). The Samuels met with John T. Lezamiz of the Hepworth firm in April 1989. Accounts of this meeting differ. The Hepworth firm asserts that it limited the scope of its representation to investigating the Samuels' claims and filing any necessary tort claim notices. The Samuels have variously contended that (1) they signed a contingent fee agreement and that the Hepworth firm agreed to fully represent them, and (2) they reached no agreement which would allow the Hepworth firm to take any action on their case. No written agreement between the Samuels and the Hepworth firm is in the record. The Hepworth firm did, however, prepare a "New Matter Report" indicating that it would have a contingency fee of 40%.

After Lezamiz interviewed several Forest Service employees at Priest Lake, the Hepworth firm prepared federal and state tort claim notices which the Samuels signed. On August 22, 1989, the Hepworth firm filed tort claim notices with the Forest Service. The Forest Service denied the tort claims on February 20, 1990. Bonner County also denied the tort claim brought against it.

On March 6, 1990, Brit Groom of the Hepworth firm wrote to the Samuels. Groom wrote that the Samuels' claims had merit but stated that, for financial reasons, the Hepworth firm declined to represent the Samuels any further. The letter recited that the Hepworth firm had agreed only to investigate the Samuels' claim and to file tort notices. Groom advised the Samuels that they had six months from the denial date in which to file a complaint against the federal government, and he further advised them to seek other legal counsel.

After the Hepworth firm withdrew, the Samuels wrote a series of letters to the firm accusing it of numerous instances of malfeasance, including forging the government documents that denied the Samuels' tort claims. The Hepworth firm corresponded with the Samuels for several months concerning these accusations. On May 22, 1990, however, the Hepworth firm ended its correspondence with the Samuels, calling it "fruitless."

Although the Samuels contacted forty-seven attorneys, they were unable to obtain legal representation for a case against the Forest Service. Therefore, they proceeded pro se. The Samuels pursued a federal tort claim action, *Samuel v. United States*, against the Forest Service and the United States in federal district court in Idaho. The federal district court dismissed all claims except those

involving invasions of privacy and intentional infliction of emotional distress. On the date set for trial, the Samuels moved for a dismissal, which the federal district court granted. Nevertheless, the Samuels appealed to the Court of Appeals for the Ninth Circuit. On appeal, the Ninth Circuit affirmed. See *Samuel v. United States*, 37 F.3d 1506 (9th Cir.1994) (unpublished disposition).

Acting on their belief that a tort claim notice was never filed with Bonner County, the Samuels also filed suit in state district court, *Samuel v. Bonner County Records*, CV-92-0085-JRM. Thereafter, alleging that Judge Michaud allowed perjured testimony in Bonner County Records, the Samuels sued Michaud and fifty-five other defendants in federal district court. This action was decided in favor of the defendants. *Samuel v. Michaud*, 980 F.Supp. 1381, 1417-18 (D. Idaho 1996), aff'd, 129 F.3d 127 (9th Cir.1997) (unpublished disposition).

The Samuels filed a complaint against Lezamiz, Groom, and the Hepworth firm (collectively, the Hepworth firm) for "professional malpractice, breach of warranty and implied covenant, and fraud and deceit." After several adverse rulings, the Samuels moved to disqualify Judge Michaud for bias and prejudice. After a hearing, the district court denied the motion. The Samuels also moved to amend their complaint to seek punitive damages. The district court denied this motion as well.

The Hepworth firm moved for summary judgment. The district court granted partial summary judgment for the Hepworth firm on the issues of attorney malpractice and breach of contract. lt held that the Samuels had not demonstrated any injury caused by the Hepworth firm's alleged negligence. When the district court denied the Samuels' motion for reconsideration, the Samuels filed an appeal with this Court. They subsequently withdrew their appeal.

In its first motion for summary judgment, the Hepworth firm failed to present argument regarding the Samuels' claims of fraud and misrepresentation. After the grant of partial summary judgment, the Hepworth firm filed for summary judgment on the remaining issues. The district court, again finding no proof of damages, granted summary judgment for the Hepworth firm on the remaining issues. When the district court denied the Samuels' motion for reconsideration, the Samuels filed the present appeal.

## III. ANALYSIS

### B. Summary Judgment on the Attorney Malpractice Claim Was Proper Because the Samuels Failed to Produce Affidavits of Expert Witnesses

In its memorandum decision on the attorney malpractice claim, the district court held that the Samuels' allegations of damages involved an evaluation of issues not within the ordinary knowledge and experience of laypersons. Because the Samuels did not present a qualified expert's opinion on damages, the district court granted summary judgment based on the Samuels' failure to present a prima facie case of legal malpractice. The Samuels assert that they provided adequate evidence to show that the Hepworth firm committed attorney malpractice.

To establish a claim for attorney malpractice arising out of a civil action, the plaintiff must show that the attorney's negligence proximately caused the plaintiff to lose the right to recover in the underlying case. *Murray v. Farmers Ins. Co*., 118 Idaho 224,227,796 P.2d 101, 104 (1990); see also *Lamb v. Manweiler*, 129 Idaho 269,272, 923 P.2d976, 979 (1996). The plaintiff bears the burden of proving that the attorney was negligent and that the attorney's negligence caused the plaintiffs damages. *Lamb v. Manweiler*, 129 Idaho at 272, 923 P.2d at 979.

A plaintiff must normally produce expert evidence of negligence and causation of damages to establish a prima facie case of legal malpractice. *Jarman v. Hale*, 112 Idaho 270, 273, 731 P.2d 813, 816 (Ct. App. 1986) (Jarman 1). Where a defendant attorney moves for summary judgment in a malpractice case, the plaintiff must ordinarily provide affidavits of expert witnesses to resist the motion. *Jarman v. Hale*, 122 Idaho 952, 961, 842 P.2d288,297 (Ct.App. 1992) (Jarman II). The reason for these

requirements, as in malpractice actions against other professionals, is that "the factors involved ordinarily are not within the knowledge or experience of laymen composing the jury." *Corey v. Wilson*, 93 Idaho 54, 58, 454 P.2d 951, 955 (1969). Expert testimony is unnecessary, however, "where the attorney's alleged breach of duty of care is so obvious that it is within the ordinary knowledge and experience of laymen," Jarman I, 112 Idaho at 273, 731 P.2d at 816, such as when an attorney allows a statute of limitations to run on a client's claim for relief.

Here, the Samuels did not present any expert affidavits to show that the Hepworth firm breached the standard of care. They also failed to present expert affidavits to show that any negligence by the Hepworth firm caused damages to them. ln this matter, whether the Hepworth firm breached the standard of care and caused damages to the Samuels was not an issue within the ordinary knowledge and experience of lay persons. Therefore, the district court correctly granted summary judgment to the Hepworth firm on the attorney malpractice claim.

TROUT, C.J., SJLAK, SCHROEDER, AND WALTERS, JJ., CONCUR.

NOTES

(1) What must plaintiff establish to avoid summary judgment in a legal malpractice action? Why is expert testimony required when the judge is an attorney? That is, expert testimony in a medical malpractice case is necessary since the judge is not a doctor and therefore has no basis upon which to evaluate plaintiffs claim of negligence. Ina legal malpractice case, however, the judge is an attorney and can independently evaluate the merits of the claim.

(2) *Lamb v. Manweiler*: In affirming the trial court's granting of defendant's motion for summary judgment, the court offered the following analysis of the plaintiff's prima facie case:

> The elements required to establish a claim for attorney malpractice arising out of a civil action are: (1) the creation of an attorney-client relationship; (2) the existence of a duty on the part of the lawyer; (3) the breach of the duty or of the standard of care by the lawyer; and (4) the failure to preform the duty must have been a proximate case of the damages suffered by the client. *Marias v. Marano*, 120 Idaho 11, 13,813 P.2d 350,352 (1991); *Johnson v. Jones*, 103 Idaho 702, 705,652 P.2d 650,654 (1982). The plaintiff bears the burden of proving that the attorney has been negligent or has failed to act with proper skill, as well as the burden of showing that the defendant's negligence was the proximate cause of the plaintiffs' damage. Without proximate cause there is no liability for negligence in a malpractice action. *Marias*, 120 Idaho at 13,813 P.2d at 352; *Murray v. Farmers Insurance Co.,* 118 Idaho at 224, 227, 796 P.2d at 101, 104 (1990); Johnson, 103 Idaho at 706, 652 P.2d at 654. In a legal malpractice action, the plaintiff must establish that he or she would have "some chance of success" in the underlying action before he or she would be entitled to recover from the attorney. *Murray*, 118 Idaho at 227, 796 P.2d at 104; e.g., *Fitzgerald v. Walker*, 121 Idaho 589, 592, 826 P.2d 1301, 1304 (1992). *Lamb* does not dispute the proposition that in a legal malpractice action arising from representation of a defendant in a criminal proceeding, the person pursuing the claim must establish the additional element of actual innocence of the underlying criminal charges.

*Lamb v. Manweiler*, 129 Idaho 269, 923 P.2d 976 (1996). See also *Blough v. Wellman*, 132 Idaho 424, 974 P.2d 70 (1999).

(3) ***Jordan v. Beeks***: Plaintiffs employed Beeks for advice on the enforceability of an oral agreement that they had entered into with third parties to purchase the stock of a closely held corporation. Beeks advised plaintiffs that he thought that the agreement was enforceable against the majority but not the minority stockholder. Following filing of suit in the shareholder litigation, the trial court granted summary judgment for the defendants, holding that the oral agreement was not binding because the parties had assumed that it would be reduced to writing. Plaintiffs initially appealed the summary judgment, but then dropped the appeal and brought an action for malpractice against Beeks. The trial court granted summary judgement for the attorney.

Plaintiffs claim that the trial court applied an incorrect standard in ruling on defendant's motion for summary judgment. Based on the decision in *Murray v. Farmers Ins. Co*., 118 Idaho 224,796 P.2d 101 (1990), they argue that the court should have determined whether their claim had "some chance of success." This is, the court asserts, a "refinement of the proximate cause element," i.e., that plaintiff must prove "that the attorney's negligence proximately caused the plaintiff to lose the right to recover in the underlying cause." The showing required to meet this burden varies, however, with the stage at which the underlying cause was terminated. When the cause has actually gone to trial, "the court reviewing the attorney malpractice case need not merely speculate on the chance of success of the underlying claim but has the benefit of scrutinizing the underlying action, the conduct of the attorney, and the opinion of the trial court." The court then reviewed the facts and concluded that any incompetence by the plaintiffs' original attorney had not been the cause of the plaintiffs' loss in the underlying claim.

(4) **Other professionals**: Attorneys are not the only non-medical professionals to face malpractice suits. The court has held a broad range of professionals subject to such claims, including accountants, *Mack Financial Corp. v. Smith*, 111 Idaho 8, 720 P.2d 191 (1986); *Streib v. Veigel*, 109 Idaho 174,706 P.2d 63 (1985); *Owyhee County v. Rite*, 100 Idaho 91,593 P.2d 995 (1979); architects, *Twin Falls Clinic & Hasp. Bldg. Corp. v. Hamill*, 103 Idaho 19,644 P.2d 341 (1982); surveyors*, Williams v. Blakely*, 114 Idaho 323, 757 P.2d 186 (1988); notary publics, *Osborn v. Ahrens*, 116 Idaho 14, 773 P.2d 282 (1989); and title companies, *Merrill v. Fremont Abstract Co*., 39 Idaho 238, 227 P. 34 (1924); *Hillock v. Idaho Title & Trust Co*., 22 Idaho 440, 126 P. 612 (1912).

# Chapter V

## CAUSATION: AN INTRODUCTION

NOTES

(1) **"when and as":**

> Whenever ***that*** would not have happened ***when and as*** it did happen, had it not been for ***this***, ***this*** is an actual cause of ***that***. Suppose, for example, an unarmed man is completely surrounded by enemies bent on his destruction, and armed with knives, so that he has no possible chance of escape; but only one blow is struck because it is instantly fatal. It may be true that without this blow he would have been killed at almost the same instant by some other knife; but no amount of repetition of such argument can conceal the fact that the actual cause of death was the blow struck. And the man who was killed by two bullets that hit him at the same time, each of which would have been instantly fatal, would not have died when and as he did die (by two bullets) had only one been fired.... A proper analysis will show that no occurrence would have happened when and as it did happen, had any contributing cause thereof been wanting. Consequently, if what happened would have happened exactly when and as it did happen regardless of what the defendant did or failed to do, he had nothing whatever to do with it....

ROLLIN M. PERKINS, CRIMINAL LAW 600 (957).

(2) ***Patrie v. Oregon Short Line R.R***.: Perkins' perspective is found in an early Idaho case. Five horses owned by plaintiff were killed (on three different days) by defendant's trains. Defendant had not fenced its right of way as required by statute, which specified that railroads were required to fence their tracks "wherever the line of their road ... passes through or ...abuts private property." Plaintiffs land bordered on bordered on the defendant's line in an area in which public and private lands were intermingled. Defendant argued

> that building a fence on the east side of said track where it passes through said private property would be no protection to stock; that stock could pass around the ends of such fence and get upon the track....[The court responded that w]e think the record shows that said horses would not have been killed, where and when they were killed, if the defendant had maintained such a fence as the law requires.

*Patrie v. Oregon Short Line R.R.,* 6 Idaho 448, 56 P. 82 (1899).

(3) The Donne effect:

> What courts are made to face ...is the problem that professional historians continuously face and never solve: ...the "Donne effect." Everything depends on everything else. If everything had not been as it was, things would not now be as they are. A kingdom is lost for want of a nail, and Richard Nixon might have served out his term as president but for the glint of a piece of masking tape. The bird that flies across the evening sunset would be flying elsewhere if the nearby road had not been built. What will the bird do? Eat the mosquito that might give your child encephalitis? The consequences of an event radiate out in a myriad direction, passing consequences from a myriad other events that are at the same time radiating in to change the condition that made the event possible. The present is a pulsating, organic whole; the past is a succession of states like the present; and the future is unknown. Of course, courts find difficulty in discussing what they perceive. It threatens the atomistic premise of legal thought and language, which divides reality into cases, structures them in bipolar form, arrests the passage of time, and concerns itself with exclusivities.
>
> …

The world upon which the courts might act is influx. Causal chains do not run in parallel straight lines into the future, to be clipped or moved here and there by the remedial hand. They grow, branch, intertwine, curl back, some faster and some slower but all at a rate that seems breathless in relation to our capacity to follow them. JOSEPH VINING, LEGAL IDENTITY 85-86, 89 (1978).

The followings cases examine the relationship between these two components of causation, cause in fact and scope of liability:

## HAYES v. UNION PACIFIC RAILROAD

Supreme Court of Idaho
143 Idaho 204, 141 P.3d 1073 (2006)

TROUT, J: This case involves a wrongful death action following a collision between an automobile driven by the decedent, Melvin Hayes (Hayes), and a Union Pacific Railroad (UPR) train. Appellants Jean Hayes, the surviving spouse, and Colin Hayes and Marcy Road, the surviving children (collectively the Hayes family), appeal from a district court decision granting summary judgment in favor of UPR.

### I. FACTUAL AND PROCEDURAL BACKGROUND

On February 20, 2001, Hayes was killed in a collision when his vehicle crossed the railroad tracks and was struck by a UPR train at a railroad crossing in Minidoka County. The crossing is located less than 2 miles from Hayes' home and he had driven over the crossing many times over the past 42 years. There was at least some evidence that at the time of the accident, visibility was reduced due to heavy fog in the area, although UPR disputes that there was fog at the accident site. The road was also icy.

A dirt and gravel roadway run in a generally north/south direction and the railroad tracks run in an east/west direction. Hayes was driving southbound toward the crossing and the train approached from the east. The crossing was protected by a yellow railroad "advance warning" sign, located approximately 583 feet north of the crossing; standard railroad crossbuck signs, located at the northeast and southwest comers of the intersection; and a red stop sign located at the crossing for southbound traffic. No active warning device, such as flashing lights or an automatic gate, was in place at the time of the accident.

Approximately 1/4 mile before the crossing is a "whistle board" which signals the train's crew to begin sounding the train's horn or bell. At the whistle board, the train crew began blowing the standard crossing signal of two longs blasts, followed by a short blast and another long one and also activated the bell on the lead locomotive. As the train approached the crossing it was traveling at approximately 60 m.p.h.

The only eyewitnesses to the accident were UPR engineer, Timothy Tripple and conductor, Jerry Winterbottom. Tripple testified that approximately 100 feet before the train reached the crossing, Tripple realized Hayes' vehicle was failing to stop at the stop sign, at which time Tripple activated the train's emergency braking system. Tripple testified it appeared Hayes locked his brakes and slid onto the track into the train's path.

The Hayes family brought suit against the Minidoka County Highway District, which was subsequently dismissed from the suit, and against UPR, claiming that it was negligent in a number of different aspects. UPR made a motion for partial summary judgment and, in the alternative, for summary judgment on the entire claim. The district judge ruled specifically on each of the issues raised by UPR in the partial summary judgment and then granted summary judgment in favor of UPR dismissing the case in its entirety. The Hayes family appeals from the dismissal of their wrongful death action against UPR.

**III. ANALYSIS**

The Hayes family alleges the district court erred in dismissing their negligence claims against UPR, maintaining UPR was negligent in the way the train crew used the horn as a warning device, [and] for exceeding the internally imposed speed restrictions ....

**A. Use of horn**

The Hayes family argues UPR was negligent because it (1) failed to blow a required emergency whistle pattern prior to the collision; ....

First, the Hayes family argues the train crew should have switched to an emergency whistle pattern in anticipation of striking Hayes and failure to do so constitutes negligence. They submitted testimony from their expert, Dr. David Lipscomb, who concluded an emergency pattern would have increased the alerting capability of the device by increasing the decibel output by 5 decibels. He also admitted, however, that sounding the emergency pattern alone would not have provided an alerting signal to Hayes until less than one second before the accident and, therefore, would have had made no difference in preventing the collision....

…

**B. Excessive speed**

Although there is no indication that the locomotive ever exceeded federal speed restrictions, the Hayes family argues UPR was negligent because it exceeded its own internally imposed speed limits, which were imposed by UPR because of the type of cargo being carried by the train and varied terrain. It appears from records maintained for the train that it exceeded the internally imposed speed limit at a point twelve minutes prior to the accident and at another point thirty-eight miles before the accident. The Hayes family argues that but for the train speeding at these points, it would not have arrived at the crossing at the same time as Hayes did and he would have had ample time to cross the tracks....

This argument ignores the foreseeability element of proximate cause. "Proximate cause consists of two factors, cause in fact and legal responsibility." *Marias v. Marano*, 120 Idaho 11, 813 P.2d 350 (1991); See *Doe I v. Sisters of the Holy Cross*, 126 Idaho 1036,895 P.2d 1229 (Ct. App. 1995). The "legal responsibility element of proximate causation is satisfied if at the time of the defendant's negligent act the Appellant's injury was reasonably foreseeable as a natural or probable consequence of the defendant's conduct." *Doe I*, 126 Idaho at 1041,895 P.2d at 1234. "Only when reasonable minds could come to but one conclusion as to whether the Appellant's injury was reasonably foreseeable may the judge decide this legal responsibility issue as a matter of law." *Id*.

It is not reasonably foreseeable that slight increases (or decreases, for that matter) in speed either twelve minutes or thirty-eight miles prior to the accident would result in the train arriving at the crossing at the exact time that Hayes' truck was on the tracks and thus cause an accident. The same argument could be made that had the train never left that day, the accident would not have been caused. Thus, as a matter of law, UPR's conduct was not the proximate cause of the accident and we affirm the district court's decision dismissing the excessive speed claim.

…

CHIEF JUSTICE SCHROEDER AND JUSTICES EISMANN AND BURDICK AND JUSTICE PRO TEM KIDWELL CONCUR.

NOTES

**(1) Two categories of "cause":** Was the failure of the locomotive's engineer to blow the emergency whistle pattern prior to the collision a cause in fact of decedents death? That is, would he have died when and as he did if the engineer had blown the whistle pattern? The plaintiff's expert testified that the whistle

would have alerted the decedent less than one second before the collision - which would have been insufficient for the decedent to act.

In contrast, was the locomotive's violation of the speed limits prior to the collision a cause in fact of decedent's death? Again: would he have died when and as he did if the train had obeyed the speed limit? The court silently concedes that the speeding was a cause in fact of the decedent's death: the train would not have been at the crossing at the same time as the decedent if the train had been driving more slowly.

How does the court avoid holding the defendant responsible for causing decedent's death? Is the test the court employs- whether "at the time of the defendant's negligent act" the "injury was reasonably foreseeable as a natural or probable consequence of the defendant's conduct" - a question of causation? Is an ethical or policy question similar to the question of whether the defendant's conduct was that of a reasonable person under the circumstances?

(2) Restatement (Third) and "cause": The Restatement {Third) distinguishes between "factual cause" and "scope of liability."

(a) **Factual cause**: Two sections define factual cause:

**§26. Factual Cause**

Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct....

RESTATEMENT (THIRD) OF TORTS § 26 (2010).

**§27. Multiple Sufficient Causes**

If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time on the absence of the other act(s}, each act is regarded as a factual cause of the harm.

RESTATEMENT (THIRD)OF TORTS§ 27 (2010).

Was the failure of the locomotive's engineer to blow the emergency whistle pattern prior to the collision a factual cause in fact the of decedent's death? That is, would the death have occurred if the whistle had been blown?

Was the locomotive's violation of the speed limits prior to the collision a factual cause of the decedent's death? That is, would the death have occurred if the train had not been speeding?

**(b) Scope of liability**: Since scope of liability is an ethical/policy decision, the drafters required eight sections. The definitional sections state:

**§29. Limitations on Liability for Tortious Conduct**

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 (2010).

**§30 Risk of Hann Not Generally Increased by Tortious Conduct**

An actor is not liable when the tortious aspect of the actor's conduct was of a type that does not generally increase the risk of that harm.

RESTATEMENT (THIRD) OF TORTS§ 30 (2010).

Was the decedent's death within the scope of liability created by the engineer's tortious conduct? Was the harm (physical injury) that occurred a result of a risk that made the defendant's conduct tortious (i.e., a breach of duty)? If the tortious conduct was the violation of the speed limits, did the conduct create a foreseeable risk to someone who will be crossing the railroad tracks in twelve minutes?

(3} **Limiting liability**: Recall the cases on duty. A recurrent concern was the need to limit potential liability since unlimited liability is out of proportion to the culpability of negligent conduct. Given the infinite number of causes and the equally large number of results from any bit of conduct, the emergency whistle decision in Hayes is relatively uncommon. As we have seen, the common liability-limiting concept in negligence is "foreseeability." For example, an actor has a duty to act with care when her conduct involves a foreseeable risk of harm. In negligence, the second liability limiting mechanism is scope of liability or "proximate cause."

**DOE v. GARCIA**

Court of Appeals of Idaho
126 Idaho 1036, 895 P.2d 1229 (1995)

LANSING, JUDGE- John Doe I, a minor child ("Doe"), and his father brought this action alleging that Sisters of the Holy Cross, doing business as St. Alphonsus Hospital ("the hospital"), is liable for sexual abuse of Doe inflicted by a former employee of the hospital. Summary judgment was entered in favor of the hospital on the ground that the plaintiffs' damages were not proximately caused by the alleged negligence of the hospital. On appeal the plaintiffs argue that summary judgment was improper because ... there are genuine issues of material fact as to whether the hospital's negligence was the proximate cause of Doe's injuries....

The uncontroverted evidence presented on the summary judgment motion established the following. Doe, who was then thirteen years old, was admitted to St. Alphonsus Medical Center following an accident in which he was seriously injured. While there he became acquainted with Fred Garcia, a respiratory therapist employed by the hospital. Shortly before Doe was discharged from the hospital, Garcia gave the boy Garcia's home telephone number and asked him to call sometime. About a month after his release from the hospital, Doe contacted Garcia and began seeing him. With his parents' permission, Doe visited with Garcia regularly and often spent the night at Garcia's residence. Garcia took the boy on numerous outings and in general appeared to befriend the boy.

Garcia's employment was subsequently terminated for misconduct involving young male employees of the hospital. The termination was based on allegations that Garcia had repeatedly invited these employees, who were under twenty-one years of age, to his home and offered to provide alcohol to them. At some point in the summer of 1989, after he had been fired by the hospital, Garcia began to sexually abuse Doe. This abuse continued until early 1992 when Doe's father became aware of it and reported Garcia to the police. Garcia was eventually convicted of lewd conduct with a minor, I.C. § 18-1508, and was incarcerated at the Idaho State Correctional Institution. Doe and his father then brought this suit against the hospital alleging that the hospital was negligent in its hiring, supervision and retention of Garcia.

The hospital filed a motion for summary judgment under I.R.C.P. 56(b) asserting that, even assuming it was negligent with respect to its employment of Garcia, the hospital's negligence was not a proximate cause of Doe's injuries. For purposes of the hospital's motion it was stipulated that the hospital was under a duty to use care in hiring and supervising its employees and to protect its patients from harm at the hands of its employees. The hospital also stipulated for purposes of the motion that it had breached this duty by not using reasonable care in hiring and supervising Fred Garcia. The sole issue, therefore, was whether the hospital's breach of duty was the proximate cause of Doe's injury, i.e., his molestation at the hands of Fred Garcia.

…

Before addressing [the procedural issues raised by the appeal,] it is necessary to have clearly in mind what "proximate cause" means. The concept expressed by the term, "proximate cause," is exceedingly complex and has been the subject of much debate. See *Fussell v. St. Clair*, 120 Idaho 591,818 P.2d 295 (1991); Matter of Estate of Eiiasen, 105 Idaho 234, 243,668 P.2d 110, 119 (1983); *Munson v. State Department of Highways*, 96 Idaho 529,531 & n.3., 531 P.2d 1174, 1176 & n.3 (1975). We are once again called upon to address the meaning and the component parts of proximate causation.

"Proximate cause," as the term has developed in the law of Idaho, is composed of two elements: cause in fact and scope of legal responsibility. *Edmark Motors, Inc. v. Twin Cities Toyota, Inc*., 111 Idaho 846, 849, 727 P.2d 1274, 1277 (Ct. App. 1986); *Crosby v. Rowand Machinery Co*., 111 Idaho 939, 941, 729 P.2d 414, 416 (Ct. App. 1986); *Challis Irrigation Company v. State*, 107 Idaho 338, 343, 689 P.2d 230, 235 (Ct. App. 1984).3 The cause in fact component has been much discussed in Idaho cases. In Challis, we stated that cause in fact was made up of two elements:

> First, an event is the cause in fact of a succeeding event only if the succeeding event would not have occurred "but for" the prior event.*** The second element is a requirement that the first event be a "substantial factor" in producing the succeeding event.

*Challis*, 107 Idaho at 343, 689 P.2d at 235.

Subsequent to our discussion in Challis, however, the Idaho Supreme Court in Fussell, held that use of "but for" terminology in a jury instruction on actual causation is improper where there are multiple independent forces that may have caused or contributed to the harm. The Court there held that in multiple causation cases the jury must be instructed that proximate cause is established if the jury finds that the defendant's negligence was a "substantial factor" in causing the plaintiffs injury.... In *Manning v. Twin Falls Clinic & Hospital, Inc.,* 122 Idaho 47, 830 P.2d 1185(1992), the Supreme Court reiterated that a substantial factor instruction alone was proper in multiple cause cases.

The substantial factor test was adopted to allow recovery in circumstances where the defendant's negligence may have concurred with another cause to bring about the injury, even though it could not be established that the damage to the plaintiff would not have occurred "but for" the defendant's negligence. *See Fussell*, 120 Idaho at 593-95, 818 P.2dat 297-99. In other words, substantial factor is a more liberal standard, allowing recovery in situations where a strict "but for" analysis might relieve the defendant of liability.

The second component of proximate cause-the scope of legal responsibility- has been little discussed in Idaho case law. In *Munson v. State Department of Highways*, 96 Idaho at 531, 531 P.2d at 1176, the Court stated: "Proximate [legal) cause focuses upon legal policy in terms of whether responsibility will be extended to the consequences of conduct which has occurred." *Id*. *See also Henderson v. Cominco American, Inc*., 95 Idaho 690, 695, 518 P.2d 873, 878 (1973). These decisions say little, however, about the practical application of this element.[15]

A subsequent Idaho Supreme Court decision, *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980), suggests that this issue as to whether the defendant's legal responsibility will be extended to cover the plaintiff's injury is determined by assessing whether it was reasonably foreseeable that such harm would flow from the negligent conduct. In *Alegria* the Court overruled *Meade v. Freeman*, 93 Idaho 389, 462 P.2d54 (1969), which had held that vendors of intoxicants would not be liable for injuries caused by drunk drivers who had purchased liquor from the vendors, because the sale of liquor was "too remote

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[15] This distinction between cause in fact and scope of legal responsibility has sometimes been referred to by the Idaho Supreme Court as a distinction between "actual cause" and "proximate cause:" Actual cause has often been confused with proximate causation. The significance of proximate cause focuses upon legal policy in terms of whether responsibility will be extended to the consequences of conduct which has occurred. Actual cause, however, is a factual question focusing on the antecedent factors producing a particular consequence. *Henderson v. Cominco American*, Incorporated, 95 Idaho 690, 695, 518 P.2d 873, 878 (1973) (citations omitted). *See also Hickman v. Fraternal Order of Eagles, Boise*, 114 Idaho 545, 549, 758 P.2d 704,708 (1988); *Munson v. State Department of Highways*, 96 Idaho at531, 531 P.2d at 1176. In more recent years, however, actual causation analysis has been discussed by the Supreme Court under the rubric of "proximate cause*." See Manning v. Twin Falls Clinic and Hospital, Inc*., 122 Idaho 47, 51-52, 830 P.2d 1185, 1189-90 (1992}; *Fussell v. St. Clair*, 120 Idaho at 592-95, 818 P.2d at 296-99.

to be considered a proximate cause." In overruling this precedent, the Supreme Court applied a reasonable foreseeability test:

> In general, it is held that "one owes the duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury."*** *Kirby v. Sonville*, 286 Or. 339, 594 P.2d 818, 821 (1979).
> ****
> In ruling on the correctness of the summary judgment entered in this case, we must determine "whether [appellant's injury and the manner of its occurrence [were] so highly unusual that we can say, as a matter of law that a reasonable man, making an inventory of the possibilities of harm which his conduct might produce, would not have reasonably expected the injury to occur."

*Kirby v. Sanville*, supra. *Alegria*, 101 Idaho at 619-20, 619 P.2d at 137-38 (emphasis in original). We note that Idaho Pattern Jury Instruction 230 incorporates this foreseeability standard by specifying that proximate cause means, "a cause which, in natural or probable sequence, produced the complained injury, loss or damage.***" The term "natural or probable sequence" implies a requirement of foreseeability.

Based upon these authorities, we conclude that the legal responsibility element of proximate causation is satisfied if at the time of the defendant's negligent act the plaintiffs injury was reasonably foreseeable as a natural or probable consequence of the defendant's conduct.

Resolution of this issue is nearly always for the jury. Only when reasonable minds could come to but one conclusion as to whether the plaintiffs' injury was reasonably foreseeable may the judge decide this legal responsibility issue as a matter of law. As the court stated in *Alegria*:

> [W]here the evidence on material facts is conflicting, or where on undisputed facts reasonable and fair-minded men may differ as to the inferences and conclusions to be drawn, or where different conclusions might reasonably be reached by different minds, the question of negligence*** and proximate cause is one of fact to be submitted to the jury and not a question of law for the court; if, upon all the facts and circumstances, there is a reasonable chance or likelihood of the conclusions of reasonable men differing, the question is one for the jury.

101 Idaho at 619-620, 619 P.2d at 137-138. See also PROSSER AND KEETON, § 45 at 320-21.

Both the factual cause and the legal cause components of proximate cause must be present in order for a negligent defendant to be liable for the plaintiff's damages. Thus, a negligent act may meet the "but for" or "substantial factor" test, so as to be a cause in fact, the defendant may not be liable because it was not reasonably foreseeable that defendant's act would lead to the harm suffered by the plaintiff. Conversely, a careless act may foreseeably create a risk of great harm to the plaintiff, but the actor will not be liable if the careless conduct was not, in fact, a source contributing to the plaintiff's injury.

In Doe's case, the district court, in granting summary judgment in favor of the hospital, appears to have been rendering a judgment that, as a matter of legal policy, liability should not be allowed to extend so far from the negligent act. That is, the district court's concern related to the scope of legal responsibility. However, the court articulated the issue as whether the hospital's negligence was a "substantial factor" in causing the sexual abuse- which is a question of factual cause.[16] We conclude that this was not a correct analytical approach.

[16] This use of a foreseeability analysis is consistent with the approach advocated by Professors Prosser and Keeton in their treatise on the law of torts, W. PAGE KEETON ETAL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984) (Prosser and Keeton). The authors pose several analytical frameworks for defining the scope of legal responsibility and conclude that a model based upon the foreseeable risk of harm created by the breach of the duty of care is the most widely adopted and analytically correct method of expressing the legal responsibility component of proximate cause. *Id*. at §§42-43.

As explained above, the substantial factor test applies to determine cause in fact when there are multiple alleged causes of the plaintiffs' injury and cause in fact is at issue. In the present case, when the substantial factor standard is properly recognized as a matter of factual cause, it is apparent that the evidence is sufficient to preclude summary judgment on that issue.

First, although this may be a multiple cause case because the negligence of the hospital, misconduct by Garcia and alleged negligence of Doe's parents may have combined to bring about the harm, the other two causes are not actually independent of the hospital's negligence for purposes of substantial factor analysis. The hospital cannot claim that Garcia's actions constitute an independent intervening force. As the Supreme Court noted in *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986):

> The fact that the plaintiffs' injuries were caused by a third party does not absolve the school district from liability for its negligence. The concept of supervening causation is inapplicable, under the allegations of the present case. Durtschi's actions were the foreseeable result of the school district's alleged failure to exercise due care to protect its students. The very risk which constituted the district's negligence was the probability that such actions might occur.
>
> It is clearly unsound to afford immunity to a negligent defendant because the intervening force, the very anticipation of which made his conduct negligent, has brought about the expected harm. *Gibson v. United States*, 457 F.2d 1391, 1395 (3rd Cir. 1972). To do so would fly in the face of basic principles of tort law, as recounted in the Restatement:
>
> > If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.

RESTATEMENT (SECOND) OF TORTS § 449. *See Smith v. Sharp*, 82 Idaho 420, 428, 354 P.2d 172, 176 (1960).

*Id*. at 471-72, 716 P.2dat 1243-44. The third potential cause- Doe's parents' alleged negligence

- also could not be an independent cause of the injury. The parents' negligence, if any, was in failing to prevent the harm to Doe caused by actions set in motion by the hospital's negligence. Standing alone, his parents' negligence would have caused no injury to Doe, and even if their negligence is proved, it would not eliminate the hospital's negligence as a cause in fact contributing to Doe's injury.

Second, the uncontroverted facts show that even the more stringent "but for" test is met here- but for the hospital's acts in employing Garcia and permitting Garcia to have contact with Doe in the hospital, the two would not have met and the ultimate abuse would not have occurred. Doe argues, and we agree, that the substantial factor standard is employed to make proof of factual cause easier than it would be under the "but for" test, not more difficult. It aids the plaintiff in circumstances where the strict "but for" test may not be satisfied. It is not intended to defeat the cause in fact element when "but for" causation is established.

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The authors also note that such an analysis is similar to that used when determining whether there has been a breach of the general duty of care. *Id*. at 280. A distinction exists, however, in that a breach of the duty of care may occur and yet the plaintiffs particular injury may exceed all bounds of reasonable foreseeability. Thus, a storekeeper who leaves a slippery floor has breached the duty of care and might be expected to foresee injury to a person who slips and falls, but not foresee that a person who falls may injure a muscle but walk away only to suffer a muscle spasm while driving home, which causes him to ram his automobile into another who in tum receives inadequate medical treatment and loses a limb. In such a case liability should be limited to those consequences that a person in the circumstances of the defendant could reasonably foresee as a result of his breach of the duty of care.

Our Supreme Court has never expressly stated that the substantial factor analysis applies only to determinations of cause in fact as distinguished from legal cause. The Court hinted at such, however, in *Hickman v. Fratemal Order of Eagles*, 114 Idaho545, 549,758 P.2d 704,708 (1988), and the Court's decisions have applied the substantial factor analysis only in circumstances where factual cause, not legal cause, was at issue. See Manning, 122 Idaho 47, 830 P.2d 1185; Fussell, 120 Idaho 591,818 P.2d 295; *Fouche v. Chrysler Motors Corp*., 107 Idaho 701,692 P.2d 345 (1984). Prosser and Keeton note that a "substantial factor" analysis is inappropriate for determining the scope of legal responsibility.

Thus, it is not a cause in fact issue that is presented by the hospital's argument that its negligence could not be the proximate cause of Doe's injury. Rather, the hospital's assertion - that itis not liable to Doe because the molestation was too remote in time and circumstance from the hospital's negligent acts- presents a question as to the other component of proximate cause, the scope of legal responsibility. Therefore, the appropriate inquiry is whether the harm suffered by Doe was a reasonably foreseeable consequence of the hospital's breach of its duty of care.

The court concluded that the trial court had erred in denying plaintiff the opportunity to pursue discovery to determine what the hospital knew about Garcia.]

WALTERS, C.J., AND PERRY, J., CONCUR.[17]

NOTES

(1) Doe is a decision that amply rewards a careful reading. To assist you in doing so, consider the following note, questions, and comments:

First, note the issue in the case: "[a]re [there] genuine issues of material fact as to whether the hospital's negligence was the proximate cause of Doe's injuries?"[ 1] To answer that question, the court is required to unpack the meaning of the term "proximate cause." As the court notes, 'The concept expressed by the term, "proximate cause," is exceedingly complex and has been the subject of much debate." [5)

Consider the steps in the court's analysis:

(a) What are the elements of "proximate cause"?

(b) What are the categories of factual cause? Do these categories correspond to those presented in the Restatement (Third) sections following Hayes?

(c) What are the legal tests jury instructions appropriate for each of the categories of factual cause? [The IDJI is are set out in note (2) below.]

(d) How does the court define "scope of liability," which it calls "scope of legal responsibility"?

(e) What legal test for scope of liability does the court provide? What IDJI language does the court identify as corresponding to the legal test? Note the hypo the court provides.

**(f)** Is Doe a single or multiple cause case? How does the court determine the answer? Can the but-for test be used to determine whether the case presents a single or multiple cause situation?

**(3) IDJis on "proximate cause":**

**(a) IDJI 2.30.1 - Proximate cause - "but for" test**

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the complained injury, loss or damage, and but for that cause the damage would not have occurred. It need not be the only cause. It is sufficient

[17] But when the "substantial factor" is made to include all of the ill-defined considerations of policy which go to limit liability once causation in fact is found, it has no more definite meaning than "proximate cause; and it becomes a hindrance rather than a help. It is particularly unfortunate insofar as it suggests that the questions involved are only questions of causation, obscuring all other issues....
PROSSER AND KEETON, supra, §42 at 278.

if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

[There may be one or more proximate causes of an injury. When the negligent conduct of two or more persons or entities contribute concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the injury regardless of the extent to which each contributes to the injury.]

**(b) IDJI 2.30.2- Proximate cause- "substantial factor," without "but for" test**

When I use the expression "proximate cause," I mean a cause that, in natural or probable sequence, produced the injury, the loss or the damage complained of. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

There may be one or more proximate causes of an injury. When the negligent conduct of two or more persons or entities contributes concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the injury regardless of the extent to which each contributes to the injury.

Which IDJI should be used for the whistle (factual causation) issue in *Hayes*? Which IDJI should be used for the speeding (scope of liability) issue in *Hayes*? Which IDJI should be used when there are potential multiple causes of the injury?

Which of the instructions poses the foreseeability issue for the jury?

**(4) Doe (the prequel):** In the previous appellate decision in the case, the court of appeals made the obvious point:

> Both the factual cause and the legal cause components of proximate cause must be present in order for a negligent defendant to be liable for the plaintiffs' damages. Thus, a negligent act may meet the "but for" or "substantial factor" test, so as to be a cause in fact, the defendant may not be liable because it was not reasonably foreseeable that defendant's act would lead to the harm suffered by the plaintiff. Conversely, a careless act may foreseeably create a risk of great harm to the plaintiff, but the actor will not be liable if the careless conduct was not, in fact, a source contributing to the plaintiff's injury.

*Doe v. Sisters of Holy Cross*, 126 Idaho 1036, 895 P.2d 1229 (Ct. App. 1995)

**(5) Doe (an addendum)**: Following the decision by the court of appeals excerpted above, the district court again granted the hospital's motion for summary judgment, deciding that the defendant did not owe plaintiff a duty since the tort had occurred after Garcia's employment had ended. On appeal, the supreme court reversed, holding that the hospital did owe plaintiff a duty. *Doe v. Garcia*, 126 Idaho 1036, 895 P.2d 1229 (1995), abrogated by *Hunter v. State, Dept. of Corrections, Div. of Probation & Parole*, 138 Idaho 44, 57 P.3d 75 (2002). *Hunter* limited *Doe*, stating: "extend[ed] the duty of an employer too far for consequences outside employment over which the employer has no realistic control. S*ee generally*, Monique C. Lillard, "Their Servants' Keepers: Examining Employer Liability for the Crimes and Bad Acts of Employees", 43 Idaho Law Review 709-765 (2007).

# Chapter VI

# CAUSE IN FACT

## [A] SINGLE CAUSES

### HENDERSON v. COMINCO AMERICAN, INC.

Idaho Supreme Court
95 Idaho 690, 518 P.2d 873 (1974)

McFADDEN, J: [Plaintiffs farmed neighboring property in Ada County. Like other peppermint growers, Henderson and Olsen had problems with weeds, which both crowd out the peppermint, diminishing yield, and also can taint the flavor of the peppermint oil. In the spring of 1967, Henderson contemplated using a herbicide on his peppermint and discussed the matter with Jenkins, an employee of Cominco. Jenkins recommended Sinox PE as an effective herbicide over competing brands and told him that Sinox PE had been successfully used on peppermint crops in Washington and Oregon. Jenkins advised that Sinox PE could be applied after the mint sprouted with minimal harm to the mint but with effective weed control. As a pre-emergent herbicide, Sinox PE is applied to the soil's surface before annual weeds emerge; as the weeds emerge and contract the herbicide, it destroys the plant tissue. Thus, Sinox PE destroys only what it touches. If the herbicide contacted the leaf or stem of a plant, it would not translocate down into the root. In contrast, a hormonal herbicide translocates throughout the entire plant and destroys the entire plant. Sinox PE was designed to control only annual broadleaf weeds and grasses. Henderson and Olsen acknowledged that their fields were infested with perennial weeds.

[Henderson and Olsen purchased Sinox PE and sprayed one application on their peppermint crop during early April. Both farmers applied Sinox PE in conformance with mixing instructions on the containers. After his first application, there was unsatisfactory weed control in one of Henderson's fields. At Henderson's request, Jenkins and a chemist from Cominco inspected the field. They recommended that Henderson put another application of Sinox on the field; Henderson sprayed the field a second time. On June 12, Jenkins and three other Cominco employees visited the field to check the weed control. During this inspection, Jenkins noticed some peppermint plants which appeared to be dying. When Henderson harvested his mint crop, seventy-five out of one hundred seventy acres were barren. Olsen also lost part of the crop and had reduced yield on the remainder. Somewhat inconsistent with Henderson's and Olsen's loss was the fact that Henderson's field which had double application of Sinox PE was not barren, although it produced a diminished yield of mint. Henderson and Olsen instituted this action against Cominco for damage to their peppermint crops from the application of Sinox PE.]

#### II. ACTUAL CAUSE

....Actual cause has often been confused with proximate causation. The significance of proximate cause focuses upon legal policy in terms of whether responsibility will be extended to the consequences of conduct which has occurred. []Actual cause, however, is a factual question focusing on the antecedent factors producing a particular consequence. [] In this case there is a question whether the Sinox PE, in fact, caused the plaintiffs' crop damage.

The primary issue is whether the plaintiffs adduced sufficient circumstantial proof of causation in fact for the case to go to the jury. Defendants contend that there is [no] proof of causation ... Plaintiffs insist that the absence of injury to other mint crops not sprayed with Sinox PE proves that Sinox PE was, in fact, the causative agent, and they exclusively rely on this as proof of causation.

A summary of plaintiffs' evidence concerning the absence of injury to other mint crops in useful. First, Laverne Larsen, one of the original plaintiffs, applied Sinox PE to all his mint crop except one-half acre. The one-half acre flourished while the rest died. Second, Ed Schwisow, plaintiffs' neighbor,

harvested a good yield of mint except for five barren acres. Schwisow did not use Sinox PE. Third, Robert Friday, Defendants' witness, grew a good crop of mint in 1967, but he did not use Sinox PE either.

In reviewing this evidence, the first question for consideration is whether the nonoccurrence of other injuries is competent proof of causation in this case....

In both negligence cases and warranty actions reasonable inferences may be drawn in connection with causation from circumstantial evidence. [] Also, causation may be proved by the occurrence or nonoccurrence of injury in similar circumstances. [] In cases using non-occurrence of injury as a mode of proof, the product alleged to be the causative agent had been used or consumed in those instances evidencing the presence or absence of injury. Here, the converse is true: Sinox PE was never applied to the fields which produced good mint yields.

To infer Sinox PE was the causative agent because other crops not sprayed with Sinox PE flourished is speculative. There are too many variables in agricultural practices among the plaintiffs and their witnesses to conclude that differences in crop yields were due solely to the application of Sinox PE. Except for cursory statements by Ed Schwisow about the similarity between his farming practices and the plaintiffs' and Larsen's there is scant evidence concerning the method and frequency of watering, soil characteristics, age of peppermint and type and frequency of cultivation. Robert Friday never testified about any of the of these variables. On the basis of these variables the crop yields suggest an equally probable inference that it was the nature of the farming methods, soil and water conditions, or even disease which caused the injury rather than Sinox PE.

Although portions of the plaintiffs' mint crops perished, there is no rational explanation for the difference between the amount of mint acreage sprayed with Sinox PE and the amount which actually died. To infer that Sinox PE was the cause of the injury on the basis of this evidence would be speculative and unreasonable. At best, it is as equally probable as not that devastated mint crops resulted from the application of Sinox PE.

.... After reviewing the evidence, inferences, and conclusions we hold that there is no rational, competent, basis in the record showing that: (1) Sinox PE was the cause of the injury,
.... The judgment is reversed.

DONALDSON, C. J., AND McQUADE AND SHEPARD, JJ., CONCUR. BAKES, J., DISSENTS [WITHOUT OPINION).

NOTES

(1) Where did plaintiffs' evidence on causation fail? Given the "many variables in agricultural practices," what could the plaintiffs have presented as evidence that it was Sinox PE? Since causation is the primary factual question in a negligence case, were they required to negative the "many variables"? Or should the problems be viewed as a question of the standard of proof? What is the proof requirement?

(2) ***Thomas Helicopters, Inc. v. San Tan Ranches***: Defendant contracted with the plaintiff for the aerial application of herbicide to its potato fields. When the fields were severely weed infested, the farmer refused to pay; plaintiff brought suit for the contract price of its services and the farmer counterclaimed for its losses. At trial, although the farmer was unable to offer any direct evidence that the weed problems were caused by a misapplication of the herbicide, he did introduce evidence

> that the weed infestation in at least some of the fields occurred in noticeable strips, alternating with strips which were relatively weed free; that the weeds were of types controllable with the proper application of Sencor [herbicide]; that the proper field preparation, irrigations and timing necessary for effective Sencor application were effected [by thefarmer]; that the best control of weeds required application of one pound of Sencor compound per acre; that ...2,480 pounds of Sencor had been used [and]2, 315 acres had been sprayed ...;that experts held the opinion that the stripping was caused by aerial misapplication; and that even if an inadequate amount of

> Sencor had been applied due to error on [the farmer's] part, weed infestation would have been uniform rather than stripped.
>
> During cross examination and through the introduction of exhibits, plaintiff cast doubt on much of this evidence. Plaintiff also introduced evidence indicating that there were several alternative possible causes of the distinctive striped pattern.

Should the trial court grant plaintiffs motion for a directed verdict on the counterclaim? *See Thomas Helicopters, Inc. v. San Tan Ranches*, 102 Idaho 567, 633 P.2d 1145 (1981). See also *Chisholm v. J.R. Sirrplot, Co*., 94 Idaho 628,495 P.2d 1113 (1972).

**(3)** ***Dent v. Hardware Mutual Casualty Co***.: Decedent was found unconscious, his head slumped against the steering wheel of his automobile. He was bleeding from the nose and mouth; his face was bruised. The condition of the automobile indicated that it had struck a bridge abutment. The weather that morning was foggy with a light glaze of ice. There were no witnesses, skid marks, or other direct evidence of the cause of the accident. The decedent was taken to the hospital where he died without regaining consciousness. The death certificate attributed death to a cerebral hemorrhage with an "accident, head injury" as a contributing cause.

Plaintiff contended that the hemorrhage was caused by striking the bridge; defendant insurance company argued that the hemorrhage caused the decedent to strike the bridge. The doctor who performed the autopsy concluded that the

> findings reveal that death was due to a massive cerebral hemorrhage without specific evidence of trauma. This is associated with heart strain due to extensive coronary arteriosclerosis and cardiac hypertrophy. There is probably a terminal congestive heart failure with death occurring rather suddenly (within a matter of 2 hours).

The surgeon on duty at the emergency room concurred in the conclusion that death was caused by cerebral hemorrhage but maintained that there was evidence of trauma. At trial, the surgeon testified that

> whether this blood vessel broke before he ran into the bridge or whether it broke afterwards, I don't think we know from this sort of picture, because you could get the same effects from either one of them. I would say this, that I feel it presumptuous to say that you know it did happen before he ran into the bridge. I think that the picture I saw, he well could have run into the bridge before-hand because he did have - he was bleeding, he had signs of injury, but as to whether this hemorrhage- and it could happen and it would be a reasonable expectation in a man of this age group who had hardening of the arteries, to have an injury, for it to break. But whether this happened before or after he hit the bridge, I think you are a little presumptuous to be able to say that you are sure that that's what happened. I don't think we know.

Should the trial court grant a directed verdict for the defendant? See *Dent v. Hardware Mutual Casualty Co*., 86 Idaho 427, 388 P.2d 89 (1964).

**(4)** ***Martineau v. Walker***: On September 18th, plaintiff purchased 129 calves from defendant. At the time of the purchase, the calves appeared healthy. They were immediately trucked to a local veterinarian for inoculation. All of the calves except for one which appeared sickly were treated. They were then trucked to the buyer's nearby ranch. The sickly calf died that night. By October 1, 10-12 calves had died; the veterinarian was summoned. After performing an autopsy, he concluded that the calves had died of leptospirotic infection and inoculated the entire herd. Calves nevertheless continued to die. A second autopsy confirmed the initial findings. By the end of December, 22 calves had died -- most within the 30 days following delivery.

Leptospira is an organism which infects cattle though the mucous membrane. It lives in moist areas and may be transmitted though waterways, contact with diseased animals, or from contact with any

environment which allows the fluid excreted by the diseased animals to remain moist. It has an incubation period of 7 days before any symptoms are evident. The symptoms are similar to shipping fever, a stress disease produced by transporting animals. Animals infected with leptospirotic infection may linger for 30-40 days before dying.

Autopsies were performed on a total of 4 animals. No autopsies were performed after the second visit on October 12th. The veterinarian on cross examination at trial admitted that the organism could have entered the animals at the seller's ranch, during shipment, at the veterinarian establishment, at the buyer's ranch, or even before the seller obtained the animals for resale. The veterinarian then said, "Okay, now, I would like to qualify this. I don't believe the organism could have come from any of these other sources."

Should the trial court grant a directed verdict for the defendant? See *Martineau v. Walker*, 97 Idaho 246, 542 P.2d 1165 (1975).

(4a) ***Sales v. Peabody, 157 Idaho 195, (2014)***: Plaintiff claimed that she contracted a toe infection as a result of a pedicure performed at a spa. The supreme court vacated summary judgement against plaintiff. The court found the complaint adequate, and held it improper for the district judge to raise, *sua sponte*, causation issues.

(4b) ***Nield v. Pocatello Health Servs., 156 Idaho 802, (2014)***: A split supreme court held that plaintiff was not required to eliminate every potential alternative source of her infrection.

(4c) ***Weeks v. Eastern Idaho Health Services*, 143 Idaho 834 (2007):** Expert evidence based on sound scientific prinicples was sufficient to withstand summary judgement, even though the expert could not pinpoint to “reasonable medical probability” the exact effect of certain meedications upon decdent’s brain.

**(5) Counter factual "causation":** Carefully consider how you intuitively analyze the following two cases. What steps were you required to follow? How do these cases differ from the preceding ones?

**(a)** ***Stephens v. Stearns***: After visiting friends and having two drinks, the plaintiff returned to her apartment shortly after 10:00p.m. She turned on the television and went upstairs to change. After changing, she started downstairs to watch television. As she reached the top of the stairs, plaintiff either slipped or fell forward. She testified that she "grabbed" in an attempt to catch herself. She was unable to do so and fell to the bottom of the stairs. The evidence showed that the stairway was 36 inches wide and did not have a handrail as required by local ordinance.

Should the trial court grant a directed verdict for the defendant? *See Stephens v. Stearns*, 106 Idaho 249, 678 P.2d 41 (1984).

**(b)** ***Leliefeld v. Johnson***: As plaintiff approached the Lightning Creek Bridge from the west, defendant was approaching from the east, driving his employer's dump truck and pulling a trailer carrying a bulldozer. The minimum width of defendant's load was 9'2"; the blade of the bulldozer extended beyond the right-hand edge of the trailer. The bridge was 20'wide. While both parties were crossing the bridge, the bulldozer's blade caught on a bridge girder pushing the bulldozer into the path of the plaintiff's oncoming vehicle.

At the time of the accident, an Idaho statute provided that no vehicle using the highways of the state could exceed 8' in width without a permit from the state; defendants did not have a permit. They argued that the jury should not have been instructed on the existence of the statute because there was no evidence that the breach of the statute was a cause of the accident. The court disagreed:

> Even though violation of a statute enacted for public safety is negligent per se, the violation must also be a proximate cause of the injury complained of in order to constitute

> actionable negligence....[Camline and Johnson] maintain that the absence of a permit could not have been a proximate cause of the accident....Camline and Johnson correctly cast their argument in terms of sufficiency of the evidence; ...;they argue that plaintiffs offered no evidence that failure to obtain a permit was a proximate cause of the accident. They suggest that evidence showing that a permit would have required the bulldozer to be moved at a different time, or along a different route, or under different conditions, would have established a causal link between the lack of a permit and the accident, but that in the absence of such evidence that is it impossible to find such a link. They claim therefore that admission of evidence of the violation of the statute is irrelevant and error. We disagree.
>
> Plaintiffs submitted evidence that wide loads such as Camline's are commonly flagged, that a permit would probably have ˙required flagging, but that no flagging was present on the bulldozer at the time of the accident. While the question of flagging was contested by Camline and Panoramic, plaintiffs' evidence was sufficient to submit the question of a permit requirement and noncompliance therewith to the jury, and to allow the jury to draw the inference that the accident might not have happened if a permit had been obtained.

*Lefiefeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983).

The causation issues presented by these cases resemble questions presented in a range of cases. For example, would the decedent have died if his friend had taken him to the hospital rather that merely driving him around (*Farwell v. Keaton*)? Why didn't the court address this issue?

**(6) Counterfactual causation: "lost chance**" Daryl Manning had chronic obstructive pulmonary disease which is characterized by a decrease both in the body's ability to transfer oxygen into the bloodstream and to expel carbon dioxide from the bloodstream. Manning had been hospitalized numerous times with life threatening episodes. When he was admitted on April 17th, the attending physician told the family that his death was imminent. On April 20th, the hospital decided to move Manning to a private room. By this time, "[v]irtually all of Manning's strength and energy were needed for breathing and he was unable to sleep or eat." When the nurses removed Manning's oxygen supply to move him, "his condition suddenly and dramatically worsened. In the few seconds that the supplemental oxygen was disconnected, Manning suffered extreme respiratory distress and, according to the record, he may have stopped breathing altogether." The family had signed a "do not resuscitate" order when Manning was brought to the hospital on the 17th and the hospital staff did not attempt to revive him. The evidence at trial indicated that Manning had at most a few hours to live and that removal of the supplemental oxygen was the cause of death. The supreme court reversed a verdict for the plaintiffs, rejecting without elaboration the "doctrine" of lost chance. *Manning v. Twin Falls Clinic & Hospital*, 122 Idaho 47, 830 P.2d 1185 (1992).

Is *Stephens v. Stems* actually a "lost chance" case? That is, did the defendant's negligence (violating the ordinance requiring a handrail) fail to prevent an unfavorable outcome (falling down the stairs)? Does Stephens differ from Manning? Should the court have affirmed on the ground that the decedent had lost the chance of living longer and reduced damages to reflect the brevity of the lost time?

## [B] MULTIPLE CAUSES

### HACKWORTH v. DAVIS

Supreme Court of Idaho
87 Idaho 98, 390 P.2d 422 (1964)

McFADDEN, J.- The facts disclosed by the record are virtually without dispute. [On December 4, 1959, Vera Weltz lost her life in an automobile accident outside Sandpoint on U.S. Highway No. 95. She was riding in the front seat of a car owned and operated by George Cussen, a teacher from Noxon, Montana. Mr. Cussen was driving four high school students from Noxon to Spokane, Washington. Going through

Sandpoint at about 8:30 a.m., the Cussen car overtook an empty logging truck owned and operated by the defendant, Laurence Davis. The Cussen car followed Davis's truck which had slowed down to about 15 to 20 mph because the highway made a sharp tum. The Cussen car followed the truck around this tum, onto a straight stretch, and as the truck approached the next curve, Cussen passed the truck at about 25 to 30 mph. The highways were icy and slick. Mer passing the truck, Mr. Cussen returned to the southbound lane and proceeded about a quarter of a mile.

[Davis was driving four or five car lengths behind the Cussen car; both were travelling about 25 to 30 miles an hour. A line of about four cars approached from the south at about the same rate of speed. Mr. Cussen testified that a car driven by Elizabeth Stanfield, the last car in the line, got out of control about 100 feet from him and skidded across the road into the path of his car; the cars collided head on. Almost immediately after being struck by the Stanfield car, the Cussen car was struck in the rear by the Davis truck. After the accident, Vera Weltz was found on the floor of the Cussen car; her neck was broken and spinal cord severed.

Mrs. Stanfield was never served with process and the action was dismissed as to her. The jury found for defendant Davis. Plaintiff appealed.)

[Plaintiff] asserts error in the refusal of the trial court to give his requested instructions to the jury dealing with the law concerning a single, or indivisible injury resulting from two separate, unrelated, but almost contemporaneous blows.

The facts disclose an impossibility of any determination as to whether the cause of death of Vera Weltz was from injuries received resulting from the impact from the Stanfield car, the Davis truck, or a combination of the two. It is likewise impossible to attribute any proportion of the injuries to either blow. Testimony of witnesses and the photographic exhibits disclose extensive damage to both the front and rear of the Cussen vehicle. The physician who examined Miss Weltz while she was still in the vehicle was unable to render an opinion as to which of the two collisions caused the fatal injuries.

[Plaintiff] sought to have the court instruct the jury on his theory of the case. He asserted it is the law that when it is impossible for anyone to determine whether a decedent dies as a result of injuries received from either one of the two blows, or from a combination of both, that because of such impossibility of determination as to the actual cause, the law requires a decedent be considered as having died as a result of both blows. His requested instructions specifically pointed out that it was for the jury to determine all the facts of the accident; also, to determine whether any act or omission of Mr. Davis was a proximate cause or contributing efficient cause of his truck striking the Cussen car, and if so determined, whether such act or omission constituted negligence.

In evaluating [plaintiffs] assignment of error, consideration must begiven to the fact that only one of the two alleged tort-feasors is before the Court; the cause was dismissed as to Mrs. Stanfield. Consideration must also be given to respondent Davis's admission contained in the pleadings that the decedent died from injuries received in the collision of the car, in which she was riding, with the other two vehicles. By [plaintiffs] contention, he is asserting a joint and several liability against respondent Davis, although he cannot prove that the girl was not already dead at the time of the second collision, or that there was a causal relation between the subsequent collision and her death.

A number of jurisdictions have been faced with a similar factual situation as is presented in this case, involving a multiple collision of vehicles, with a single or indivisible injury. The problem, that first plagued the courts in resolving the law in such cases was how one defendant could be held to be jointly and severally liable with another defendant when in fact their tort was not a "joint" tort; there was no joint duty owed to a plaintiff, and no breach of any joint duty when two automobile drivers successively collided with the plaintiffs' car. []

Generally, the courts have resolved such problem on a practical basis ....

Prosser, in his handbook on the Law of Torts § 45 (2d ed. 1955), states the proposition thus:

***Where two or more causes combine to produce such a single result, incapable of any

> logical division, each may be a substantial factor in bringing about the Joss, and if so, each may be charged with all of it. Here again the typical case is that of two vehicles which collide and injure a third person. The duties which are owed to the plaintiff by the defendants are separate, and may not be identical in character or scope, but entire liability rests upon the obvious fact that each has contributed to the single result, and that no rational division can be made. []; *Summers v. Tice*,33 Cal. 2d 80, 199P.2d 1(1948).
>
> RESTATEMENT OF TORTS § 879 states what we believe to be the correct rule:
> Except as stated in § 881 [pertaining to persons contributing to a nuisance], each of two persons who is independently guilty of tortious conduct which is a substantial factor in causing a harm to another is liable for the entire harm, in the absence of a superseding cause.

[Defendant] counters [plaintiffs] contention there was reversible error in failing to instruct on the indivisible injury theory, by asserting that the law applicable to the facts and issues of this action were fully covered by the court's Instructions .... These instructions properly covered the law as to a factual situation where the negligence of two or more persons did in fact combine or concur in causing injury to a third person. However, in the instant action, under the instructions given, in order for [plaintiff] to recover, the jury had to find negligence on the part of both Mrs. Stanfield and [defendant] Davis; also that the negligence of each of them was a contributing cause of the accident; and also determined that the combined injuries suffered by the Weltz girl, from the collisions, brought about the tragic result; or the jury had to find Davis negligent and that his negligence was the sole proximate cause of the injuries. Under [plaintiff's] theory, however, if the jury found Davis to be negligent, there was no requirement that the jury find the negligence of Davis combined or concurred with the negligence of Mrs. Stanfield in bringing about the results, or that Davis's negligence was solely responsible; all the jury was required to find was negligence on the part of Davis, and a single or indivisible injury suffered as a result of two separate collisions. If the jury made such findings, either driver found negligent could be held responsible for the full injury.

It is our conclusion that the instructions given by the court did not adequately cover this principle of law, and failure to instruct upon [plaintiffs] theory of the case as embraced in his requested instructions was prejudicial error.

The judgment is reversed, and the cause remanded for new trial.

KNUDSON, C.J., AND McQUADE, TAYLOR, & SMITH, JJ., concur.

NOTES

(1) *Hackworth* is a classic example of an injury traceable to multiple causes. It also demonstrates why the but-for test is problematic when it is applied to multiple causes. It is clear (isn't it?) that Weltz was killed by either one of or the combination of the impact of the Stanfield car and the Davis log truck. Is it possible, however, to assign but-for causation to either of the other drivers individually? Both, therefore, would be able to avoid liability through the but-for test. Does the solution that the court adopted a pragmatic ethical position reflecting a recognition that neither side can prove who did it- and therefore the allocation of the burden of proof will be decisive.

(2) Which IDJI would the trial court use if the case were going to trial today?

(3) **Restatement (Third) and proof of causation:**

> **28. Burden of Proof**
>
> (a) Subject to Subsection (b), the plaintiff has the burden to prove that the defendant's tortious conduct was a factual cause of the plaintiff’s harm.

(b) When the plaintiff sues all of multiple actors and proves that each engage in tortious conduct that exposed the plaintiff to a risk of harm and that the tortious conduct of one or more of then caused the plaintiffs harm, but the plaintiff cannot be reasonably be expected to prove which actor or actors caused the harm, the burden of proof, including both production and persuasion, on factual causation is shifted to the defendants.

RESTATEMENT {THIRD) OF TORTS § 28 (2010).

(4) ***Fouche v. Chrysler Motors Corp***.: Plaintiff was injured when his automobile struck a stationary vehicle in the emergency lane of an interstate highway. Plaintiff brought suit against only the manufacturer of his automobile, alleging that his injuries were enhanced because of a defect in the vehicle's seat belt system. The trial court concluded that plaintiff failed "to prove affirmatively what injuries would have occurred had the defect not been present." Since plaintiff had failed to apportion the damages by proving which were the result of each causative factor, the trial court granted defendant's motion for a directed verdict.

The Idaho Court of Appeals reversed, holding that the plaintiff had the burden of proving that the conduct of the defendant[s] was a substantial factor in causing the injury:

> If the plaintiff fails to show that the defects were a substantial factor, there can be no recovery. If the defects are shown to be a substantial factor, then the burden of proving apportionment falls on the defendants. Where no apportionment is established, the plaintiff is entitled to recover fully from any defendant whose (conduct] was a substantial factor in producing the injuries.
>
> On review, the Idaho Supreme Court agreed in a rehearing decision that emphasized the rule that causation was a factual question "reserved for the jury unless the proof is so clear that all reasonable minds would construe the facts and circumstances in the same manner," an event which the court characterized as a "rare situation." Justice Bistline then turned to defendant's contentions:
>
> > Chrysler argues that because Mr. Fouche introduced no expert medical testimony to demonstrate that "plaintiffs injuries would not have occurred but for the alleged failures of the seat belt and collapsible steering column to properly function ...,the jury would have had to speculate whether plaintiffs tom aorta and other injuries would have sustained in the collision even if there had been no defect or whether plaintiff’s injuries were caused solely by the allegedly defective seat belt and steering column." However, this objection misconceives the proper analysis. The question is merely whether, giving full consideration to the evidence produced by the plaintiff and every legitimate inference which can be drawn therefrom, the product's defect was a substantial factor in causing the injuries suffered. Cf. *Munson v. State Department of Highways*, 96 Idaho 529, 531 P.2d 1174 (1975); *Hackworth v. Davis*, 87 Idaho 98, 390 P.2d422 (1964). The conduct of the manufacturer need not be the sole factor, or even the primary factor, in causing the plaintiff's injuries, but merely a substantial factor therein. []

Justice Bakes dissented, contending that "not only did Mr. Fouche fail to show what caused his aorta to rupture, he failed to prove any connection between the alleged defects and the injury." *Fouche v. Chrysler Motors Corp*., 107 Idaho 701, 692 P.2d 345 (1984).

**(5)** ***Petersen v. Parry***: Plaintiffs' decedent died in a head-on automobile collision that killed all of the occupants of both cars. The decedent was a passenger in one of the vehicles. Plaintiffs appealed a summary judgment for the estates of both drivers. The Idaho Supreme Court affirmed, concluding that plaintiff had failed to prove that the accident was caused by the other driver:

> when an Idaho state police officer, trained in the art of investigating accidents and determining the cause thereof, could not form an opinion as to the cause of this accident on the basis of all and the only evidence available, twelve untrained ladies and gentlemen of a jury could not fix or determine the proximate cause of this accident without resorting to pure speculation and

> conjecture. This court has previously held that a verdict cannot rest on conjecture. *Dent v. Hardware Mutual Casualty Co*., 86 Idaho 427, 388 P.2d 89 (1964); *Splinter v. City of Nampa*, 74 Idaho 1, 256 P.2d 215 (1953); *Antler v. Cox*, 27 Idaho 517, 149 P. 731 (1915).

Nonetheless,

> It is contended that the submission of the question of proximate cause to the jury is authorized by the Idaho case of *Hackworth v. Davis*, 87 Idaho 98, 390 P.2d422 (1962), based on the California case of *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948).
>
> These cases however are distinguishable from the cause at bar, for the basic theory proclaimed therein is that where the negligence of two or more persons combined in causing a single, indivisible injury to a third person, then all the tortfeasors are jointly and severally liable for the injury produced. As previously pointed out in this opinion, the evidence at hand is insufficient to support a finding of negligence on the part of [the other driver]. Therefore, Hackworth and Tice are inapplicable.

Is *Petersen* distinguishable from *Hackworth*? Is the Court's description of *Hackworth* correct?

**(6)** ***Joint and several liability***: As *Hackworth* demonstrates, the issue can be phrased in different ways: was defendant's conduct the cause of plaintiffs injury? Was it a cause? For what portion of plaintiff's injury is defendant responsible? As the court notes, "The problem, that first plagued the courts ... in such cases was how one defendant could be held to be jointly and severally liable with another defendant when in fact their tort was not a "joint" tort; there was no joint duty owed to a plaintiff, and no breach of any joint duty when two automobile drivers successively collided with the plaintiff's car. []Generally, the courts have resolved such problem on a practical basis ....

The resolution that the court notes was dependent upon a common-law solution to the payment of judgments- the law of joint and several liability: where two or more persons are liable for the same injury (e.g., the death of Vera Weltz) they may either be jointly liable (each is liable for the total) or severally liable (i.e., each if liable for their share of the total). When defendant are jointly and severally liable, the plaintiff is not required to pursue each defendant severally but can obtain the whole judgment from any liable defendant who is then obligated to seek contribution from the other defendant(s). The decision in Hackworth- which requires the defendants to apportion their responsibility- operates in this system.

.

The plaintiff's argument was that the death in this case was not apportionable- and that the plaintiff was able to recover the whole loss from either party. Can death ever be apportioned?

The Idaho Legislature has substantially limited the common law of joint and several liability:

> **I.C. § 6-803. Contribution among joint tortfeasors - Declaration of right - Exception - Limited joint and several liability.**
>
> (1) The right of contribution exists among joint tortfeasors, but a joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.
>
> (2) A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.
>
> (3) The common law doctrine of joint and several liability is hereby limited to causes of action listed in subsection (5) of this section. In any action in which the trier of fact attributes the percentage of negligence or comparative responsibility to persons listed on a special verdict, the court shall enter a separate judgment against each party whose negligence or comparative responsibility exceeds the negligence or comparative responsibility attributed to the person recovering. The negligence or comparative responsibility of each such party is to be compared

individually to the negligence or comparative responsibility of the person recovering. Judgment against each such party shall be entered in an amount equal to each party's proportionate share of the total damages awarded.

(4) As used herein, "joint tortfeasor" means one (1) of two (2) or more persons jointly or severally liable intort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.

(5) A party shall be jointly and severally liable for the fault of another person or entity or for payment of the proportionate share of another party where they were acting in concert or when a person was acting as an agent or servant of another party. As used in this section, "acting in concert" means pursuing a common plan or design which results in the commission of an intentional or reckless tortious act.

Would the statute have changed the result in Hackworth? Why/why not? The missing information that would allow you to answer this question is the development of comparative fault.

**GARCIA v. WINDLEY**

Supreme Court of Idaho
144 Idaho 539, 164 P.3d 819 (2007)

BURDICK, J: [On November 24, 2001, a car accident occurred when defendant Jay Windley's vehicle struck Maria Garcia's vehicle from behind. The jury found that Windley was negligent. At trial, Garcia argued that] before the accident she had spondylolysis (a weak or fractured pedicle on the back of her vertebra) making her susceptible to injury, that this is a benign condition unless something causes traumatic injury, and that the collision caused a teardrop fracture in Garcia's vertebra and traumatic spondylolis thesis (one vertebra actually slipping on top of the other). Windley argued the accident only caused a lumbar strain and that the teardrop fracture and spondylolis thesis preexisted the accident. 2 Garda moved for a new trial on several grounds including the causation instruction ... The district court denied the motion for a new trial and held the causation instruction was not erroneous, did not mislead the jury, and that even if it were misleading there was no prejudice since the jury found Windley's negligence to be the proximate cause of Garcia's damages....

**II. ANALYSIS**

Garcia argues ... that the jury instruction on proximate cause was erroneous and prejudiced Garcia in this case....

**B. Jury Instruction**

Garcia argues that the proximate cause jury instruction was erroneous and prejudicial because this was a multiple cause case and thus a "substantial factor" jury instruction should have been used rather than a "but for" jury instruction. Windley argues that this is not a multiple cause case and that even if it were a "substantial factor" instruction would not have been appropriate.... We analyze each issue below.

Instruction No. 15, the proximate cause jury instruction stated:

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the complained injury, loss or damage, and but for that cause the damage would not have occurred. It need not be the only cause. Itis sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

> There may be one or more proximate causes of an injury. When the negligent conduct of two or more persons or entities contribute concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the injury regardless of the extent to which each contributes to the injury.

(Emphasis added).

In Idaho, the "but for" test may be employed when there is a single possible cause of the injury; however, the "substantial factor" test must be employed when there are multiple possible causes of injury, and the jury must be instructed accordingly. *Newberry v. Martens*, 142 Idaho 284, 288, 127 P.3d 187, 191 (2005). "The 'but for' instruction and the 'substantial factor' instruction are mutually exclusive." *Id*. (quoting *Le'Gall v. Lewis County*, 129 Idaho 182, 187,923 P.2d 427, 432 (1996)).

The jury instruction at issue here is identical to the jury instruction used for the proximate cause "but for" test. IDJI 2.30.1.2 The first paragraph of the instruction used in this case is also identical to the jury instruction we reviewed in *Fussell v. St. Clair*, 120 Idaho 591, 818 P.2d 295 (1991).[18]

In *Fussell*, the plaintiffs argued that a doctor committed medical malpractice resulting in the brain damage and death of their child. The Fussells asserted the doctor was negligent in that he:(1) artificially ruptured Mrs. Fussell's fetal membranes during delivery when the child was too high, thereby causing a prolapsed umbilical cord; and (2) mismanaged the delivery when the prolapsed umbilical cord was discovered. Fussell, 120 Idaho at 592, 818 P.2dat 296. The doctor submitted evidence to show that there was a nonnegligent cause for the child's brain damage and death for which he was not responsible-an occult (hidden) prolapsed umbilical cord. *Id*. at 593, 818 P.2d at 297. We held the Fussell jury instruction was erroneous as the jury could have concluded that the doctor's negligence was nota proximate cause because the brain damage and death of the child "would likely have occurred anyway." *Id*. We also noted that it was not appropriate for the trial court to use the bracketed portion of IDJI 2.30 referring to one or more proximate causes due to multiple negligent actors because neither party alleged any person other than the doctor was negligent. *Id*. at 593-94, 818 P.2d at 297-98.

In Fussell, we concluded that because the evidence presented by the defense would have permitted a jury finding that two forces or causes caused the damage, the substantial factor instruction should read:

> When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the damage complained of. It need not be the only cause. It is sufficient if it is a substantial factor concurring with some other cause acting at the same time, which in combination with it, causes the damage.

*Id*. at 595, 818 P.2d at 299. The suggested instruction omits any mention of "but for" and also omits the portion instructing that it is not a proximate cause if the damage "likely would have occurred anyway."

This Court recently reaffirmed its position in *Newberry v. Martens*, 142 Idaho 284, 127 P.3d 187 (2005). In that case, the trial court used the suggested substantial factor instruction found in Fussell.3 *Id*. at 287, 127 P.3d at 190. There, Newberry argued the loss of vision in his right eye was due to his doctor's negligence in failing to locate the metal shard in his eye and in failing to refer Newberry to a specialist. *Id*. at 288, 127 P.3d at 191. The doctor argued that the loss was caused by the presence of bacteria which had been introduced to the eye with the metal shard. *Id*. The doctor in Newberry contended that the trial court should have used a "but for" instruction instead of a "substantial factor" instruction because there was only one allegedly negligent cause of injury. *Id*. However, we held that the district court correctly determined that it was a multiple cause case since the plaintiff argued the doctor's negligence caused the injury and the defendant doctor argued the presence of bacteria caused the injury. *Id*. We rejected the doctor's arguments that the Fussell rule only applies when there are multiple

[18] Note that in the Idaho Jury Instructions, the second paragraph is bracketed, indicating that it may be used in appropriate cases.

defendants and multiple potential acts of negligence. *Id*. at 289-90, 127 P.3d at 192-93. Instead, we held that policy supports the use of a "substantial factor" instruction when there are multiple causes, even if there is only one potentially negligent defendant. *Id*. at 291, 127 P.3d at 194. Additionally, we held that the omission of the sentence instructing that there is no proximate cause if the injury "likely would have occurred anyway" was appropriate. *Id*. at 288-89, 127 P.3d at 191-92.4

Windley attempts to justify the jury instruction given on several grounds. First, Windley argues that Fussell and Newberry do not apply to the present case because those holdings are limited to medical malpractice cases. However, there is nothing to suggest the discussion surrounding a "substantial factor" instruction in Fussell and Newberry was meant to apply only to medical malpractice cases. Both of those cases rely on cases outside the medical malpractice context.... Thus, we have previously determined a "substantial factor" causation instruction is appropriate in non-medical malpractice cases, and we decline to now limit such an instruction to medical malpractice cases.

Next, Windley argues that a "substantial factor" instruction would have been inappropriate because this was not a multiple cause case. Garcia contends that throughout Windley's presentation of his case, Windley asserted several possible additional causes of Garcia's injuries including the weather and that the spondylolis thesis preexisted the accident. First, weather cannot be considered a possible cause of the accident. Weather, in and of itself, did not cause the accident. The state of the weather goes to breach- either Windley was driving negligently in that weather or he was not. The parties to this action have continuously mixed and matched arguments concerning the cause of an injury and the cause of an accident. In this case there was one possible cause of the accident and two possible causes of the injury. In this opinion, we are discussing the cause of an injury.

As to possible causes of the injury, Windley theorized that spondylolis thesis preexisted the accident.[19] In Newberry, the defendant argued that the introduction of bacteria, which occurred prior to Newberry visiting the doctor, caused the loss of vision. We did not allow the doctor to "point to a second cause, independent of his negligence, and at the same time maintain that [it was] a single cause case." Newberry, 142 Idaho at 289, 127 P.3d at 192. Similarly, Windley has pointed to a second and nonnegligent cause of Garcia's damages - that spondylolis thesis developed prior to the accident.

Thus, because this was a multiple cause case a "substantial factor" instruction and not a "but for" instruction should have been used. Jury Instruction No. 15 should not have included the phrase "but for," nor should it have included the statement that there is no proximate cause if the injury "likely would have occurred anyway." However, the erroneous instruction is reversible only if Garcia can show she was prejudiced. *See Newberry*, 142 Idaho at 287, 127 P.3d at 190.

[After evaluating the prejudice issue, the court concluded] because this was a multiple cause case, because a "but for" instruction was given instead of a "substantial factor" instruction, and because that erroneous instruction could have affected the outcome of the trial, we reverse and remand for a new trial.

JUSTICES TROUT, EISMANN AND JONES, CONCUR.

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[19] In addition, the subsequent jury instruction, also appealed by the doctor in Newberry read:

> A cause can be a substantial contributing cause even though the injury, damage or loss would likely have occurred anyway without that contributing cause. A substantial cause need not be the sole factor, or even the primary factor in causing the plaintiffs injuries, but merely a substantial factor therein.

Newberry, 142 Idaho at 287, 127 P.3d at 190.

Thus, IDJI 2.30.2, the proximate cause "substantial factor" instruction, which contains the sentence "V]t is not a proximate cause if the injury, loss or damage likely would have occurred an}'Way" is in conflict with Fussell and Newberry.

Garcia argued that her preexisting condition of spondylolysis was aggravated by the accident to cause spondylolis thesis. Windley argued that Garcia had spondylolis thesis before the accident. Windley is correct that spondylolysis is not a cause of Garcia's damages that would make this a multiple cause case. However, Windley's argument that the damages resulting from Garcia's spondylolis thesis were caused by the preexisting condition of spondylolis thesis and not by the accident is an alleged cause of Garcia's damages.

CHIEF JUSTICE SCHROEDER, DISSENTS WITHOUT OPINION.

NOTES

**(1)** What did the court hold? Must the "but for" test be used when there is a single possible cause of the injury? Must the "substantial factor" test be used when there are multiple possible causes?

How would a trial court be required to instruct the jury if Henderson came to trial after the decision in Garcia? That is, was the case a single- or multiple-cause case?

After Garcia, are "single-cause cases likely to be very uncommon? Is there ever a situation in which only one thing is the cause? Is that the issue? Consider these issues in the context of the following cases.

**(2)** **Causation IDJIs (What's left?)**: What portions of IDJI 2.30.1-.2 did the court void?

**(3)** **Breach not causation:** Note the court's statement that "Weather, in and of itself, did not cause the accident. The state of the weather goes to breach - either Windley was driving negligently in that weather or he was not."

**(4)** ***Woodland v. Portneuf-Marsh Valley Irrigation Co.***: Plaintiff sought to recover damages for loss of his hay crop caused by the flooding of his land. Defendant appeals a jury verdict:

> It is established by the evidence and admitted by the company that some water from its canals contributed toward the flow that overflowed Woodland's land and injured his hay. In defense it is contended by the company that the evidence does not show that the water wrongfully discharged from the canals, or laterals of its irrigation system, was sufficient by itself to overflow the channel of the creek through Woodland's land or cause any of the injury to his crops. But this is not a good defense, even though true, because where one contributes as an independent tort-feasor toward causing an injury, he will be liable for the injury done by him although his acts or negligence alone might not have caused any injury. In this case the evidence tends to prove that there were at least six sources from which the water came that injured Woodland's hay, and it is not contended by him that the company was responsible for more than one. And, while the evidence is very indefinite as to the relative and specific amount of water from each source, it is sufficient to show that considerable water from the company's canals wrongfully ran into the creek that overflowed its banks and flooded Woodland's property. And everyone who permits water to waste on to the land of others without right is liable for his proportionate share of the injury caused or the harm resulting therefrom, even though the water allowed to run down by each would do no harm if not combined with that of others, and the injury is caused by the combined flow wherein the waters of all are mixed and indistinguishable. If the injury follows as the combined result of the wrongful acts of several, acting independently, recovery may be had severally against each of such independent tort-feasors in proportion to the contribution of the injury. []

*Woodland v. Portneuf-Marsh Valley Irrigation Co*., 26 Idaho 789, 146 P.1106 (1915). If all of the other sources of water that contributed to the flooding of plaintiff's hay were not traceable to human actions, would the defendant have been liable for the entire loss since that water would be like the weather in *Garcia*?

**(5)** **Cause of the injury rather than cause of the accident**: "In this case there was one possible cause of the accident and two possible causes of the injury." 13] Is it possible to have two causes of an accident and only one cause of the injury? Does the court's statement only apply to accidents? In *Henderson*, there were a large number of causes of the injury-- the court's "many variables."

(6) ***Woodland v. Portneuf-Marsh Valley Irrigation Co***. (redux): If the other sources of water that flooded the plaintiff's hay were not traceable to human actions, would the defendant be successful in

distinguishing Garcia by arguing that the water was in fact a cause of the injury unlike the weather in Garcia?

**(7)** ***In re Estate of Eliasen***: Edgar and Lucille were having marital difficulties and Lucille moved out of their residence. Edgar responded by filing for divorce in July 1974. In September, Lucille came to the ranch and shot Edgar in the abdomen. Edgar had a stomach cancer for which he had been receiving chemotherapy. Although the chemotherapy had been effective in inhibiting the stomach cancer, it interfered with the healing of the abdominal wound and had to be discontinued for some time. Following Edgar's death on November 28, 1974, Lucille pled guilty to assault with a deadly weapon.

Edgar expressly disinherited Lucille and she challenged the will. The case thus required the court to construe Idaho's slayer statute, I.C. §15-2-803. The statute provided that "[n]o slayer shall in any way acquire any property or receive any benefit as a result of the death of the decedent" and defined "slayer" as "any person who participates, either as principal or as an accessory before the fact, in the willful and unlawful killing of any other person." If Lucille caused Edgar's death, she was not entitled to share in his estate; if she did not, she had been excluded unlawfully.

A divided Idaho Supreme Court in an opinion by Justice Shepard held that Lucille fell within the statute. Noting that Edgar had been responding well to chemotherapy prior to the shooting,

> [w]hile the chemotherapy treatment was withheld from the decedent, there was a rebound and rapid growth of the cancer, and the decedent remained hospitalized until his death on November 28, 1974. Decedent's death certificate listed the primary cause of death as tumor cachexia, a terminal state of cancer ....
>
> The magistrate and the district court declined to apply the slayer's statute, on the grounds that the proximate cause of the decedent's death was cancer, not the gunshot wound inflicted by the appellant widow. We disagree. The clear and undisputed evidence supports the magistrate's finding that the gunshot wound hastened the decedent's death by weakening his physical condition and by interrupting his chemotherapy treatments, thus allowing the cancer, which had been controlled, to rebound and rapidly grow. We hold that the gunshot wound was a substantial factor and a proximate cause of the death of decedent, and therefore the slayer's statute applies to prevent Lucille Eliasen from inheriting from Edgar Eliasen's estate.
>
> In the instant case, the magistrate had before him the testimony of two doctors relating to the cause of decedent's death. One stated that the drastic change in decedent's condition was attributable to the gunshot wound and that the gunshot wound was a contributing cause of the decedents death ....
>
> The second doctor indicated that adenocarcinoma is one of the most difficult cancers to treat, and that the probability was ten per cent that the decedent would have lived one year from the time the cancer was diagnosed, but this doctor stated:
>
> > "A. I believe that, from reviewing the records,that he would have died of the adenocarcinoma of the stomach in any event. I don't believe that the gunshot wound was either necessary or sufficient to explain his death. I do believe that it was a contributing factor, in the sense that it may have hastened his death by weeks because of its effect on his stomach and because of the fact that it necessitated a 2-week discontinuance of his chemotherapy."
>
> We hold that the magistrate's conclusion that the wound inflicted must necessarily have been the "direct cause" of death was erroneous. The fact that the gunshot wound was not the immediate cause of death is not controlling. One accused of homicide cannot escape liability merely because the wound he inflicted is not by itself mortal or the immediate cause of death. A non-fatal wound is the legal cause of death if it started a chain of causation which led to death,

> and the one who inflicted such a wound has committed homicide. [] The gunshot wound involved here, by itself, was not fatal, since the wound had healed prior to the decedents death and death would not have occurred "but for" the decedent's cancer. However, the medical testimony clearly indicates that, except for the wound, the decedent would have lived for a longer period of time, i.e., some weeks or some months. He may have lived a much longer period of time, and it is impossible to set a specific time framework. It is a certainty, however, that the decedent's death would not have occurred when it did, "but for" the gunshot wound. Hence, we hold that the gunshot wound caused the decedent's premature death.
>
> It is a universally accepted rule that a tortfeasor takes his victim as he finds him and will be held responsible for the full extent of the injury, even though a latent susceptibility of the victim renders his injury far more serious than reasonably could have been anticipated. [] Equally well established but less familiar is the principle that one whose wrongful conduct forwards a diseased condition and thereby hastens and prematurely causes death cannot escape responsibility, although the disease probably would have resulted in death at a later time. Thus, an act which accelerates death, causes death, according to both civil and criminal law. []

Justice McFadden, with Bistline, dissented:

> Decedent's death certificate was properly admitted into evidence. Under cause of death, disease or condition directly leading to death is written, "Tumor cachexia." Under antecedent causes is written, "Metatastic Cancer of stomach adenocarcinoma of stomach" and under "other significant conditions" is written, "bullet wound of stomach."
>
> .... I.C. § 39-263 provides:
>
> "Evidentiary character of records and copies of records- Any certificate filed in accordance with the provisions of this act and the regulations prescribed by the board, or any copy of such records or part thereof, duly certified by the state registrar, shall be prima facie evidence of the facts recited therein."
>
> The death certificate being admitted into evidence, [], the burden was on the estate to prove that decedent did not die of the condition listed on the certificate but rather from the gunshot wound. The evidence supports the conclusion of the trial court and the district court... Proximate cause has been defined as the "cause without which the result would not have occurred,"[]; and "[b]y proximate cause is meant a direct cause, that is, a cause which, by direct and natural sequence, produced the death in question. To say it differently, the proximate cause of a thing is that cause which produces it and without which it would not have happened." Decedent was dying of cancer at the time of the gunshot and while it may have hastened his death by a matter of weeks, the testimony supports the lower courts' conclusion that the gunshot wound was not the proximate cause of his death. Because the gunshot wound was not the proximate cause of decedent's death, the slayer's statute is inapplicable. Findings of fact supported by substantial and competent evidence, though conflicting, will not be disturbed on appeal. []

*In re Estate of Eliasen*, 105 Idaho 234, 668 P.2d 110 (1983).

Does the dissent argue that Lucille's conduct did not hasten Edgar's death? Or does it merely disagree with the plurality on the legal significance of the results of her conduct? Does the dissent's argument suggest the problems associated with any attempt to find a single "sufficient" or "proximate" cause in a world where everything is intimately connected?

**(8)** ***Munson v. Department of Highways***: What is the relationship between causation and comparative responsibility? Plaintiffs decedent was the owner of a van being driven by a third party. The van struck a pickup truck which had stopped for highway repairs and the decedent was killed. The state highway repair crew had failed to set out the required warning sign, a breach of a statutory duty upon which the plaintiff predicated her case.

Plaintiff appealed a summary judgment; the court began its analysis by setting forth the conditions under which the accident occurred:

> [T]he record discloses that the conditions of the accident were as follows: the Ostergar van, driven by Gooch, approached the work site on a dry highway, with one-quarter to one-half mile of clear visibility as a result of the full daylight; the pickup truck with which the van collided had been stopped by a highway crew flagman wearing a fluorescent red vest and holding a red paddle-type stop sign; the flagman was standing near the pickup; Mansfield ... had failed to move the warning signs up the highway as he told a co-worker he would do; the Ostergar van collided with the rear of the stopped pickup truck, throwing that vehicle approximately 285 feet into the sagebrush beside the road; there is no evidence that the van either slowed down or swerved prior to the collision.
>
> Within that factual framework the plaintiffs allege that Mansfield's conduct constituted a negligent act resulting in Ostergar's death. The analysis of a negligence question requires consideration of both factual cause and legal cause of the injury. *Henderson v. Cominco* American, Inc., 95 Idaho 690, 518 P.2d 873 (1973). As the Court stated in Henderson, "*** proximate [legal] cause focuses upon legal policy in terms of whether responsibility will be extended to the consequences of conduct which has occurred. *** [while] actual cause *** is a factual question focusing on the antecedent factors producing a particular consequence." The relationship is well explained by Professor Green as, "It is the defendant's conduct (actual cause) that inflicts the hurt, but it is the law (legal cause) that makes his conduct negligent." Green, The Causal Relation Issue, 60 MICH. L. REV. 543, 551. Thus, the threshold question of negligence analysis is whether the conduct of the defendant was a substantial factor in bringing about the injury suffered by the plaintiff.
>
> Although the determination of the factual cause of an injury is normally left to a jury, the court may perform that function as a matter of law when the undisputed facts can lead to only one reasonable conclusion .... We believe this to be such a situation. The record does not support a contention that the conduct of Mansfield was a factor in the death of Ostergar.
>
> The driver of an automobile is held to have notice of that which is plainly visible on the highway before him. *Yearout v. Chicago, Milwaukee, St. Paul & Pacific R.R*., 82 Idaho 466, 354 P.2d 769 (1960); *Whiffen v. Union Pacific R.R*., 60 Idaho 141, 89 P.2d 540 (1939). The repair site was identifiable by the flagman, the pickup truck, the various vehicles of the repair crew, and the members of the crew. All this was clearly visible from a considerable distance. The Ostergar van drove directly into the parked pickup truck. To find that Mansfield's failure to erect yellow, four-foot by four-foot warning signs was an actual cause of Ostergar's death would require a finding that those signs would have provided more notice of the blocked highway than did the obvious blockage itself. This we cannot do. Therefore, we find that Mansfield's conduct was not an actual cause of Ostergar's injury. (]

Justice Bakes concurred specially on the ground that the trial court had been correct in imputing the negligence of the driver of the vehicle to the owner of the vehicle under §49-1404(1):

> However, it is necessary to comment on certain statements expressed in the majority opinion with which I strongly disagree. The majority opinion, while assuming that the defendants were negligent for failure to properly put up warning signs, nevertheless concludes that "[t]o find that Mansfield's failure to erect yellow, four-foot by four-foot warning signs, was an actual cause of Ostergar's death would require a finding that those signs would have provided more notice of the blocked highway than did not obvious blockage itself. This we cannot do." By weighing the evidence and deciding that a vehicle stopped in the roadway at a construction site necessarily provides more notice of the need to stop than would appropriately placed warning signs farther down the road, and majority has invaded the province of the jury and usurped their factfinding function. If it is necessary to decide whether properly placed warning signs would have provided

more notice of the blocked highway than did the blockage itself, the jury, not the trial court upon motion for summary judgment or this Court upon appeal, should decide that issue of fact. Itis the jury's responsibility to determine if there was negligence and, if so, whether that negligence actually caused the injuries involved.

Aside from my objections concerning the usurpation of the jurors' traditional functions, it further believe the quoted language displays a lack of understanding of the concept of causation in negligence actions. The majority opinion states, "To find that Mansfield's failure to erect yellow, four-foot by four-foot warning signs, was an actual cause of Ostergar's death would require a finding that those signs would have provided more notice of the blocked highway than did the obvious blockage itself. This we cannot do." What that phrase says is that negligence, in order to be actionable, must constitute more than 50% of the proximate cause of the accident. I don't understand that to be the law. The majority earlier said that negligence is an actual cause of an injury when it is a substantial factor in bringing the injury about. This latter statement is accurate. [] But taking the two statements together, the majority is saying that negligence is not a substantial factor unless it is more than 50% of the cause of the accident. I know of no authority supporting that position, and the majority has cited none. In any event, such a finding is an invasion of the province of the jury to find the facts. As stated in PROSSER, LAW OF TORTS at 240:

> The defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about. Whether it was such a substantial factor is for the jury to determine, unless the issue is so clear that reasonable men could not differ. It has been considered that "substantial factor" is a phrase sufficiently intelligible to the layman to furnish an adequate guide in instructions to the jury, and that it is neither possible nor desirable to reduce it to any lower terms. As applied to the fact of causation alone, no better test has been devised.

The plaintiff has shown sufficient facts from which reasonable men could conclude that there were two independent negligent acts, both of which were an actual cause of the accident. The first was the failure of the contractor to erect the appropriate signs, and the second was the negligence of the driver of the Ostergar vehicle in which the plaintiffs' decedent, Mr. Ostergar, was riding. Had there been a third party who was injured by the collision, such as an occupant of the car which the Ostergar vehicle struck, the third party should certainly be able to proceed against either or both of these negligent joint tortfeasors, the driver or the contractor, and should be able to collect damages from either of them. However, the majority, in order to maintain consistency, would still have to say that the signs would not have provided any more notice than the third party's car, and therefore hold that the negligence of the contractor in failing to put out the signs was not an actual cause of the accident. Thus, a third party would have no right of recovery against the contractor, one of the joint tortfeasors. Merely because the majority feels that the driver's negligence contributed to the accident to a greater extent than the contractor's negligence does not mean the contractor's negligence could not be a cause of the accident. Yet this is the effect of the majority opinion, and if it becomes the law it would rewrite the law of joint tortfeasors and set dangerous precedent for the developing law of comparative negligence.

*Munson v. State Department of Highways*, 96 Idaho 529,531 P.2d 1174 (1975). Cf. *Garrett Freightlines, Inc. v. Bannock Paving Co*., 112 Idaho 722, 735 P.2d 1033 (1987).

# Chapter VII

# SCOPE OF LIABILITY

## [A] UNEXPECTED HARM

NOTES

**(1) Restatement (Third) and scope of liability**: Recall the basic standard for evaluating whether the harm that occurred was within the scope of liability of the actor:

> **§29. Limitations on Liability for Tortious Conduct**
>
> 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 (2010).

**(2) Restatement (Third) and unforeseeable harm**:

> **§31. Preexisting Conditions and Unforeseeable Harm**
>
> 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.

RESTATEMENT {THIRD) OF TORTS§ 31 (2010).

**(3)** ***Jones v. City of Caldwell***: Plaintiff was injured when she stepped on a broken board in the sidewalk and fell. Following the fall, she suffered severe abdominal pain and eventually underwent an operation. The surgeon discovered that her fallopian tubes were inflamed, and they were removed. The defendant city presented no evidence to contest plaintiff's claim on the cause on the fall. It did, however, argue that it should not be responsible for the injury to plaintiff's reproductive organs:

> The action of the court in refusing to give the following instruction requested by the plaintiff is assigned as error: "If you find from the evidence that the plaintiff was caused to fall by a defect in the sidewalk negligently permitted to exist by the defendant, the defendant is responsible for all ill-effects which naturally and necessarily follow the injury in the condition of health in which plaintiff then was at the time of such fall, and it is no defense that such injury may have been aggravated and rendered more difficult to cure by reason of plaintiff's state of health at that time, or that by reason of latent disease the injuries were rendered more difficulty to cure by reason of plaintiff's state of health at that time, or that by reason of latent diseases the injuries were rendered more serious to her than they would have been to a person in robust health."
>
> That instruction contains a correct statement of the law upon the subject there involved, and upon the evidence introduced on the trial the instruction should have been given. A person or corporation has no more right to negligently inflict injuries upon a sick person than upon a well person, and the existence of latent disease brought into activity by a fall or other injury would not constitute a defense to an action to recover damages for such injuries. Dr. Stewart testified that the plaintiff might have been suffering from latent infection which, however, would be likely never to break into activity or cause any discomfort or illness or pain except for a violent fall or similar accident. If that be true, in this case the proximate cause of the pain, discomfort and suffering from such latent disease would be the fall and not the latent condition. If the latent condition itself did not case pain, suffering, etc., but such condition plus the fall caused such pain, the fall and not the latent condition is the proximate cause.

*Jones v. Caldwell*, 20 Idaho 5, 116 P.110 (1911).

Recall the decision of the court of appeals in *White v. University of Idaho*, 115 Idaho 564, 768 P.2d 827 (Ct. App. 1989) [Chapter I]in which plaintiff was seriously injured by a light tap on the shoulder. Are the cases distinguishable? What is "unexpected harm"?

**(4)** ***Hayhurst v. Boyd Hospital***: Plaintiff was in a hospital convalescing from typhoid fever. The nurse placed him in a chair before an open window. He subsequently developed pneumonia. Defendant argued that:

> the evidence does not show that the acts of defendant were the proximate cause of plaintiff's subsequent ailments, but rather shows that the proximate cause was the previous existence in his body of the germs which cause pneumonia; arguing that although the germs might not have developed except for plaintiff's exposure, he was prior to such exposure being attacked by the pneumonia germs, and that the negligence, if any, merely created a condition under which the pneumonia developed. He cites in this connection cases wherein injuries to a plaintiff due to a defendant's negligence so weakened the plaintiff that he became more readily a prey to a disease subsequently contracted. The cases cited properly apply the rule as to an independent intervening cause which would not ordinarily be anticipated as the result of the negligent acts complained of and are not applicable here. This case is rather within the rule that the negligent acts producing an injury are actionable, even though in themselves they would not have produced the injury, had the physical condition of the plaintiff not been in such condition as to render him susceptible to such injury.

*Hayhurst v. Boyd Hospital*, 43 Idaho 661, 254 P. 528 (1927).

**(5)** ***Linder v. City of Payette***: Lloyd Linder was injured in an accident on March 31, 1941, that broke his left arm. On June 14, 1941, with

> his left arm still in plaster cast weighing about eight pounds and extending from the shoulder to the fingers, holding the elbow rigid, the forearm at right angles to the upper arm, Linder with a companion in a small boat was fishing in Sage Hen Reservoir. The companion, sitting in the stem, caught a fish; Linder raised up from the bow to assist in landing the fish; the prow went straight up in the air, and the boat turned over backwards, precipitating both into the water. The companion was rescued. Linder's body was later recovered. No autopsy was performed, and there is no direct evidence as to the exact cause of death. Appellant and respondent, however, evidently agreed he was drowned, have so stated, the board has so found, and it was so pronounced, though perhaps prematurely, in the previous opinion.
>
> On such assumption appellant urges the original accident was the proximate cause of the death because the cast on Linder's arm interfered with his efforts to save himself by swimming or holding on to the boat and misled rescuers into thinking he had a life preserver, wherefore they successfully assisted his companion first.
>
> …
>
> We accept as correct appellant's proposition of law that the definition and determination of "proximate cause" in the field of torts is applicable herein. A recognized concomitant is that if there occurs, after the initial accident and injury, an intervening, independent, responsible, and culminating cause, the latter occurrence becomes the proximate cause.
>
> "The proximate cause of an event must be understood to be that which in a natural and continuous sequence, unbroken by a new cause, produces that event and without which that event would not have occurred." *Pilmer v. Boise Traction Co*., 14 Idaho 327,94 P. 432 (1908).
>
> "The law regards the one as the proximate cause of the other, without regard to the lapse of time where no other cause intervenes or comes between the negligence [initial injury] charged and the injuries received to contribute to it. There must be nothing to break the causal connection

between the alleged negligence [first accident and injury] and the injuries [death]." *Antler v. Cox*, 27 Idaho 517, at527, 149 P. 731 (1915)).

It must be clearly kept in mind that the essential causal connection which must not be broken is, not that between the concededly compensable accident and the direct injury therefrom, *Brink v. H. Earl Clack Co.,* 60 Idaho 730, 96 P.2d 500 (1939), but between the initial accident and injury and a subsequent and otherwise disconnected injury having no relationship whatever to decedent's employment.

While the facts are not in dispute, difference inferences might be drawn therefrom as to what actually caused Linder's death and what was the proximate cause. The judgment for defendant was therefore affirmed.

*Linder v. City of Payette*, 64 Idaho 656, 135 P.2d 440 (1943).

**(6)** ***Burkland v. Oregon Short Line R.R***.: Plaintiff was a fireman on one of defendant's locomotives. As the train approached a grade crossing, plaintiff notice9 a gasoline truck pulling a tank trailer about to cross the track. He yelled to the engineer to stop the train. The engineer did not respond. When the train struck the tank, it ruptured and enveloped the locomotive in a ball of flames. The engineer died of his injuries and plaintiff was severely burned. The trial court erred in instructing the jury that defendant was only liable for the consequence

which ordinarily follows an act, "the result of which may reasonably be anticipated"; and again they were told that "proximate causes are such as are the ordinary and natural result of the omission or negligence complained of' and such only as "are usual and might have been reasonably expected to occur," and not the "result of which could not be reasonably anticipated." These definitions taken in connection with the other statements contained in this instruction were calculated and most likely to lead a jury of laymen to the belief that unless the engineer saw the trailer on the track or had reason to know, or was informed, that it was on the track, and that he could have reasonably foreseen that the collision would result in bursting the tank and spraying the locomotive with gasoline and burning the plaintiff, the company would not be liable. If so construed and understood by the jury, the instruction would be erroneous and extremely prejudicial to the plaintiff. He might not have recognized the trailer as a gasoline tank; he could not know whether it was empty or loaded nor could he foresee that a collision would burst the tank or that the contents of the tank would ignite and envelop the locomotive, burning himself and the fireman. The law does not require such an exact foresight into probable results before holding one responsible in whole or in part for the results of an act of negligence.

The true rule, as we understand it, does not require that the defendant must have been able to foresee the precise injury which in fact resulted from the accident, or the particular, injurious result which might be inflicted upon person or property as the result thereof; on the other hand the Jaw only requires that he shall be able to understand and appreciate that the results of some kind of injurious nature may reasonably be anticipated from the negligent act of omission or commission .

*Burkland v. Oregon Short Une R.R*., 56 Idaho 703, 58 P.2d 773 (1936).

(6) **The Magic Circle**: Prosser offers a description of the result in these cases:

It is as if a magic circle were drawn about the person, and one who breaks it, even by so much as a cut on the finger, becomes liable for all resulting harm to the person, although it may be death.

W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, & DAVID G. OWEN, PROSSER AND KEETON ON TORTS 291 (5th ed. 1984).

## [B] UNEXPECTED EVENTS AND ACTORS

NOTES

**(1) Restatement (Third) and unexpected acts:**

**§34. Intervening Acts and Superseding Causes**

When a force of nature or an independent act is also a factual cause of harm, 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 § 34 (2010).

**DEWEY v. KELLER**

Supreme Court of Idaho
86 Idaho 506, 388 P.2d 988 (1964)

McFADDEN, J. Plaintiff Norma Dewey is the mother and guardian ad litem of the minor plaintiffs, and the widow of John C. Dewey, who died from injuries received in an automobile accident December 11,1957. This action was brought by Mrs. Dewey, seeking compensation for her loss and the loss of her children occasioned by Mr. Dewey's death. Her complaint charges negligence on the part of defendant Roy Keller in parking a house on a public highway during hours of darkness, without any lights, flares or other warning signals; the complaint also alleges defendant Robert Worley was a deputy sheriff of defendant Gem County, and that he was negligent in signaling traffic around the parked house, and in failing to place, or cause to be placed, lights or other devices to warn of the obstruction, and that the county is responsible for his negligence.... The answers of the respective defendants generally denied the charges of negligence and asserted contributory negligence on the part of Mr. Dewey as the proximate cause of the accident.

Defendant Keller on December 11, 1957, was moving a 60foot house, sitting on dollies, easterly on Highway 52toward Emmett, Idaho. The tractor pulling the house broke down, leaving the house on the highway, totally blocking the south lane of the highway, and obstructing the north lane to the extent of about four and a half feet. Keller, in moving the house, had a truck acting as a "pilot car" to warn oncoming traffic of the obstruction, which truck was being driven by one Mary E. Heil, now Mary Keller. Keller replaced the broken-down tractor with a smaller one being carried on the truck. Before he could move the house, it was necessary to fill the radiator of the smaller tractor. Keller left Mrs. Keller to guide traffic around the house while he went for water. For that purpose, she was using a flashlight, it being dark or dusk at the time.

About 6:00o'clock, p.m., Deputy Sheriff Worley, in response to a call, went to the scene, expecting to find a house in the process of being moved, but instead found the house stopped on the highway. When he arrived at about 6:10p.m., Keller had not yet returned, and Worley took charge. Keller returned shortly. Finding there were no flares, reflectors or warning devices in either the truck or the tractors, and having none in his own vehicle, Worley then radioed for assistance and the necessary equipment. Keller desired to move the house further down the highway, but Worley refused to permit him to do so. Keller upon his return to the house left his truck, facing the east, in front of the house; Worley placed his vehicle 75 to 100 feet east of the house, with lights focused on the house, and with the red flashing light of his vehicle burning. Worley directed Mrs. Keller to tum the truck lights off to avoid blinding drivers approaching the house from the east. Worley, using a flashlight to warn traffic, stood in the highway so he could observe traffic from both directions. Mrs. Keller also stood in the highway with her flashlight.

In the meantime, decedent John C. Dewey, who resided some miles further west from Emmett, left his home in his Ford vehicle, accompanied by Stanley Harwell. They were going easterly toward Emmett in response to a relative's call concerning an injured child. As they approached the house, which, unknown to them, was blocking their lane of traffic, they observed a flashlight on the left side of the highway. Harwell stated he and Dewey figured someone might be having tire trouble. Shortly after they passed the flashlight, Harwell told Dewey, "There is a house!" The brakes were applied, but the car did not stop in time to avoid hitting the house, severely injuring Harwell, and fatally injuring Dewey. Worley and Mrs. Keller, at the time, were some 75 to 100 feet to the west of the house and had been signaling the Dewey car with the flashlights. It was totally dark at the time of the accident, and there were no flares, reflectors, or other warning devices indicating the presence of the obstruction.

The jury returned a verdict in favor of all the defendants, on which judgment was entered. It is from this judgment that the appeal was taken by the plaintiffs.

Plaintiffs attack instruction no. 16. This instruction dealt with an issue presented by the answers of the respective defendants, Keller and Worley. Keller asserted that any negligence on his part had been superseded by the negligence of Worley when he took charge of the hazard on the highway. The instruction dealt with the issue of proximate cause of the accident and advised the jury among other things that if they should find from a preponderance of the evidence that Worley's acts were such as to break the causal connection of Keller's acts so that Keller's acts were not a proximate cause of the accident, they should find for Keller.

It is difficult to see where prejudicial error arose from the giving of this instruction. Under the issues presented by the respective parties' pleadings, it was essential to give such an instruction. It was for the jury to determine whether after the initial negligence of Keller there was a totally unanticipated, intervening and superseding cause which in fact became the proximate cause of the accident, and whether the antecedent negligence of Keller was therefore not the proximate cause or a contributing proximate cause of the accident. *Chatterton v. Pocatello Post*, 70 Idaho 480,223P.2d389(1950); *Clark v. Chrishop*, 72 Idaho 340,241 P.2d 171 (1952); *Smith v. Sharp*, 82 Idaho 420, 354 P.2d 172(1960); []. Under the principles as announced by this court, before an intervening superseding cause of an accident can become the sole proximate cause of the injury, and thus relieve the first negligent wrongdoer of liability, such subsequent cause must have been unforeseen, unanticipated and not a probable consequence of the original negligence. *Chatterton v. Pocatello Post* and *Smith v. Sharp*. The intervention of a third person's negligence or of other and new direct causes of injury does not preclude recovery against the original negligent actor if the injury was the natural or probable result of the original wrong. *Carron v. Guido*, 54 Idaho 494, 33 P.2d 345 (1934).

In *Scrivner v. Boise Payette Lumber Co*., 46 Idaho 334, 268 P. 19(1928), it was held that a subsequent independent act of negligence does not displace a former one as the proximate cause of an injury where the succeeding act is so connected with the first in time and nature as to make it plain that the damage was the natural and probable consequence of the original wrongful act or omission.

Having determined that this cause must be remanded for new trial, we deem it proper to point out, [], that in giving of an instruction on the principles covered by instruction no. 16, the jury should be advised that before Keller could be exonerated by any acts of Worley, those subsequent acts must not have been reasonably foreseeable at the time of Keller's initial conduct, nor a natural or probable consequence of Keller's misconduct. The question of foreseeability and natural or probable consequence is a question of fact for the jury to determine. Care must also be taken that the jury is not misled into believing that only the acts of one person could be considered in resolving the problem of the proximate cause of the injuries; nor misled into believing that the combined acts of two or more persons could not both be considered as proximate causes of the injuries.

KNUDSON, C.J., AND McQUADE, TAYLOR, & SMITH, JJ., concur.

NOTES

(1) What standard did the court approve to give the issue to the jury? What does this standard require the jury to determine?

Was Roy Keller's conduct a cause in fact of John Dewey's death? What was the risk that made Keller's conduct a breach of Keller's duty to act with due care? Was the harm that befell Dewey within the risk created by Keller's conduct? Was the injury "the natural or probable result" of the breach? Was the injury "foreseeable"?

**LUNDY v. HAZEN**

Supreme Court of Idaho
90 Idaho 323,411 P.2d 768 (1966)

SMITH, J. -This is an appeal from a summary judgment dismissing an action brought by appellants against respondent for recovery of damages which Franklin Lundy, a minor, sustained June 27, 1963, on account of personal injuries, together with medical and hospital expenses. The boy was playing with a 22-caliber cylinder type pistol loaded with a single shell, when the pistol discharged, the bullet wounding him in the face with resultant residual scars.

Appellants, at the time of the accident, maintained their home in Kimberly, Idaho, with their two children, Franklin, 13 years old, and Julie, 15 years old. Appellant Arch Lundy was a forest service employee. The parents, on June 1st, moved to a ranger station about 31 miles distant from Kimberly. Mrs. Lundy traveled back and forth from the station to the home sometimes 3 or 4 times a week, returning to the station at night. The children worked in the beet fields. Mrs. Lundy kept in close touch with the children both personally and by telephone.

For some time prior to the accident Franklin had in his possession a 22-rifle loaned to him by a relative. Esther Lundy, in her deposition, stated that the boy was allowed to go hunting with the rifle and was permitted to purchase ammunition for it. He had had instruction in the use of the gun. Mrs. Lundy considered him to be a careful boy.

On June 27, 1963, Franklin, accompanied by his sister, went to a sporting goods store in Twin Falls, owned by respondent, for the purpose of buying a pistol with moneys he had earned. The sister advised her brother to consult his father before purchasing the gun. Respondent, without requesting written parental consent, sold the pistol to Franklin. His parents had not given their consent, either orally or inwriting, to the purchase, although the boy's mother knew of the boy's desire to acquire the pistol.

The evening of June 27th, Julie telephoned her mother. Mrs. Lundy, in her deposition, stated that during the conversation, she first learned about her son's purchase of the pistol. Earlier that day, when she visited the children at the home, Franklin told his mother of his desire to obtain the pistol. Mrs. Lundy then stated, "I asked him not to, to talk to his dad first, and he said, well, he had the money, and I excused it at that, because I figured the man wouldn't sell it to him because he wasn't old enough." She then stated that she did not tell Julie, the daughter, to take the pistol away from Franklin, but consented to the boy keeping it "for the time being, because she "figured he would handle it with care and keep it put up. She didn't remember whether she told her husband that Franklin had the pistol; later she stated that on June 28, 1963, after the accident, she told the boy's father that the boy had purchased the gun. The father, Arch Lundy, in his deposition, stated that the pistol was bought without his consent or knowledge.

The afternoon of June 28, 1963, after purchasing ammunition, Franklin returned home; after "restacking" the ammunition in its box, he had one cartridge left over which he inserted in the pistol. Later, he was "playing" with the pistol, snapping its hammer and trigger mechanism; the cartridge discharged and the bullet caused the boy to suffer sundry wounds in his face, neck and mouth.

Esther Lundy, in answer to an interrogatory, stated that on the evening the gun was purchased, the automobile which she used in going to and from the ranger station and her home was not capable of making the trip.

The trial court, upon hearing respondent's motion for summary judgment, dismissed the action, and from the resulting judgment appellants have appealed.

Appellants contend that respondent's act of selling the pistol to Franklin Lundy, a minor under the age of 16years, without the child having presented the written consent of his parents to the purchase of the gun, was in violation of I.C. § 18-3308, and that such act was the proximate cause of the child's injury. I.C. § 18-3308, reads in part as follows:

> No person, firm, association or corporation shall sell or give to any minor under the age of sixteen years *** any firearms of any description, without the written consent of the parents or guardian of such minor first had and obtained. Any person, firm, association or corporation violating any of the provisions of this section shall be deemed guilty of a misdemeanor, ****

I.C. §18-3308 enunciates a positive prohibition of the act committed by respondent, i.e., the sale of a firearm to Franklin Lundy, a minor then of the age of 13 years, without the written consent of his parents. *Carron v. Guido*, 54 Idaho 494, 33 P.2d 345 (1934).

Respondent, while admitting that violation of I.C. §18-3308 constitutes negligence per se, nevertheless contends that no liability attaches to the seller of the firearm unless the illegal sale is the proximate cause of the injury.

While the act complained of is negligence per se, that alone is not sufficient to render respondent liable. For one to be liable for his negligent act, it must be shown that the act was the proximate cause of the injury. *Dewey v. Keller*, 86 Idaho 506, 388 P.2d 988 (1964); *Smith v. Sharp*, 82 Idaho 420, 354 P.2d 172 (1960); *Clark v. Chrishop*, 72 Idaho 340, 241 P.2d 171 (1952); *Carron v. Guido*.

In *Chatterton v. Pocatello Post*, 70 Idaho 480, 223 P.2d 389 (1950), this court stated: "The breach of duty to be actionable must be the proximate cause of the injury complained of, that is, the cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the result, and without which the result would not have occurred."

Respondent asserts however, that the minor's mother acquiesced in and consented to her son's possession of the pistol and thereby she assumed control over its use prior to the injury, thereby constituting an independent intervening cause sufficient of itself to be the proximate cause of the injury; that from the point of assumption of parental consent, the seller's negligence no longer was the proximate cause of the injury.

Respondent shows that appellant Esther Lundy had notice or knowledge of the fact that Franklin had purchased the pistol and asserts that by not ordering it taken away from her son, she consented to his possession of the same; that such parental consent and failure to take steps to have the gun taken from Franklin, constituted an intervening or superseding cause of the boy's injury, which relieved respondent of liability for harm resulting from the sale of the firearm.

In *Smith v. Sharp*, this Court, quoting from Restatement Torts adopted the definition of an efficient, intervening cause or superseding cause, comment thereon, and considerations to be regarded in determining whether an intervening force is a superseding cause of the injury. We quote almost identical language from Restatement Torts 2d, as follows:

> A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.
> Comment

***

b. A superseding cause relieves the actor from liability, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm. Therefore, if in looking back from the harm and tracing the sequence of events by which it was produced, it is found that a superseding cause has operated, there is no need of determining whether the actor's antecedent conduct was or was nota substantial factor in bringing about the harm.

RESTATEMENT (SECOND) OF TORTS § 440.

The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:

***

(b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;

(c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;

(d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;

(e) the fact that-the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;

(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion."

RESTATEMENT (SECOND) OF TORTS § 442.

The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

(b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or

(c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent."

RESTATEMENT (SECOND) OF TORTS § 447.

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized, or should have realized, the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

RESTATEMENT (SECOND) OF TORTS §448.

In *Dewey v. Keller*, speaking of foreseeability of an intervening cause, this Court said:

*** Under the principles as announced by this court, before an intervening superseding cause of an accident can become the sole proximate cause of the injury, and thus relieve the first negligent wrongdoer of liability, such subsequent cause must have been unforeseen, unanticipated and not a probable consequence of the original negligence. [] The intervention of a third person's

> negligence or of other and new direct causes of injury does not preclude recovery against the original negligent actor if the injury was the natural or probable result of the original wrong. []

This court has not ruled on the question of parental consent as being an efficient, intervening cause such as to relieve a seller of a firearm of liability for harm resulting from allowing a child to gain possession of a gun. The few cases decided in other jurisdictions indicate that where the negligent acts of a third person have permitted a child to come into possession of dangerous explosives or firearms with resultant injury, and the parent or parents became cognizant of the situation but permitted the child to retain possession, the parents' acts have been deemed to be an intervening cause sufficient to relieve the third party of liability. []

Although Mrs. Lundy, in her deposition, stated that she knew of the boy's desire to purchase the pistol, nevertheless she deferred to the boy's father in the matter of consent. She told the boy to talk to his father first. Julie, the sister, expressed herself to the same effect when Franklin was looking at the pistol in respondent's store, her testimony being as follows:

> Well, we went in the store and Skip [Franklin]was looking at this 22, and, as I said before, I told Skip to wait and talk to dad, and Skip didn't say anything, and I says, "Well, put some money on it, you know, so you will have it," and Mr. Hazen [respondent said something to the effect that "you better buy it now, this kind goes fast," or something like that. I don't remember his exact words, and Skip said he would rather buy it now.

The conversations to which Julie referred in the foregoing testimony are shown to have taken place in the presence of respondent; nevertheless, though respondent was put on notice by the conversation, he urged and induced the boy to purchase the gun.

The affidavit of appellant Arch Lundy shows that not only was the pistol purchased without his consent or knowledge, and against his wishes, but that he did not know that his son had the gun until after the accident, and that he had not at any time consented that his son have a pistol; also, that he had lectured the boy about having such a firearm and told him that it was dangerous for children to play with pistols.

The record, as it relates to the conduct of Mrs. Lundy, cannot be interpreted as clearly showing that she gave her "consent" to respondent's sale of the pistol to Franklin. Whether she did consent and if so, whether such consent constituted an intervening superseding cause which insulated respondent from his antecedent negligence as the proximate cause of the boy's injury, would be questions of fact for determination by the finder of the facts. The conduct of Mrs. Lundy, if it constituted "consent," must be considered in the light of Restatement Torts 2d §442(c), as to whether the asserted intervening force, i.e., Mrs. Lundy's conduct, operated independently of any situation created by respondent’s negligence, "or, on the other hand, is or is not a normal result of such a situation"; also, in the light of Restatement Torts 2d § 447, that the asserted intervening negligent act of Mrs. Lundy does not make it a superseding cause of harm to the boy which respondent's negligent conduct was a substantial factor in bringing about, if

> (a) respondent, at the time of his negligent conduct, should have realized that Mrs. Lundy might so act, or
>
> (b) a reasonable man, knowing the situation existing when Mrs. Lundy so acted, would not regard it as highly extraordinary that she so acted, or
>
> (c) the asserted intervening act on the part of Mrs. Lundy was a normal consequence of a situation created by respondent's conduct, and the manner in which Mrs. Lundy acted was not extraordinarily negligent.

In other words, was the conduct of Mrs. Lundy extraordinary, or rather, was it a fairly normal response to the stimulus of the situation created by respondent? On the other hand, was her conduct an

intervening force operating independently of the situation which respondent created? These theories are recognized in *Scrivner v. Boise Payette Lumber Co*., in language as follows:

> The principles to be drawn from the authorities are that, in order that a subsequent independent act of negligence shall not displace a former one as the proximate cause, or to constitute the first of two acts of negligence the proximate cause of an injury, it is necessary that the succeeding act of negligence should be so connected with the first in time and nature as to make it plain that the damage was the natural and probable consequence of the original wrongful act or omission, and that to establish this the original negligence must have been such that it must have been known to, or anticipated by, the original wrongdoer that, in the natural course of human conduct, a succeeding act of negligence was at least likely to be committed, or, as said in *Lynch v. Nurdin*, [], it was extremely probable that some other person would unjustifiably set in motion the dangerous instrumentality or negligent condition created by the original wrongdoer, and thus cause an injury.

The summary judgment of dismissal is reversed, and the cause remanded with instructions to reinstate the action.

McFADDEN, C.J., AND McQUADE, & TAYLOR, JJ., concur.

NOTES

(1) What standard did the court approve to give the issue to the jury? What does this standard require the jury to determine?

Was J.W. Hazen's conduct a cause in fact of Franklin Lundy's injury? What was the risk that made Hazen's conduct a breach of his duty to act with due care? Was the harm that befell Lundy within the risk created by Hazen's conduct? Was the injury "not [the] highly extraordinary'' result of the breach? Was the injury "foreseeable"?

(2) *Ness v. West Coast Airlines*: What function is served by the search for the "proximate cause" of a result? Is it an attempt to ensure that the basic policies of the cause of action are applied in situations which seem unusual? That is, since negligence is concerned with conduct which imposes foreseeable and unreasonable risks, conduct which gives rise to such risks is the proximate cause of the injury. In *Ness v. West Coast Airlines, Inc*., the court wrote:

> It was not necessary to establish the precise cause of the air turbulence. It is not contended or suggested that defendant was in anywise responsible therefor. But, it was defendant’s duty to exercise such means as were available to it to avoid or minimize the danger to its passengers which probably would result from such turbulence.
>
> As to proximate cause, it was sufficient to show that the probability of air turbulence, and the likelihood of injury to passengers therefrom, in the absence of warning thereof, was foreseeable.

*Ness v. West Coast Airlines, Inc*., 90 Idaho 111,410 P.2d 965 (1965).

(3) *Scrivner v. Boise Payette Lumber Co*.: Defendant employed a watchman to patrol its mill at Barber Flats. The watchman owned a gun which he had recently cleaned and (apparently) had failed to set the safety. On the night of the accident, the watchman attended a dance at the company's town, Barber. The facts were such that the jury could have reasonably concluded that he did so within the scope of his employment. The decedent and the watchman met at the dance and in the course of some joking, the decedent was killed by a discharge from the watchman's gun. After reviewing a number of cases, the Court stated the general rule as set forth in *Lundy*. It concluded:

> Unless it can be said that it should have been apparent to a man of ordinary capacity and prudence, and the defendant company must have known and anticipated that it was likely, and

> well within the range of reasonable foresight, that [the watchman], in the ordinary and natural course of events, would, upon occasion in nowise calling for it, and not as a part of the performance of any duty, or in the scope of his employment, needlessly, willfully, carelessly, and as a joke, draw and point this loaded pistol at someone ...the original negligence [of the company] cannot be said to be the proximate cause of the injury.

*Scrivner v. Boise Payette Lumber Co*., 46 Idaho 334,268 P. 19 (1928). To ask the question is to answer it. On the other hand, if the court had phrased the issue as whether it is reasonably foreseeable that an armed watchman might accidentally shoot someone with his pistol the answer might well be different.

(4) *Rowe v. Northern Pacific Ry*.: Plaintiff was injured when the Studebaker sedan in which he was riding struck a boxcar sitting in the middle of Main Street in Moscow. The accident occurred about 12:30 a.m. The intersection was lighted with a street light 70 feet south and 50 feet north of the crossing. The defendant was in violation of a Moscow ordinance. The court reversed a judgment for the plaintiff:

> The conclusion is inescapable that, due to the unfortunate thoughtlessness of the car's occupants and their unwarranted assumption of a clearance at the time not apparent, the car came hurtling through the night with a momentum uncontrollable the remaining distance. The presence of the boxcar merely presented a condition: it was not the proximate cause of respondent's mishap. That cause lay primarily in the negligence of respondent and his host.

*Rowe v. Northern Pacific Ry*., 52 Idaho 649, 17 P.2d352 (1932). Was the presence of the boxcar a cause in fact of the injury? Was a foreseeable result of leaving a boxcar in the middle of a poorly illuminated road at night an accident?

(5) *Smith v. Sharp*: Plaintiffs brought wrongful death actions against the driver of the automobile in which their daughters were riding and the City of Pocatello. The decedents drowned in the Portneuf River when the automobile went through a barrier at the dead end of a street. Plaintiffs alleged that the city was negligent in failing to erect proper barricades or signs to indicate that the street was a dead end. The trial court dismissed the action against the city.

> The court began by noting that cities had a statutory duty "to keep the streets within their limits in a 'reasonably safe condition for use by travelers,'" a duty that required the city to maintain barriers or warning devices. Nonetheless, to be actionable the negligence "must be the proximate cause, or a contributing proximate cause, of plaintiff's injury." Here, the conduct of Sharp was highly extraordinary and not a normal response to any stimulus of the situation created by the defendant city. []"Men of ordinary experience and reasonable judgment, looking at matter after the event and taking into account the prevalence of that 'occasional negligence, which is one of the incidents of human life,' would" regard it as extraordinary the Sharp would knowingly and intentionally drive the death car at excessive speed, in the nighttime, with out lights and without keeping any lookout whatsoever as to the roadway ahead. []
>
> The negligence of Sharp was an intervening force operating independently of any situation created by the city. [] The intervening negligence of Sharp was wrongful toward the passengers in the automobile.
>
> The acts of the defendant city, in maintaining South Hayes street with its dead end upon the bank of the river and with a steel post barrier, were not such that the city should have realized that a third person, such as Sharp, would knowingly and intentionally operate a motor vehicle thereon, in the nighttime, at excessive speed, without lights and without keeping a lookout ahead. The intentional unlawful and tortious conduct of Sharp, being altogether extraordinary and unusual, was the superseding cause of the injury which resulted. []
>
> It is evident from the allegations of the complaints that it was the unlawful operation of the Sharp automobile in the nighttime, at excessive speed, without lights, and without keeping a lookout to the road ahead, which proximately caused the accident. Neither reflectors, signs nor a penetrable barrier, would have been of much help to such a driver.... A consideration of these facts impels us to the conclusion that the city was not required to foresee nor anticipate that

anyone would operate an automobile upon South Hayes Street in the manner in which the automobile involved was operated by defendant Sharp.

More in point is our own decision in *Rowe v. Northern Pacific Ry*., 52 Idaho 649, 17P.2d352. In that case the plaintiff, a guest, was injured when the car in which he was riding crashed into a boxcar standing across the main street of Moscow. The accident occurred in the nighttime. Plaintiff claimed the defendant was negligent in failing to maintain an adequate light at the crossing, as required by a city ordinance. It was plaintiff's contention that the glare from the light maintained by defendant blinded the vision of plaintiff and his host, driver, so that they were unable to see the obstruction until it was too late to avoid the collision. After referring to the facts that the plaintiff and his host were familiar with the crossing; the imposed duty to stop, look and listen; the speed at which the car was being driven, as indicated by the severity of the impact; and that the temporary stopping of railroad cars upon the crossing was not unlawful, this court said

"The conclusion is inescapable that, due to the unfortunate thoughtlessness of the cars occupants and their unwarranted assumption of a clearance at the time not apparent, the car came hurtling through the night with a momentum uncontrollable the remaining distance. The presence of the boxcar merely presented a condition: it was not the proximate cause of respondent's mishap. That cause lay primarily in the negligence of respondent and his host." [] *Smith v. Sharp*, 82 Idaho 420, 354 P.2d 172 (1960). Recall the discussion of Sharp in the materials on recklessness in Chapter 1.

(6) *Robinson v. Williamsen Idaho Equipment Co*.: The court was confronted with a claim that the defendant's conduct was not the proximate cause of plaintiff's injury. The Court responded:

Recovery in negligence requires that appellants' damages be within the scope of the risk created, that is, proximately caused, by the unsafe condition of the hoist.... Damages in this case resulted from the interplay between uneven distribution of the load on the truck bed and the loss of hydraulic fluid in one cylinder relative to the other. The proximate cause issue turns on whether the uneven loading represented an intervening factor that vitiated the causal relation between appellants' damages and the unsafe condition of the hoist.

Respondent knew the purpose for which the hoist was purchased. From the circumstances portrayed in the record it appears that uneven distribution of the load was, in practical terms, an unavoidable incident of using the unit in the roofing business. Even where the contents of the truck bed were precisely balanced, some instability necessarily resulted when a worker walked upon the elevated bed to unload it. In any case, it appears that maintenance of a balance of the materials themselves could not always be expected with loads of gravel or other roofing supplies. The central question is whether the degree of unevenness could have been reasonably foreseen and was sufficient to cause one cylinder to lose fluid relative to the other. If so, then the uneven loads were foreseeable intervening factors which fell, as a matter of law, within the scope of the original risk created by the unsafe condition of the hoist. In that event, they did not vitiate the proximate relation between that condition and the resultant damage.

The trial court made no findings on this critical question; rather, he concluded, without discussion, that proximate cause had not been shown. That general finding, like any finding by the trial court, would be upheld if supported by competent though conflicting evidence. However, appellants established without challenge that the second accident occurred after the hoist had been extended, as an employee walked upon the elevated bed and unloaded sacks of gravel. That event appears to demonstrate that the foreseeable degree of unevenness in the load was sufficient to cause one cylinder to lose fluid relative to the other. The only contrary evidence adduced by respondent which might have pertained indirectly to this issue was the mere fact that none of the Marion hoists, which had been on the market for a number of years, contained flow control devices. However, respondent made no attempt to connect that fact with this case by showing that when other Marion hoists were used in a similar manner the two cylinders extended

> and retracted equally. Due to this failure, in light of appellants' evidence, the trial court's conclusion on proximate cause is unsupported by the record before us.

*Robinson v. Williamsen Idaho Equipment Co.*, 94 Idaho 819,498 P.2d 1292 (1972).

(7) *Mico Mobile Sales & Leasing, Inc. v. Skyline Corp*.: The case began as a wrongful death action brought by the parents of a small child who died after drinking apple juice that had been diluted with tap water. The tap water contained methanol that had been put into the trailer's water system as an antifreeze by the retailer, Mico. Because of a plugged cold water line and a defective kitchen faucet, the methanol had not been purged from the system. The water line and the faucet were the responsibility of the trailer's manufacturer, Skyline. After settling the parent's claim, Mico sought indemnification from Skyline, arguing that the plugged line and the faucet were the cause of the child's death. After reviewing the earlier cases, the Idaho Supreme Court concluded:

> Skyline argues that the two defects (plugged water line and defective faucet) chargeable to it were nota legal cause of the death because Mico's act of placing a toxic substance in the domestic water system was a superseding cause. This court has adopted the definition of superseding cause of the Restatement (Second) of Torts §440 (1965).
>
> > A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.
>
> *Lundy v. Hazen*, 90 Idaho 323, 411 P.2d 768 (1966). Accord *Smith v. Sharp*, 82 Idaho 420, 354 P.2d 172 (1960). Mico's act of placing a toxic substance in the water system intervened between the prior alleged negligent acts of Skyline and the injury to the child.
>
> [] This court must determine whether, as a matter of law, the intervening act of Mico constituted a superseding cause. According to Restatement (Second) of Torts § 442 (1965), the following guidelines should be considered in determining whether an intervening act was a superseding cause of harm to another.
>
> ***
>
> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
>
> (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
>
> (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
>
> (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
>
> (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
>
> (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.
>
> Ordinarily, a question of foreseeability is a question of fact. *Dewey v. Keller*, 86 Idaho 506,388 P.2d 988 (1964). However, when the undisputed facts can lead to only one reasonable conclusion, this court may rule upon the issue of foreseeability as a matter of law. *Munson v. State Department of Highways*, 96 Idaho 529,531 P.2d 1174 (1975).

> Mica's use of methanol in a fresh water plumbing system was in violation of the "Standard for Mobile Homes" formulated by the American National Standards Committee on Mobile Homes and Recreational Vehicles.
>
> "11.4 Materials
>
> "11.4.3 Prohibited Material. *** Pipe dope, solder flux, oils, solvents, chemicals, or other substances that are toxic, corrosive, or otherwise detrimental to the water system shall not be used."
>
> According to an administrative rule promulgated by the Department of Labor, the plumbing system of a mobile home must be installed in accordance with these standards. [] It is unlawful to sell a mobile home which is not manufactured in compliance with this standard and itis unlawful to alter or convert a plumbing system so that the system is not in compliance with this standard. []
>
> .... Mica's act of placing the methanol in afresh water system was in violation of state law, mobile home industry standards, and plumbing trade practices; thus, its act was an extraordinary event which was not foreseeable to Skyline. As a matter of law, Mica's act of placing a toxic substance (methanol) in the fresh water system was a superseding cause.

*Mica Mobile Sales & Leasing, Inc. v. Skyline Corp*., 97 Idaho 408, 546 P.2d 54 (1975).

(8) *Orthman v. Idaho Power Co*.: A customer brought a negligence action against an electric utility for injuries he received when he was shocked as he attempted to reconnect power. He argued that utility knew or should have known that a customer would attempt to reconnect his power after utility allegedly wrongfully terminated it. The trial court granted defendant's motion for summary judgment, and plaintiff appealed. The supreme court reversed, holding that whether utility could have foreseen that disconnected electrical power source created general risk of harm was a jury question that precluded summary judgment for utility.

> Justice Silak with Justice Schroeder dissented:
>
> The question is '"whether [appellant's] injury and the manner of its occurrence [were] so highly unusual that we can say, as a matter of law that a reasonable [person], making an inventory of the possibilities of harm which [that person's] conduct might produce, would not have reasonably expected the injury to occur.'" *Alegria v. Payonk*, 101 Idaho 617, 620,619 P.2d 135,138 (1980) (quoting *Kirby v. Sanville*, 2860r. 339,594 P.2d818, 821 (1979) (emphasis added)). I would hold that the question must be answered in the affirmative.
>
> We have indeed stated that the resolution of whether an injury was a foreseeable result of a negligent act is generally a question of fact for the jury. *Alegria*, 101 Idaho at 619-20, 619 P.2d at 137-38; *Mica Mobile Sales and Leasing, Inc. v. Skyline Corp*., 97 Idaho 408, 412,546 P.2d 54,58 (1975). However, in order for foreseeability to be a jury question, one of three possible scenarios must exist. The first scenario is that there is conflicting evidence on material facts. The second possibility is that there are undisputed facts upon which reasonable and fair-minded persons might reach different inferences or conclusions. Or, the third and final scenario is that "different conclusions might reasonably be reached by different minds." *Alegria*, 101 Idaho at 619-20, 619 P.2d at 137-38. When considering each of those three scenarios, it is important to keep in mind that we require a power company to guard against probabilities, not possibilities. []
>
> In this case, the first scenario does not apply, because as the trial court found, the parties do not dispute the essential facts of this case. The question then becomes whether reasonable people could reasonably conclude that Russell's actions were foreseeable, or phrased differently, whether Russell's actions were such that a reasonable person could find that they were a probability against which a power company should guard. We have held that when a mobile home retailer illegally used methanol in a mobile home plumbing system, that illegal act was an

extraordinary event not foreseeable to the mobile home manufacturer. Thus, as a matter of law, the retailer's actions were not foreseeable, and we upheld the grant of summary judgment in favor of the manufacturer. Mico, 97 Idaho at 414, 546 P.2d at 60.

Although Russell was not charged with a crime, he illegally attempted to reconnect his own power, in violation of Idaho Code section 18-4621. Under Mico, that fact alone is sufficient to call into question the foreseeability of Russell's actions. Further, the fact that Russell acknowledged in his deposition that he knew that raising a metal pole around power lines presented a risk of shock calls into question whether a reasonable person could find it foreseeable that someone would take such a risk. Really, the record contains facts showing that Russell's wife was communicating with Idaho Power in an effort to have electrical service restored; thus, Idaho Power could have only reasonably believed that the Orthmans were taking legal steps to have power restored.

Given these facts, I would hold as a matter of law that while it was possible that Russell would attempt to reconnect his own power, it was not probable. Phrased differently, and to paraphrase *Alegria*, I would hold that Russell's injury and the manner of its occurrence were so highly unusual that this Court can say, as a matter of law, that a power company, making an inventory of the possibilities of harm which his conduct might produce, would not have reasonably expected Russell's injuries to occur.

Therefore, I respectfully dissent.

*Orthman v. Idaho Power Co*., 130 Idaho 597, 944 P.2d 1360 (1997).

## [C] UNEXPECTED PLAINTIFFS -- OF DUTY AND SCOPE OF LIABILITY

### ALEGRIA v. PAYONK

Supreme Court of Idaho
101 Idaho 617, 619 P.2d 135 (1980)

DONALDSON, C.J.: This case is before us on appeal from an order granting summary judgment against plaintiffs-appellants in favor of defendants-respondents liquor vendors.

On December 2, 1973, seventeen-year-old Lawrence Payonk consumed quantities of beer in taverns known as "John's Bam" and "The Office." Later in the evening, while driving in an allegedly intoxicated condition, Payonk collided with a car in which Marie Alegria was a passenger. Mrs. Alegria was killed in the accident and her husband, Albert Alegria, was injured. Albert Alegria and the children of decedent filed suit against Payonk and the owners and employees of the two taverns for the injuries sustained by Mr. Alegria and for the death of Marie Alegria. The material allegations of plaintiffs' complaint are, in substance, that defendants sold, served and dispensed alcoholic beverages to Payonk, notwithstanding that defendants knew or should have known that Payonk was under the legal drinking age of nineteen years and knew that he was actually, apparently and obviously intoxicated at the time so served; that the auto collision occurred as a result of the intoxication of Payonk, which intoxication resulted from consumption of the alcoholic beverages negligently served to him by defendants; and that the negligent acts of defendants were the actual and proximate cause of the death of decedent and the injuries and damages sustained by plaintiffs.

Pursuant to motion the district court ruled that the decision in *Meade v. Freeman*, 93 Idaho 389, 462 P.2d 54 (1969), compelled the conclusion that as a matter of law the vending of intoxicants cannot be a proximate cause of damage to a third person and accordingly granted summary judgment against plaintiffs.

[T]he narrow issue presented is whether in this state the sale of alcoholic beverages by a licensed vendor of such beverages to an actually, apparently and obviously intoxicated person known to be a minor can be a contributing actual and proximate cause of the damage resulting to a third person from the subsequent negligent operation of an automobile by such intoxicated minor, thereby giving rise to a cause of action against such vendor.

In *Meade v. Freeman*, this Court was first presented with the question whether the sale of intoxicants could, under any circumstances, visit upon the seller liability for injury tortiously caused by the consumer of such intoxicants. The question was answered by the Court in the negative:

> [Plaintiff's theory runs squarely in the face of almost all authority. Itis nearly universally held, [], that it is the consumption of intoxicants that constitutes the proximate cause of damage to third parties resulting from the tortious or unlawful acts of the consumer and that the vending of intoxicants is too remote to be considered a proximate cause.

In the intervening decade since Meade was decided, four of the cases upon which the majority relied have been overruled....

Appellants contend the time has come for this Court to reexamine the wisdom of a rule which in all cases precludes the fact finder from considering the sale of intoxicants as a possible proximate cause of subsequent injury occasioned to others by the drunken consumer. In their view, the rule is anachronistic in an age where death and destruction occasioned by drunken driving is so tragically frequent. They urge that in the case of an already intoxicated minor, the progression of sale-consumption-aggravated drunkenness-driving-injury flows so logically as to make continued application of the rule indefensibly at odds with the well-settled principle that, where reasonable minds could draw differing inferences, questions of negligence and proximate cause are normally to be resolved by the trier of fact. See, e.g., *Idaho State University v. Mitchell*, 97 Idaho 724, 552 P.2d776(1976); *Smith v. City of Preston*,97 Idaho 295, 543P.2d 848(1975); *Fairchild v. Olsen*, 96 Idaho 338, 528 P.2d 900 (1974). We agree.

The elements of common law negligence have been summarized as (1) a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage. *Brizendine v. Nampa Meridian Irrigation District*, 97 Idaho 580, 548 P.2d 80 (1976).

In general, it is held that "one owes the duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury." *Kirby v. Sonville*, 286 Or. 339, 594 P.2d 818,821 (1979). And in *Harper v. Hoffman*, 95 Idaho 933, 523 P.2d 536 (1974), this Court stated: "Every person has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him, and to do his work, render services or use his property as to avoid such injury." []quoting *Whitt v. Jarnagin*, 91 Idaho 181, 418 P.2d 278 (1966).

In determining whether such duty has been breached by the allegedly negligent party, his conduct is measured against that of an ordinarily prudent person acting under all the circumstances and conditions then existing. *Nagel v. Hammond*, 90 Idaho 96, 408 P.2d468 (1965). We perceive no justification for excusing the licensed vendor of intoxicants from the above general duty which each person owes all others in our society.

We come now to the question whether the jury in the present case should have been allowed to determine whether respondents, engaged in the daily business of selling intoxicants for consumption on their premises, could reasonably have foreseen or anticipated that their sale of intoxicants to Payonk, whom they knew or should have known to be a minor and whom they knew or should have known to be actually, apparently and obviously intoxicated, might result in injury to appellants; and whether the

conduct of respondents in so acting fell below that of a person of ordinary prudence acting under the same circumstances and conditions.

> In *Nagel v. Hammond*, it was held that where the evidence on material facts is conflicting, or where on undisputed facts reasonable and fair minded men may differ as to the inferences and conclusions to be drawn, or where different conclusions might reasonably be reached by different minds, the question of negligence ... and proximate cause is one of fact to be submitted to the jury and nota question of law for the court; if, upon all the facts and circumstances, there is a reasonable chance or likelihood of the conclusions of reasonable men differing, the question is one for the jury.

[] quoting *Stowers v. Union Pacific R.R*., 72 Idaho 87, 237 P.2d 1041 {1951). The Oregon Supreme Court, faced with an appeal from a judgment of involuntary nonsuit in *Kirby v. Sonville*, framed the central issue as

> "whether plaintiffs injury and the manner of its occurrence [were] so highly unusual that we can say as a matter of law that a reasonable man, making an inventory of the possibilities of harm which his conduct might produce, would not have reasonably expected the injury to occur." []

In the present case, it is alleged {1) that respondents liquor vendors sold further intoxicants to a minor at a time when he was already actually, apparently and obviously intoxicated, with actual or constructive knowledge of the minor consumer's age and condition; and {2) that such conduct on the part of respondents constituted an actionable breach of the general duty owed appellants, as members of society, to use reasonable care to avoid injury to others in a situation in which injury was foreseeable should respondents fail to use such care.

Subsequent to Meade, this Court in *Kinney v. Smith*, 95 Idaho 328, 408 P.2d 1234 (1973), held that a car owner who lends his vehicle to an unlicensed driver may be liable not only on a theory of imputed negligence, but also on the basis of the owner's independent negligence in entrusting the automobile to the unauthorized driver. In a footnote, we indicated that negligent entrustment of an automobile to one who is intoxicated would also be actionable. []

The "negligent entrustment" tort approved in Kinney is a recognition of the risk of injury which exists when two ingredients are combined; the automobile and an incompetent or incapacitated driver. In Kinney, we said that a party may be liable for providing an intoxicated individual with an automobile. The issue in this case is the converse, i.e., should a party ever be held liable for providing the driver of an automobile with intoxicants.

In ruling on the correctness of the summary judgment entered in this case, we must determine "whether [appellants' injury and the manner of its occurrence [were] so highly unusual that we can say, as a matter of law that a reasonable man, making an inventory of the possibilities of harm which his conduct might produce, would not have reasonably expected the injury to occur." *Kirby v. Sonville*, []. We are constrained to hold that, under the facts alleged at this stage of the proceedings, the question is not one of law but of fact and should be resolved not by the court but the jury. It appears to this Court that if appellants are able to prove by a preponderance of the evidence that respondents knew or reasonably should have known that the intoxicated minor Payonk would operate an automobile upon leaving their establishment, in addition to proving the allegations of the complaint, a reasonable jury could conceivably find liability.

In *Meade v. Freeman*, the Court considered whether it should, in the absence of statute, make a change in the common law regarding actionable negligence in the vending of intoxicants to consumers. The answer then was in the negative. [] However, as the court further said in *Meade v. Freeman*

> the strength of the common law lies in its capacity to adopt itself to ever changing circumstances. Although traditionally hesitant to change, it should not fail to do so where a hoary doctrine loses its raison d'etre, [].

We therefore declare that decision, to the extent it infers that under common-law rule and present statutes the vending of intoxicants can never be the proximate cause of damage to third parties resulting from the tortious or unlawful acts of the consumer, is overruled.[20]

Accordingly, the summary judgment in favor of defendants-respondents is reversed and the cause is remanded for further proceedings in accordance herewith. Those proceedings may include a renewal of the motion for summary judgment and any response thereto, both of which must be made in light of the proximate cause standard as set out in this opinion.

BAKES & BISTLINE, JJ., CONCUR.

SHEPARD, J., DISSENTING: ....

McFADDEN, J., DISSENTING: In *Meade v. Freeman*, 93 Idaho 389,462 P.2d 54 (1969), this court recognized the common law rule that an injury to a third person caused by an intoxicated person is not actionable against the vendor who sold liquor to the intoxicated person because the sale was only a remote, and not a proximate, cause of the injury. We stated in Meade that the common law rule arises from the normal assumption that a person should not be able to relieve himself from responsibility for his own acts by becoming intoxicated, and from the further assumption that it is not a tort to sell liquor to an able-bodied person, since the liquor vending business is legitimate, and the purchaser is deemed responsible. []

The logical premises on which the common law rule is based have not changed since the Meade decision. Intoxicated persons are still legally responsible for their acts, liquor vending is still a legitimate business, and the consumption of liquor is still closer to the injury in terms of causation than the sale or dispensing of the liquor....

NOTES

(1) The majority argues that the question of the causal connection between the defendant's conduct and plaintiff's injury is a "question of ...fact to be submitted to the jury and not a question of law for the court" except when "the plaintiff's injury and the manner of its occurrence [were] so highly unusual ... that a reasonable man, making on inventory of the possibilities of harm which his conduct might produce, would not have reasonably expected the injury to occur." To which of the elements of causation -- cause-in-fact or scope of liability - does this standard apply? And, a corollary: is the standard actually a "factual" question? Or, is the court using "factual" simply as the exclusive alternative to "legal"?

(2) What is the dissent's argument? Is McFadden's claim that the most immediate (i.e., "proximate") cause-in-fact is the sole responsible cause? Or, is his claim that a judicial decision creates a rule that a subsequent court cannot overturn? If it is the latter, could a subsequent court create exceptions and redefine its scope since rules can be stated more or less expansively?

(3) Is *Alegria* a Palsgraf case? What is the basic pattern of a Palsgraf case? What does it mean to say that Helen Palsgraf was "not foreseeable"? Does Cardozo actually make such a statement? Is it unforeseeable that a person will be standing on the platform at a train station? Were Albert and Marie Alegria "not foreseeable"?

(4) The three Palsgraf questions: Palsgraf raises three issues:

[20] It is of pivotal significance in this case that respondents are persons and entities engaged in the daily business of selling intoxicants by the drink, and to whom a jury might reasonably attribute a conscious awareness of the number of drinks sold to and consumed by the minor Payonk as well as the effect such consumption would have on one particularly susceptible to the incapacitating effects of alcohol due to physical and mental immaturity.

(a) Is duty relational? What is the nature of duty? Is the source of duty the relationship between plaintiff and defendant - or is it the defendant's act?

(i) Cardozo is widely interpreted as arguing that duty is relational: "The conduct of the defendant's guard, if wrong in its relation to the holder of the package, was not wrong in its relation to the plaintiff, standing far away. And: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."[ 4] And finally: "Negligence, like risk, is a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all." Although the language is not unambiguous, it is generally understood as concluding that the existence of a duty requires the defendant to have some relationship to the plaintiff or to the class of people of which the plaintiff is a member. See, e.g., Leon Green, The Palsgraf Case, 30 COLUM. L.REV. 789, 789-90 (1930).

Andrews, on the other hand, argued that duty arises from the act that creates the risk: "Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone." [See , 10] And: "Every one owes the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.

(ii) Is duty a relational concept in Idaho?

**(A)** Does "relationship" play a role in duty in Idaho? As we have seen, it is a significant factor in the affirmative duties such as *Keller v. Holiday Inns, Inc*., 105 Idaho 649, 671 P.2d 112 (Ct. App. 1983) (landowners have an obligation to make premises safe for invitees), *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 987 P.2d300 (1999) (sorority assumed a duty to take care of a pledge), *Clark v. Tarr*, 75 Idaho 251, 270 P.2d 1016 (1954) (public callings), *Rife v. Long*, 127 Idaho 841, 908 P.2d 143 (1995) (custodial relationships), *S.H. Kress& Co. v. Godman*, 95 Idaho 614, 515P.2d561 (1973) (special expertise on the risk), etc. Did Cassie Jo have a relationship with the school district? Are the relationships in these cases similar to those that Cardozo seems to require?

If Ms. Palsgraf had been standing next to the passenger and thus have been potentially injured from a direct (and nonexplosive) impact of the package, would she have been within "the orbit of duty"? That is, the various special relationship cases that we have seen involved ex ante relationships. Is this what Cardozo meant - or is mere physical proximity sufficient?

**(B)** Recall also the Idaho courts' recurrent citation of the list of duty factors: "In determining whether a duty will arise in a particular context, our Supreme Court has identified several factors to consider. Turpen, 133 Idaho at 247, 985 P.2d at 672. The factors include the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. *Id*.; *Rife v .Long*, 127 Idaho 841, 846, 908 P.2d 143, 148(1995)."Boots ex rei. *Boots v. Winter*. 145 Idaho 389, 179 P.3d 352 (Ct. App. 2008).

Is a relationship between defendant and plaintiff required by any of these factors? Although the first- "the foreseeability of harm to the plaintiff'- might be read as doing so (by placing the emphasis on "to the plaintiff'), the courts have instead emphasized the degree of foreseeability: 'Where the degree or result of harm is great, but preventing it is not difficult, a relatively low degree of foreseeability is required. *Turpen*,

133 Idaho at 248, 985 P.2d at 673; *Sharp [v. W.H. Moore Inc.,]* 118 Idaho [297,] 300--01, 796 P.2d [506,] 509-10 [(1990)].

Conversely, where the threatened injury is minor but the burden of preventing such injury is high, a higher degree of foreseeability may be required." Boots ex rei. *Boots v. Winter*. 145 Idaho 389, 179 P.3d 352 (Ct. App. 2008). Rather than relationality, foreseeability appears to be the central question in the multi-factor policy decision.

(iii) Finally, recall Restatement (Third)'s duty standard:

(a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.

(b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

RESTATEMENT {THIRD) OF TORTS §7 (2010). Unlike- as will be discussed below?

Restatement (First), the new duty standard does not include any consideration of a relationship between the defendant and the plaintiff.

**(b)** Should the foreseeability of the plaintiff a question under duty or scope of liability? The second issue raised by Palsgraf is whether duty or scope of liability is the appropriate liability-limiting mechanism. Cardozo argued "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." That is, duty is predicated upon the foreseeability of the plaintiff. Andrews, on the other hand, argued that the foreseeability of the plaintiff was a question exclusively for scope of liability- or, in the language of the day, "proximate cause": "But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former."

(i) Foreseeability and the duty vs. scope of liability "debate" in Idaho: Given that the court's opinion is stated in terms of whether defendant owed plaintiff a duty, does the court decide that duty is the limiting mechanism? How can this be squared with the statement that "[n]ormally, the foreseeability of a risk of harm, and ... is a question of fact reserved for the jury. [] Foreseeability is most commonly addressed when considering the question of proximate causation"?

Consider *Johnson v. McPhee*: Johnson was a licensed real estate agent Coeur d'Alene. McPhee was a real estate developer. They were social acquaintances and had worked together on at least one previous real estate project. Johnson's complaint alleged that McPhee told him of McPhee's plans to develop a subdivision and asked Johnson to find and to help acquire land for the project. Johnson and McPhee orally agreed that Johnson would be paid a commission. Johnson located and helped negotiate purchase of land for the subdivision. McPhee, however, rebuffed his repeated demands for payment.

Johnson also claimed that during the period when he was working on the subdivision development and later when he was engaged in conflict with McPhee over his claim for payment, he was subjected to verbal abuse by McPhee.

The verbal abuse was mostly sexual in nature and included repeated demands from McPhee to participate in sexual acts as well as a graphically descriptive threat that McPhee would have sex with Johnson's girlfriend....

Johnson alleges that McPhee's verbal abuse caused Johnson severe emotional distress. Johnson produced evidence that he suffered from post-traumatic stress

> disorder, was at times rendered nearly immobile due to his emotional state, once fainted while discussing McPhee's alleged abuse with a business acquaintance, and generally suffered "strange chaotic bodily experiences."

The district court granted McPhee's motion for summary judgment on all claims. On appeal, the court of appeals held that the trial court's stated reason for granting summary judgment was erroneous. The court then turned to the other grounds that McPhee had asserted because "we must consider whether the dismissal of this cause of action can be affirmed on any alternative ground that was urged by the defendants in their summary judgment motions." Because summary judgment is appropriate when a party fails to present evidence sufficient to establish the existence of an element essential to that party's case, the court examined McPhee's alternative grounds for summary judgment.

> The defendants assert that the facts alleged by Johnson are insufficient even to raise a genuine factual issue as to some of the elements of a cause of action for negligent infliction of emotional distress. They contend that Johnson's evidence [does not show an injury caused by McPhee.] The defendants assert that ...Johnson's emotional distress was not caused by McPhee's acts but was instead caused by other factors in Johnson's life, such as economic hardship and perceived ostracization from the local community due to his odd or improper behavior. Johnson acknowledges that he suffered from unrelated emotional instability and other stressors in his life, but contends that his level of emotional pain was severely exacerbated by McPhee's behavior.

We conclude that the disposition of the defendant's argument for summary judgment on the negligent infliction of emotional distress claim turns largely upon whether Johnson's evidence is sufficient to support a finding that a risk of serious harm to Johnson from McPhee's conduct was foreseeable to McPhee when the conduct occurred, for foreseeability is a component of both the duty element and the causation element of a negligence claim. The duty element recognizes that every person "has a 'duty to exercise ordinary care to prevent unreasonable, foreseeable risks of harm to others.'" Nation, [](quoting *Turpen v. Granieri*, 133 Idaho 244,247,985 P.2d 669,672 (1999)) (emphasis added). See also *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 399, 987 P.2d 300, 311 (1999); *Le'Gall v. Lewis County*, 129 Idaho 182, 185, 923 P.2d 427, 430 (1996); *Sharp v. WH. Moore, Inc*., 118 Idaho 297, 300, 796 P.2d 506, 509 (1990); Boots ex rei. *Boots v. Winters*, 145 Idaho 389,393, 179 P.3d 352, 356 (Ct. App. 2008).

Foreseeability is also a factor in the causation element of a negligence cause of action. An injured party may recover only for harm that was proximately caused by a breach of the duty of care. *Hayes v. Union Pac. R.R. Co.,* 143 Idaho 204, 208, 141 P.3d 1073, 1077 (2006). Proximate cause consists of two components, actual cause and legal cause, also referred to as cause in fact and scope of legal responsibility. *Cramer v. Slater*, 146 Idaho 868, 204 P.3d 508 (2009); Hayes, []; *Doe v. Sisters* of the Holy Cross, 126 Idaho 1036, 1039-41, 895 P.2d 1229, 1232-34 (Ct. App. 1995). The "legal responsibility" component focuses upon "whether it was reasonably foreseeable that such harm would flow from the negligent conduct." *Cramer, [];Hayes,[]; Sisters of the Holy Cross*, []. Proximate causation cannot be established if "the injury and manner of occurrence are 'so highly unusual that ... a reasonable [person], making an inventory of the possibilities of harm which his conduct might produce, would not have reasonably expected the injury to occur.'" *Cramer, [](quoting Sisters of the Holy Cross*,[]. See also *Alegria v. Payonk*, 101 Idaho 617,619-20,619 P.2d 135, 137-38 (1980).

This Court would readily hold that in ordinary circumstances of social interaction, it would not be foreseeable that insulting and demeaning remarks like those attributed to McPhee could inflict serious emotional harm. As observed by our Supreme Court in *Brown v. Fritz*, 108 Idaho 357, 699 P.2d 1371 (1985):

> The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough

> language and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt.

*Id*. [] (quoting RESTATEMENT (SECOND) OF TORTS§ 46 (1965)). Johnson's claim is not so readily disallowed, however, because he has presented evidence of unusual emotional fragility and susceptibility to harm from McPhee's insults due to Johnson's emotional instability or mental illness, and he asserts that McPhee was aware of this exceptional emotional vulnerability when he engaged in the abusive behavior.

Liability can arise from otherwise unactionable conduct if the conduct caused serious emotional harm to a peculiarly fragile individual and the defendant knew or should have known of the individual's susceptibility. As stated in the RESTATEMENT (SECOND) OF TORTS § 313 (1965), comment C, "[O]ne who unintentionally but negligently subjects another to such an emotional distress does not take the risk of any exceptional physical sensitiveness to emotion which the other may have unless the circumstances known to the actor should apprise him of it." (emphasis added). A treatise refers to this concept as a "pervading principle of tort law," saying:

> Generally defendant's standard of conduct is measured by the reactions to be expected of normal persons.... Activity may be geared to a workaday world rather than to the hypersensitive. It may be otherwise, however, if defendant has knowledge or notice of the presence of idiosyncrasy in any given case. This, of course, is the application of a pervading principle of tort law.

*Fowler v. HARPER ET AL*., 3 THE LAW OF TORTS § 18.4, at 691-92 (2d ed. 1986)...

Thus, the existence or non-existence of a duty of care and proximate causation in this case turns upon whether McPhee was aware of Johnson's abnormal vulnerability and the consequent risk of serious emotional injury from McPhee's insults.... After reviewing Johnson's evidence, the court concluded:

> It thus appears that, if all reasonable inferences are drawn in his favor, Johnson provided sufficient evidence from which a trier of fact could find that his burden of proof is satisfied on all of the elements of his negligent infliction of emotional distress claim....

*Johnson v. McPhee*, 147 Idaho 455, 210 P.3d 563 (Ct. App. 2009).

How does the court decide the question of duty vs. scope of liability? Note that the court states, "foreseeability is a component of both the duty element and the causation element of a negligence claim." Does the court subsequently choose between the alternatives?

> (ii) Andrews' position has been adopted by the Restatement (Third):
>
> n. Unforeseeable plaintiffs. No express limitation in this Section [§ 29] places harm to unforeseeable plaintiffs outside the scope of an actor's liability. The limitation on duty for negligence actions, § 6, and the definitions of strict liability torts, §§ 20-23, also contain no such express limitation. Ordinarily, the risk standard contained in this Section will, without requiring any separate reference to the foreseeability of the plaintiff, preclude liability for harm to such plaintiffs.

RESTATEMENT {THIRD) OF TORTS § 29, cmt. n. (2010).

**(iii) Duty or scope of liability- who cares?** What difference does it make if the court treats the liability-limitation as a duty issue rather than a scope of liability issue? Which member of the trial tribunal decides each element?

Note that *Alegria* is anomalous on this point: what is the effect of announcing a rule to decide a scope of liability issue? Is there any difference between the decision in Meade holding that conveying intoxicants was as a matter of law not a cause of injury to third parties and a decision holding that there is no duty to avoid injuring third parties? What is the difference between standards and rules? Recall our discussion of the role of the reasonable person standard.

(c) Is the court or the jury the proper decisionmaker on the foreseeability question? Recall that duty is a question of law. Recall also *Baltimore & Ohio R.R. v. Goodman* [FRG@ 60] and *Pokora v. Wabash Ry*. [FRG @ 62].

(i) In Palsgraf, Cardozo writes, "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension ...The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury. Here, by concession, there was nothing on the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station.

Is Cardozo's statement a reflection of the fact that the jury resolves the factual questions upon which duty depends? Recall that in *Farwell v. Keeton* the court noted that "the jury must determine, after weighing all the evidence, whether the defendant attempted to aid the victim. If he did, a duty arose which required defendant to act as a reasonable person. This task would be given to the jury through an instruction that stated "if you find ...,then ...."

(ii) In *Stoddart v. Pocatello School District*, 149 Idaho 679, 239 P.3d 784 (2010), the court wrote:

Normally, the foreseeability of a risk of harm, and thus whether a duty consequently attaches, is a question of fact reserved for the jury. [] Foreseeability is most commonly addressed when considering the question of proximate causation. []

"[W]hen the undisputed facts can lead to one reasonable conclusion, this court may rule upon the issue of foreseeability as a matter of law." [] We conclude that there is no genuine issue of material fact and that the danger to Cassie Jo was not foreseeable.

Is the court's statement correct that foreseeability is a question of fact for the jury when it is an element of duty issue? The court's statement raises tow questions:

(A) First, if duty is a legal issue for the court, the court must necessarily decide whether there is sufficient foreseeability of harm to impose a duty on the defendant. This may be a contingent conclusion similar to that made by the court in *Farwell v. Keaton*, but *Keaton* is the exception rather than the rule. When a court concludes that there is a duty, it necessarily is deciding that, because this type of conduct involves a sufficiently foreseeable degree of risk and social policy, one individual is required to act with due care in regard to the interests of another. Is this type of foreseeability qualitatively different than the question before the jury in the scope of liability element?

(B) Second, is foreseeability a question of fact? Is it a normative, law- applying judgment decision? Note that the question is often phrased as "reasonably foreseeable."

**(5) RESTATEMENT OF TORTS**: Shortly after Palsgraf was argued before the New York Court of Appeals, Cardozo participated in a meeting of the "advisers" to the reporter (Professor Francis Bohlen) of the American Law Institute's Restatement of Torts. The meeting involved an extended discussion of a draft on the elements of a cause of action for negligence. The draft contained language stating that a careless defendant was not liable to an unforeseeable plaintiff. In the ensuing discussion, Cardozo and Learned Hand (*United States v. Carroll Towing Co*. and The T.J. Hooper) forcefully debated the proposition and Cardozo finally stated, "The error I think I started with was assuming that when destroyed the box [which unbeknownst to the actor contained explosives] I invaded the interest in the ownership of the house [which was destroyed in the ensuing blast]. But I think that the general statement that it must be negligent with respect to the interest invaded covers the matter." ANDREW L. KAUFMAN, CARDOZO 291 (1998).

The Restatement adopted the position espoused by Hand and accepted by Cardozo:

§ 281 Statement of the Elements of a Cause of Action for Negligence

The actor is liable for an invasion of an interest of another, if

(a) the interest invaded in protected against unintentional invasion, and

(b) the conduct of the actor is negligent with respect to such interest or any other similar interest of the other which is protected again unintentional invasion, and

(c) the actor's conduct is a legal cause of the invasion .... RESTATEMENT OF TORTS § 281 (1934).

The same discussion also provided arguments that foreshadowed Andrews dissent in Palsgraf. See Robert E. Keeton, A Palsgraf Anecdote, 53 TEX. L. REV. 513, 515-16 (1977-78).

**(6) "Dram-shop" liability**: Vendors of intoxicants operate "dram-shops" as these establishments were known in England. The potential liability of such vendors has a long history. It is also a highly emotional topic. It is hardly surprising, therefore, that *Alegria* was not the last word on the issue.

(a) Idaho caselaw: The Idaho appellate courts have decided several additional cases applying *Alegria* in a variety of factual contexts. *See Idaho Department of Labor v. Sunsewt Marts, Inc*., 140 Idaho 207, 91 P.3d 1111 (2004) (recounting history of dram shop liability in Idaho); *Slade v. Smith's Management Corp*., 119 Idaho 482, 808 P.2d 401 (1991) (suppliers of intoxicant's at company party); *Fischer v. Cooper*, 116 Idaho 374, 775 P.2d 1216 (1989) (tavern operator without a valid liquor license); *Bergman v. Henry*, 115 Idaho 259, 766 P.2d 729 (1988) (vending intoxicants to an obviously intoxicated adult); *Estates of Braun v. Cactus Pete's, Inc*., 107 Idaho 484, 690 P.2d 939 (Ct. App. 1985) (vending intoxicants to an obviously intoxicated adult), rev'd on other grounds, 108 Idaho 798, 702 P.2d 836 (1985).

(b) The legislative response: Because the facts of *Alegria* involved the sale of intoxicants to someone who was both obviously intoxicated and under the legal drinking age, some construed it as merely creating a narrow exception (serving intoxicants to someone under the legal drinking age) to the prior rule of no liability established in Meade. The Court subsequently decided that *Alegria* also applied to serving intoxicants to an obviously intoxicated adult. *Bergman v. Henry*, 115 Idaho 259, 766 P.2d 729 (1988). See also *Fischer v. Cooper*, 116 Idaho 374, 775 P.2d 1216 (1989). Development of the common law was largely foreclosed when the Idaho Legislature adopted a dram shop act in 1986. The Act begins with a statement on "causation":

> The legislature finds that it is not the furnishing of alcoholic beverages that is the proximate cause of injuries inflicted by intoxicated persons and it is the intent of the legislature, therefore, to limit dram shop and social host liability [with exceptions set out in section (3)].

The Act precludes liability for "injury, death or other damage caused by an intoxicated person against any person who sold or otherwise furnished alcoholic beverages to the intoxicated person" with two exceptions:

(a) The intoxicated person was younger than the legal age for the consumption of alcoholic beverages at the time the alcoholic beverages were sold or furnished and the person who sold or furnished the alcoholic beverages knew or ought reasonably to have known at the time the alcoholic beverages were sold or furnished that the intoxicated person was younger than the legal age for consumption of the alcoholic beverages; or

(b) The intoxicated person was obviously intoxicated at the time the alcoholic beverages were sold or furnished, and the person who sold or furnished the alcoholic beverages knew or ought reasonably to have known that the intoxicated person was obviously intoxicated.

Did the legislature expand or merely codify the liability created by *Alegria* its progeny?

The Dram Shop Act was held to be constitutional in *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 987 P.2d 300 (1999).

# Chapter VIII

# DAMAGES

### CROWN v. STATE, DEPARTMENT OF AGRICULTURE

Court of Appeals of Idaho
131 Idaho 297, 955 P.2d 612 (1998)

PERRY, JUDGE- In this case, we review whether the district court erred in involuntarily dismissing an action brought by Wayne Crown, Clark Bean and Steve Bean (the growers) against the Department of Agriculture [DOA].... For the reasons set forth below, we affirm.

### I. BACKGROUND

The background of this case is as follows:

From 1983 to 1988 the growers delivered their bean crops to the Hawkins Warehouse, a licensed and bonded commodities warehouse in Filer, Idaho. The DOA conducted regular inspections of the physical contents and financial records of the warehouse pursuant to I.C. §§ 69-201 to 267 in order to ensure that the warehouse had sufficient inventory for its depositors.

Jerry Hawkins (Hawkins), the warehouse manager, called the DOA in April of 1988 and requested that the DOA come and conduct its inspection. Because he knew that he had a substantial shortfall of bean inventory, Hawkins moved one to two hundred boxes of dirt and bean culls into the warehouse and then surrounded them with boxes of beans. Hawkins also doctored the warehouse books so that it appeared that 40,000 cwt. of beans were "written off." He also had checks drawn up to show a fictional planned purchase of 30,000 cwt. of additional beans.

David Sparrow (Sparrow) came to the warehouse on behalf of the DOA and conducted the inspection from May 3, 1988, to May 9, 1988. Sparrow never discovered the boxes filled with dirt and culls and accepted Hawkins' explanation that the40,000 cwt. of beans that had been "written oft" were transferred to treated seed. Although Sparrow's inventory still found the warehouse to be 6,475 cwt. short, Sparrow accepted Hawkins' representation that additional beans were to be purchased when Hawkins showed Sparrow several uncashed checks made payable to growers.

Sparrow completed his inspection but never followed up to see if Hawkins purchased the beans as promised. In late August 1988, the growers began to deliver their 1988 bean crop to the warehouse. On November 21, 1988, after an internal audit revealed the warehouse's serious inventory shortfall, the warehouse management ceased operation and contacted the DOA which then seized the warehouse.

The growers' case was originally brought on January 5, 1989, as a class action against a number of parties, including the DOA. However, the DOA was dismissed as a party because the growers had failed to comply with the Idaho Tart Claims Act's requirement that they first present their claim to the governmental defendant.

On January 6, 1989, the Hawkins Warehouse filed a Chapter 11 petition in bankruptcy. The growers then initiated an adversarial proceeding as part of that litigation in which the DOA was named as a defendant.

> After the DOA was dismissed from the above-described class action and the growers' claim under the Tart Claims Act was denied, the present case was filed on November 2, 1990. The growers alleged that the DOA had negligently conducted inspections of the Hawkins Warehouse that failed to disclose shortfalls in inventory from the 1983-88growing seasons. In addition, the growers alleged that the DOA negligently failed to inform them of the insufficient inventory and failed to close the warehouse upon learning of the shortfall in 1988, thus allowing the growers to deliver their 1988 crop to a warehouse that the DOA knew was in non-compliance. The growers alleged damages for loss of half of their 1988 crop and for beans deposited prior to 1988.

*Crown v. State, Dep't of Agriculture*, 127 Idaho 175, 177-78, 898 P.2d 1086, 1088-89 (1995) (footnotes omitted). Subsequently, the DOA moved for summary judgment and dismissal which the district court granted. The growers appealed, and the Supreme Court reversed the district court's order granting summary judgment and dismissal in favor of the DOA, but only on the issue as it related to "the loss of bean inventory before July 1, 1988, due to negligent inspections." *Id*. at 182, 898 P.2d at 1093. The Supreme Court affirmed the district court's order on all other issues. *Id*.

On remand, [the district court granted defendant's motion for dismissal at the close of plaintiffs case.]

## II. DISCUSSION

### A. Sufficiency of Evidence

The growers allege that the district court's findings of fact are not supported by substantial, competent evidence. Specifically, the growers assert that the "conduct of Mr. Sparrow in testimony under oath concerning his physical count of the warehouse, his review of the book record and the impossible reconciliation of those sets of figures, establish an orderly and absolutely false and negligent examination." The growers also assert that the "inspection performed by David Sparrow was not that of an ordinarily prudent person acting under all of the circumstances and conditions then existing."

The DOA argues that the growers failed to present evidence to support the growers' negligence claim. Specifically, the DOA contends that ... [because the] inventory loss pre-dated the DOA's examination [, even] assuming Sparrow negligently conducted his examination, ...the growers failed to prove that the plaintiffs suffered any harm.

In dismissing the growers' case, the district court found:

> …
>
> **4. As to Harm**
>
> 37. No evidence was adduced, nor can any reasonable inference be drawn from the evidence which was presented, which established that any member of the Plaintiffs' class sustained any harm or loss before July 1, 1988.

Subsequently, the district court concluded:

> 13. The court concludes that the Plaintiffs failed to prove, either directly or by reasonable inference, and no evidence does prove, that any member of the Plaintiffs' class sustained any harm or loss before July 1,1988.
>
> …

Next, we review the main thrust of the growers' appeal - whether the district court's findings of fact are supported by substantial, competent evidence. At trial, the growers failed to call any class members to testify. The growers did call Sparrow, the DOA inspector. Counsel for the growers extensively examined Sparrow and attempted to demonstrate that Sparrow's inspection had been negligently conducted. Besides Sparrow's testimony, the growers' only other witnesses who testified at trial were Walter DeForest and Rick Davis, Hawkins warehouse employees. DeForest and Davis both testified that they had moved boxes of culls and dirt into the Hawkins warehouse prior to Sparrow's examination in

May of 1988. It was undisputed, however, that Hawkins, the warehouse manager, doctored the books and had boxes of culls and dirt moved into the warehouse to conceal the shortage of beans. Although DeForest testified that he had accompanied Sparrow through the warehouse during Sparrow's examination, DeForest's testimony did not evidence that Sparrow negligently conducted his examination.

As set out earlier in this opinion, the district court made numerous findings of fact regarding the growers' negligence claim in dismissing their case. In the growers' appeal, however, they have not challenged any specific finding of fact as being clearly erroneous; rather, the growers' argument is based on bare assertions and conclusory allegations, many of which are based on evidence not admitted at trial- Sparrow's work papers and the individual grower cards. Thus, after thoroughly reviewing the growers' contentions, we conclude that the district court's findings of fact are not clearly erroneous. Accordingly, the district court's order involuntarily dismissing the growers' case is affirmed. LANSING, CHIEF JUDGE, SPECIALLY CONCURRING- While I join in the foregoing opinion, I write separately to address what I consider to be a specific fatal deficiency in the growers' trial evidence.

In *Crown v. State Department of Agriculture*, 127 Idaho 175,898 P.2d 1086 (1995), the Idaho Supreme Court affirmed the district court's summary judgment against the growers with respect to all claims except those relating to "the loss of bean inventory before July 1, 1988, due to negligent inspections." *Id*. at 182, 898 P.2d at 1093. The Court held that as to any losses occurring after that date, the trial court had properly granted summary judgment based on I.C. §§ 6-9048, and 6-904C. Therefore, the Court reversed the summary judgment "only as it relates to loss of bean inventory before July 1, 1988." *Id*. at 180, 898 P.2d at 1091. Thus, upon remand following that Idaho Supreme Court decision, it should have been abundantly clear to plaintiffs' counsel that in any ensuing trial it would be incumbent upon the plaintiffs to prove they suffered some loss between May9, 1988, the date that the allegedly negligent inspection was completed, and July 1,1988. However, the record here is devoid of evidence of any losses occurring during that short time frame, either through additional deposits of commodities by the growers or additional thefts committed by Hawkins. Therefore, regardless of the correctness of other bases stated by the district court for its decision, the Jack of this element of proof was fatal to the plaintiffs' claims.

NOTES

(1) Negligence requires some actual, compensable injuries. In the absence of such an injury, plaintiff has failed to prove her prima facie case.

## [A] COMPENSATORY DAMAGES

One provision of the 1987 legislature's "tort reform" package was a limitation on "noneconomic" damages:

**§ 6-1601: DEFINITIONS** - As used in this act:

…

(3) "Economic damages" mean objectively verifiable monetary loss, including but not limited to out-of-pocket expenses, loss of earnings, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, medical expenses, or loss of business or employment opportunities.

(4) "Future damages" mean noneconomic damages and economic damages to be incurred after entry of a judgment.

(5) "Noneconomic damages" mean subjective, nonmonetary losses including, but not limited to, pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party; emotional distress; Joss of society and companionship; loss of consortium; or destruction or impairment of the parent-child relationship.

…

(7) "Personal injury" means a physical injury, sickness or death suffered by an individual.

(8) "Property damage" means loss in value or in use of real or personal property, where such loss arises from physical damage to or destruction of such property.

**§ 6-1603: LIMITATION ON NONECONOMIC DAMAGES-**

(1) In no action seeking damages for personal injury, including death, shall a judgment for noneconomic damages be entered for a claimant exceeding the maximum amount of four hundred thousand dollars ($400,000); provided, however, that beginning on July 1, 1988, and each July 1 thereafter, the cap on noneconomic damages established in this section shall increase or decrease in accordance with the percentage amount of increase or decrease by which the Idaho industrial commission adjusts the average annual wage as computed pursuant to section 72-409(2), Idaho Code.

(2) The limitation contained in this section applies to the sum of:

(a) noneconomic damages sustained by a claimant who incurred personal injury or who is asserting a wrongful death;

(b) noneconomic damages sustained by a claimant, regardless of the number of persons responsible for the damages or the number of actions filed.

(3) If a case is tried to a jury, the jury shall not be informed of the limitation contained in subsection (1) of this section.

(4) The limitation of awards of noneconomic damages shall not apply to:

(a) Cause of action arising out of willful or reckless misconduct.

(b) Causes of action arising out of an act or acts which the trier of fact finds beyond a reasonable doubt would constitute a felony under state or federal law.

The 1990 legislature added an additional restriction:

**§6-1606**: **PROHIBITING DOUBLE RECOVERIES FROM COLLATERAL SOURCES**- In any action for personal injury of property damage, a judgment may be entered for the claimant only for damages which exceed amounts received by the claimant from collateral sources as compensation for the personal injury or property damage, whether from private, group or governmental sources, and whether contributory or noncontributory. For the purposes of this section, collateral sources shall not include benefits paid under federal program which by law must seek subrogation, death benefits paid under life insurance contracts, benefits paid by a service corporation organized under chapter 34, title 41, Idaho Code [Hospital and Profession Service Corporations, e.g., Blue Shield, etc.], and benefits paid which are recoverable under subrogation rights created under Idaho law or by contract. Evidence of payment by collateral sources is admissible to the court after the finder of fact has rendered an award. Such award shall be reduced by the court to the extent the award includes compensation for damages which have been compensated individually from collateral sources.

## [B] PUNITIVE DAMAGES

The 1987 and 2003 legislatures also changed the common law on punitive damages:

**§6-1601: DEFINITIONS** - As used in this act:

…

(9) "Punitive damages" mean damages awarded to a claimant, over and above what will compensate the claimant for actual personal injury and property damage, to serve the public policies of punishing a defendant for outrageous conduct and of deterring future like conduct.

**§6-1604: LIMITATION ON PUNITIVE DAMAGES-**

(1) In any action seeking recovery of punitive damages, the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.

(2) In all civil actions in which punitive damages are permitted, no claim for damages shall be filed containing a prayer for relief seeking punitive damages. However, a party may, pursuant to a pretrial motion and after hearing before the court, amend the pleadings to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the pleadings if after weighing the evidence presented, the court concludes that, the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. A prayer for relief added pursuant to this section shall not be barred by lapse of time under any applicable limitation on the time in which an action may be brought or claim asserted, if the time prescribed or limited had not expired when the original pleading was filed.

(3) No judgment for punitive damages shall exceed the greater of two hundred fifty thousand dollars ($250,000) or an amount which is three (3) times the compensatory damages contained in such judgment. If a case is tried to a jury, the jury shall not be informed of this limitation. The limitations on noneconomic damages contained in section 6-1603, Idaho Code, are not applicable to punitive damages.

(4) Nothing in this section is intended to change the rules of evidence used by a trier of fact in finding punitive damages.

The 2003 amendment changed the required level of proof from "by a preponderance of the evidence" to "by clear and convincing evidence" and imposed a cap on punitive damage awards.

# Chapter IX

# PRIVILEGES

## INTRODUCTION

At the common law, an elaborate classification of reasons for no-liability was developed. These were divided into several categories, of which the following were relevant to torts:

**(1)** **justification** is the power to act offensively, i.e., the defendant was justified in doing what she did because she was acting within a legally protected interest. Thus, a person is justified in publishing true statements about a public figure. If the public figure brings a defamation action, the defendant may avoid liability by proving the statement to have been true.

**(2)** **excuse** is a power only to act defensively, i.e., the defendant's conduct is excused because she did what she did in response to some external event which threatened a protected interest. Thus, a person is excused from liability if the conduct was reasonably necessary for self-defense.

**(3)** **immunity** differs from the other two defenses because it does not negate one of the elements of the underlying tort, but rather avoids liability under all circumstances because of the status of the defendant, i.e., because of who or what the defendant is, it cannot be liable. Thus, the servant employed by a charity may be negligent without the charity being liable for any resulting injuries: the conduct remains tortious- there simply is no liability.

As a general matter, the distinctions between justification and excuse are no longer relevant; both terms have been subsumed under the more modem term:

privilege avoids liability only under particular circumstances because the circumstances make the conduct non-tortious. That is, proof of the privilege negates one of the elements of the tort.

## [A] COMPARATIVE FAULT

**I.C. § 6-801: Comparative negligence or comparative responsibility - Effect of contributory negligence-** Contributory negligence or comparative responsibility shall not bar recovery in an action by any person or his legal representative to recover damages for negligence, gross negligence or comparative responsibility resulting in death or in injury to person or property, if such negligence or comparative responsibility was not as great as the negligence, gross negligence or comparative responsibility of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence or comparative responsibility attributable to the person recovering. Nothing contained herein shall create any new legal theory, cause of action, or legal defense.

**I.C. § 6-802: Verdict giving percentage of negligence or comparative responsibility attributable to each party-** The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence or comparative responsibility attributable to each party; and the court shall then reduce the amount of damages in proportion to the amount of negligence or comparative responsibility attributable to the person recovering. Nothing contained herein shall create any new legal theory, cause of action, or legal defense.

**I.C. § 6-803: Contribution among joint tortfeasors - Declaration of right -- Exception - Limited Joint and Several Liability -**

(1) The right of contribution exists among joint tortfeasors, but a joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.

(2) A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.

(3) The common law doctrine of joint and several liability is hereby limited to causes of action listed in subsection (5) of this section. In any action in which the trier of fact attributes the percentage of negligence or comparative responsibility to persons listed on a special verdict, the court shall enter a separate judgment against each party whose negligence or comparative responsibility exceeds the negligence or comparative responsibility attributed to the person recovering. The negligence or comparative responsibility of each such party is to be compared individually to the negligence or comparative responsibility of the person recovering. Judgment against each such party shall be entered in an amount equal to each party's proportionate share of the total damages awarded.

(4) As used herein, "joint tortfeasor" means one (1) of two (2) or more persons jointly or severally liable intort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.

(5) A party shall be jointly and severally liable for the fault of another person or entity or for payment of the proportionate share of another party when they were acting in concert or when a person was acting as an agent or servant of another party. As used in this section, "acting in concert" means pursuing a common plan or design which results in the commission of an intentional or reckless tortious act.

**I.C. § 6-804: Common law liabilities preserved - Nothing in this act affects**:

(1) The common law liability of the several joint tortfeasors to have judgment recovered and payment made from them individually to the injured person for the whole injury shall be limited to causes of action listed in section 6-803, Idaho Code. However, the recovery of a judgment by the injured person against one (1) joint tortfeasor does not discharge the other joint tortfeasors.

(2) Any right of indemnity under existing law.

**I.C. § 6-805: Effect of release of one tortfeasor on liability of others** - A release by the injured person of one (1) joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides, but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if such amount or proportion is greater than the consideration paid.

**I.C. § 6-806: Effect of release of one tortfeasor on his liability for contribution to others** - Limits on application of section -A release by the injured person of one (1)joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all the other tortfeasors. This section shall apply only if the issue of proportionate fault is litigated between joint tortfeasors in the same action.

## 1. HOW IT WORKS

NOTES

**(1) Comparative fault systems**: Although comparative fault statutes vary, they share basic features. Most fundamentally, all comparative fault schemes require the factfinder to assign a percentage of fault to the parties. Based on this determination, the different approaches all specify under what situations a plaintiff may recover and specify a method for determining how much money plaintiff will be entitled to recover. There are three types of statutes based on their specification of when a plaintiff can recover:

(a) **pure comparative fault** statutes allow the plaintiff to recover when another party has any fault.

(b) **no-greater-than comparative fault** statutes allow the plaintiff to recover when the plaintiffs fault is no greater than defendant's fault.

(c) **not-as-great-as comparative fault** statutes allow the plaintiff to recover when plaintiffs fault is not as great as defendant's fault.

**(2) Contribution**: When there is more than one defendant who is liable to plaintiff, a second question arises: how is the liability to be allocated among the potentially liable defendants? This is a question not of comparative fault but of contribution. "Contribution" is the right of one tortfeasor who has paid all or a disproportionate share of a judgment to recover part of that payment from another tortfeasor. Contribution was not available at the common law. As a creature of statute, contribution comes in a variety of forms.

There is no necessary connection between contribution and comparative fault. Simply because a jurisdiction adopts comparative fault does not require it also to rework any existing statutory system of contribution. Generally, however, comparative fault systems do modify contribution requirements by providing for contribution on the basis of the comparative fault of the defendants.

How does the Idaho resolve contribution?

**(3) The "individual rule**": In *Odenwalt v. Zaring*, 102 Idaho 1, 624 P.2d 383 (1981), the Idaho Supreme Court held that the Idaho comparative fault statute had adopted the "individual rule," i.e., fault was to be compared individually in determining liability. Thus, a plaintiff who was 25% at fault could not recover from a defendant 10% at fault; recovery could only be from the remaining defendant who was 65% at fault. The court thus rejected the "unit" rule, which permits the plaintiff to recover from any negligent defendant so long as the plaintiff's negligence is less than the combined negligence of all defendants. In 1981, the language of § 6-803 did not specifically resolve the issue; it now appears to do so.

One effect of adopting the individual rule is demonstrated by the decision in *Tucker v. Union Oil Co*. The jury determined the comparative fault as: Collier Carbon (defendant), 60%; Feed Services (plaintiffs employer), 30%; and Tucker (plaintiff), 10%. The trial court reduced the damage award by 10% and entered judgment for the remainder against Collier since the employer is immune from tort liability under the state's workers' compensation law. Collier thus was required to pay 90% of plaintiff's loss.

On appeal, Collier argued that it should be responsible for only 60% of the total award since that was the amount of its relative fault:

> Collier Carbon contends that the enactment of our comparative negligence statutes, I.C. §6-801 to -806, together with general principles of equity and fairness require that its liability for damages should be based on its proportionate share of fault. We disagree.

I.C. § 6-801 provides:

> To be particularly noted is the language that the damages allowed should be "diminished in the proportion to the amount of negligence attributable to the person recovering." The trial court reduced the total award for damages by the 10% of the negligence which was attributable to James Tucker. The result sought here by Collier Carbon would effectively attribute the negligence of Feed Services to the Tuckers. That result is not required by I.C. § 6-801. The express language of portions of our comparative negligence act make clear that our legislature intended to retain the general common law rule of joint and several liability....
>
> We deem it clear that the contention of Collier Carbon that a negligent tortfeasor's liability is to be limited solely to his proportionate fault would undermine the fundamental rationale of the joint and several liability doctrine. At this time at least, the adoption of our comparative negligence act in Idaho does not require and we do not deem it appropriate to find a legislative intent to so abolish joint and several liability.

*Tucker v. Union Oil Co*., 100 Idaho 590, 603 P.2d 156 (1979).

(4) The "individual rule" and vicarious liability: When DiAnn Adams went to Dr. Krueger's office, she was initially examined by Krueger's nurse-practitioner, Leila Parker, and diagnosed as having genital herpes. Krueger prescribed an ointment to help relieve the symptoms. Adams subsequently consulted another doctor and was advised that she did not have herpes but rather a severe yeast infection. Ms. Adams and her husband filed a malpractice action against Krueger and Parker. The jury found Parker 41% negligent, Krueger 10%negligent, and DiAnn Adams 49% negligent.

The district court determined Krueger to be 51% negligent, reasoning that Krueger was responsible for the negligence of his employee, Parker. The district court also imputed DiAnn Adams's negligence in considering Patrick Adams's award. The court accordingly entered a judgment against Krueger, awarding DiAnn and Patrick Adams 51% of their sustained damages.

On appeal, the Idaho Supreme Court affirmed the verdict:

> In Idaho, the legislature has adopted the so-called "individual rule" of comparative negligence. That is, in those cases where the negligence of co-defendants is merely concurrent, each defendant’s negligence is compared separately. I.C. § 6-801; *Ross v. Coleman Co*., 114 Idaho 817, 761 P.2d 1169(1988). Thus, Krueger argues that he is not individually liable because the jury found him to be only 10% negligent. He further contends that he cannot be held responsible for his employee's actions because she was found to be 41% negligent where in contrast DiAnn Adams was found to be 49% negligent. In other words, Krueger contends that because the employee is not individually liable the employer cannot be vicariously liable.
>
> [W]e adopt the well-reasoned opinion written by Chief Judge Walters:
>
> ... Krueger and Parker stand in relation as master and servant, whereby the negligent acts of the servant, or employee, are imputed to the master, or employer, under the doctrine of respondeat superior. [ 1 The historical and economic genesis of the doctrine of respondeat superior, or vicarious liability, lies in the fact that the tort is brought about in the course of an undertaking for the benefit of the master, and that the master possesses the right to control the servant's course of conduct as well as the result to be accomplished through such conduct. Because the "employment" is a factor causing the tort, the law regards the business as a unit and deals with the act of any member of it as the act and responsibility of its principal the employer.
>
> The enactment of our comparative negligence law has not changed the basic principle of vicarious liability....

*Adams v. Krueger*, 124 Idaho 74,856 P.2d 864 (1993).

(5) The fault of non-parties: What should be the effect of the contribution of non-parties to the injury-causing event?

(a) *Pocatello Industrial Park Co. v. Steel West, Inc*.: An issue presented but not decided in Tucker was whether the comparative fault of only the parties before the court should be considered or whether the fact finder should determine the comparative fault of all actors. In *Pocatello Industrial Park Co. v. Steel West, Inc.*, 101 Idaho 783,787,621 P.2d 399,403 (1980), the Idaho Supreme Court formally adopted the rule implicit in the *Union Oil* decision:

> when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tortfeasors either by operation of law or because of prior release.

(b) *Beitzel v. City of Coeur d'Alene*: Robert Beitzel was injured when he drove his motorcycle into an unmarked and unbarricaded trench in a public street. He sued the city, the telephone company (GTNW), and the telephone company's excavation and paving contractors. At trial, the evidence established that an unknown person had removed the barricades sometime between Friday afternoon and Monday morning.

> The city and GTNW assert that the trial court should have included on the special verdict form a place for the jury to apportion to unnamed parties' negligence for having removed a lighted barricade from the site of the excavation prior to Beitzel's accident. Because the jury did not apportion any negligence to Beitzel, itis not necessary for us to address this question.
>
> The Court has ruled that in appropriate cases where comparative negligence is at issue the name of a non-party should be placed on the verdict form. *Hickman v. Fraternal Order of Eagles*, 114 Idaho 545, 547 758 P.2d 704, 706 (1988); *Vannoy v. Uniroyal Tire Co*., 111 Idaho 536, 542, 726 P.2d 648, 654 (1985); *Lasselle v. Special Prod. Co*., 106 Idaho 170, 172,677 P.2d483,485 (1983); *Pocatello Industrial Park Co. v. Steel West, Inc*., 101 Idaho783, 786-87, 621 P.2d399,402-03 (1980). As stated most recently by the Court in Hickman, I.C. § 6-801 and 6-802 "envision apportionment where there is 'negligence attributable to the person recovering.'" [] In Hickman, the Court upheld the trial court's decision not to include an allegedly negligent non-party on the verdict form where the plaintiffs were not negligent. The rationale of the Court for upholding the trial court's decision was that any negligence of the non-party could not serve to lessen the award to the plaintiffs.
>
> Under the "individual rule" adopted by the Idaho legislature when it enacted comparative negligence, the negligence of the plaintiff must be compared against each individual defendant in determining whether the plaintiff may recover. I.C. §6-801 to -803; see also *Ross v. Coleman Co*., 114 Idaho 817, 830, 761 P.2d 1169, 1182 (1988); *Oldenwalt v. Zaring*, 102 Idaho 1, 5, 624 P.2d 383, 387 (1980). In this case, the jury found that Beitzel was not negligent, but that there was negligence on the part of each of the four named defendants which was a proximate cause of any damages suffered by Beitzel. Therefore, even if an unnamed party who allegedly removed the lighted barricade from the site of the excavation had been included on the verdict form, all of the named defendants would have been liable to Beitzel. Also, if some negligence had been apportioned to an unnamed party, the four named defendants would not have been able to obtain contribution against the unnamed party pursuant to I.C. § 6-803, since the identity of the party was unknown. The verdict would not have been binding on the unnamed party, in any event. *Beitzel v. City of Coeur d'Alene*, 121 Idaho 709, 827 P.2d 1160 (1992).

(7) Comparative fault and other varieties "fault" decisions:

(a) Children: Should the age of the plaintiff or defendant enter into comparative fault allocations:

> Once the jury finds there is negligence on the part of the driver and the passenger, it must weigh the negligence of each party to determine what part of percentage each party's negligence played in causing the accident. This weighing process is done on the same scale, without regard to whether one was an adult and one was a child.

*Krieger v. Howell*, 109 Idaho 704, 710 P.2d 614 (Ct. App. 1985).

(b) Negligence per se: Should the fact that a party's conduct is negligence per se affect the allocation of responsibility?

> Porter's violation of I.C. § 49-640 (1) by failing to yield [was] negligence per se. [] This does not, however, compel a conclusion that Porter's negligence exceeded that of Vaughn. The function of negligence per se is not to assign to a defendant a degree of fault; the effect of demonstrating negligence per se is to conclusively prove the first two elements of a negligence cause of action, namely, the existence of a duty and a breach thereof. [] Once proved, negligence per se does not differ in its legal consequences from ordinary negligence.

*Vaughn v. Porter*, 140 Idaho 470, 95 P.3d 88 (Ct. App. 2004).

**(7) The jury's role**: Should the jury be informed of the effect of their assessment of comparative fault? In Seppi, the Idaho Supreme Court considered this question. It noted that several jurisdictions had concluded that to so instruct the jury was reversible error because it undercut the theoretical basis of the special verdict which is intended to prevent bias. The court doubted the value of such verdicts in preventing bias: "jurors are concerned about the effect of their verdicts on the ultimate outcome of the case and the use of a special verdict or special interrogatories does not magically eliminate that well known trait of American juries." Additionally, the court felt that this tendency was at least arguably a virtue rather than a vice. Regardless of whether a vice or virtue, jurors speculate and "in those instances where the legal effect of their answers is not so obvious, the jurors will speculate often incorrectly and thus subvert the whole judicial process." The court continued:

> It is this latter problem, juries speculating on the effect of their answers, that creates a unique danger when the issues in a comparative negligence case in Idaho are submitted to a jury in a special verdict form. A jury uninformed about the precise working of the Idaho comparative negligence law, when presented with questions asking them to apportion the negligence between the parties and to fix the total amount of damages, is likely to assume that the plaintiff's recovery will be reduced in proportion to his negligence. In such situation the Idaho comparative negligence rule, which bars recovery if the plaintiff's negligence is50% or more, poses a trap for the uninformed jury. The jury may become frustrated with the formidable task of determining as a matter of fact what percentage of the total negligence in the case is attributable to the various acts of the various parties and treat the question as one which requires them to determine how much of the plaintiff's damages the defendant should be responsible for. In the case where it is clear that both parties were negligent to some extent, a 50-50 allocation of negligence is singularly attractive to a jury, particularly in a highly contested case or one in which the jurors themselves are sharply divided. Consequently, a jury, not knowing the critical importance Idaho law places on a finding of 50% negligence, may reach such a verdict too quickly and without carefully examining the facts. The rule against informing the jury of the effect of a 50-50 allocation of negligence of course places the defense counsel in a position to exploit the sense of equity implied in such a finding without the plaintiff's counsel being able to argue the critical legal import of such a determination. Thus, the uninformed jury could easily deceive itself into believing that it has decided that the defendant should pay for half of the plaintiff's damages when in fact it has determined that the plaintiff will recover nothing at all.
>
> Contrast that situation to one in which the jury is composed of members at least some of whom have learned from prior jury experience or other sources how the comparative negligence law in Idaho actually operates. A reminder in the deliberations by one of the jurors that a finding of 50% negligence will result in no recovery by the plaintiff is likely to cause the jurors to examine the facts more closely before quickly coming to the appealing 50-50 allocation of negligence. Thus, it is not unlikely that in a number of cases whether the plaintiff recovers may depend as

> much upon how "courtwise" the members of the jury are as upon how the jurors view the facts. In short, not informing the jury of the effect of a 50% negligence finding in many cases is likely to cause an unjust result and produce a judgment which does not reflect the wisdom of the jury or their view of the facts, but only their ignorance of Idaho law.

*Seppi v. Betty*, 99 Idaho 186, 579 P.2d683 (1978). The court applied the reasoning from Seppi to the question of joint and several liability in *Luna v. Shockey Sheet Metal & Welding Co*., 113 Idaho 193, 743 P.2d 61 (1987).

**(8) Negligence and intent**: Is plaintiffs claim to be reduced under the comparative fault scheme if defendant's conduct is intentional rather than negligent? The court held that, since the statute does not limit its applicability of negligence and it definition of tortfeasor is very broad, the statute applies to intentional conduct. *Rausch v. Pocatello Lumber Co.*, 135 Idaho 80, 14 P.3d 1074 (Ct. App. 2000). Should conduct that is subject to strict liability, i.e., no fault, also lead to the reduction of the plaintiffs claim?

## 2. WHAT IT MEANS: THE EFFECTS OF COMPARATIVE FAULT ON THE SUBSTANTIVE LAW OF NEGLIGENCE

As the courts developed the tort of negligence, they created a variety of doctrines that reflected a fundamental policy decision: if plaintiffs conduct contributed to the injury-causing event and that conduct was less than reasonably careful, the plaintiff was barred from recovering for her injuries regardless of the relative degree of culpability of plaintiff and defendant. This policy was explicitly stated in the defenses of contributory negligence and assumption of risk. But it was also implicit in a variety of other situations that were often stated as no-duty rules-for example, recall the rule emphasized by the dissent in *McKinley v. Fanning* that a lessor has no duty to remove a risk that the lessor created if the lessee is aware of the risk- or as proximate cause. For example, there was the plaintiffs conduct in *Rowe v. Union Pacific* which the court treated as a superseding cause. As long as contributory negligence was a complete bar to recovery, it made no difference whether plaintiffs conduct was viewed as contributory negligence or proximate cause or subject to a no-duty rule: plaintiff’s conduct precluded recovery.

In 1971, however, the Idaho legislature replaced contributory negligence with a system of comparative fault under which the jury is required to assess the degree to which the conduct of all of the actors contributed to the accident. With that decision, the courts were presented with a quandary since a no-duty rule continued to bar all recovery while comparative fault did not automatically do so. Did the legislative abrogation of contributory negligence affect all situations in which a plaintiff’s conduct arguably is a cause of her injury?

### HARRISON v. TAYLOR

Supreme Court of Idaho
115 Idaho 588, 768 P.2d 1321 (1989)

BISTLINE, J.-This is a trip and fall case. The Harrisons brought a negligence action against the owner and lessor of a building for injuries sustained from a fall when her shoe allegedly caught the lip of a hole in a private sidewalk. The district court granted summary judgment for the defendants on the basis that the hole was an open and obvious danger.

On August 14, 1985, at about noon, plaintiff Norma Harrison and her husband made a business visit to Gloria's House in Bloom, operated by defendant Gloria Struchen, in order to pickup a floral arrangement. The sidewalks were dry that day. While approaching Gloria's House in Bloom, Mrs. Harrison encountered what she described as a hole. A section of concrete was missing from the private sidewalk due to "flaking." A slab had been removed and gravel remained. Mrs. Harrison stated in her

deposition that she successfully negotiated the hole when entering the floral shop by stepping into the middle of it.

After being informed that her flowers were not ready, Mrs. Harrison began to leave the floral shop. She carried a checkbook and shoulder bag. As she exited, plaintiff walked on the sidewalk closest to the building and stepped over the hole with her right foot. She saw the hole.
Her left foot caught the lip of the hole and plaintiff fell, breaking both arms. She hit the sidewalk with such force that the fall flattened a metal bracelet she was wearing. The hole was in the same condition it had been when she entered the shop.

The affidavit of James Ann establishes that prior to Mrs. Harrison's fall, he too tripped on the lip of the hole and informed defendants Struchen that the hole constituted a defect which should be remedied. His affidavit states that the defect extended across the full length of the sidewalk, or 49 inches. The width of the hole throughout its extension ranged from 20 1/2 inches on the east side to about 8 inches on the west side. The south edge of the depression had ridges ranging from 1/2 inches to 1 inch in height.

Plaintiff and her husband commenced an action against the owners and the tenants alleging negligent maintenance and failure to repair the defect in the sidewalk. Daniel Harrison seeks damages for loss of consortium. The building is owned by a partnership which includes defendant Taylor. Defendant/tenants-in-possession are Gloria Struchen, doing business as Gloria's House in Bloom, and Ed Struchen, doing business as Ed's Office Products.

All defendants moved for summary judgment. A hearing was held. The Harrisons filed a motion to join additional defendants who owned the building in partnership with the Taylors. The trial judge granted defendants' motion for summary judgment based on the open and obvious doctrine....

This appeal requires us to consider these issues:

(1) Whether the trial court erred by granting summary judgment for the defendants based on the open and obvious danger doctrine;

The judicially-created open and obvious danger doctrine has served this state long but not particularly with an even hand since the legislature established comparative negligence in 1971. To date, our cases have established two lines of authority. One line, represented by *Otts v. Brough*, 90 Idaho 124,409 P.2d 95 (1965), states that owners or persons in charge of property owe to an invitee the duty to keep the premises in a reasonably safe condition or to warn of hidden dangers which the owner or person in charge knows or should know by the exercise of reasonable care. However, this duty does not extend to dangers known to the visitor. *Otts; accord McCasland v. Floribec, Inc*., 106 Idaho 841, 683 P.2d877 (1984); *Tommerup v. Albertson's, Inc*., 101 Idaho 1, 607 P.2d 1055 (1980).

The other line, represented by *Ryals v. Broadbent*, 98 ldaho 3922,565 P.2d 982 (1977), and *Keller v. Holiday Inns, Inc.*, 107 Idaho 593, 691 P.2d 1208 (1984), holds that there is an exception to the open and obvious danger defense when the injured party encounters a known danger while acting in the course of employment. The rationale for the exception is that an employee is faced with an economic compulsion, i.e., possible loss of employment, which implicitly encourages the employee to encounter the danger or hazard notwithstanding that he or she perceives the risk. *Keller, accord Marcher v. Butler*, 113 Idaho 867, 749 P.2d486 (1988).

[W]e base our decision today on a broader reading of our cases and of the legislative intent derived in Idaho's comparative negligence statute. We do not today simply extend the Ryals/Keller employee exception from the open and obvious danger doctrine to the facts of this case. Instead, as explained below, we simplify the standard of care applicable to both owners and occupiers of land - and to the invitees who come upon the premises. Fundamental to our decision is the legislative mandate that comparative negligence shall apply in all negligence actions. I.C. §6-801.

In *Salinas v. Vierstra*, 107 Idaho 984, 695 P.2d 369 (1985), we concluded that application of the implied assumption of risk doctrine is untenable in the era of comparative negligence established by I.C. § 6-801. We reasoned as follows:

> The scope of I.C. § 6-801 is broad. It is not limited to certain types of action; it is not limited by exceptions. Rather, it covers any action in which the plaintiff is seeking to recover on grounds of negligence. Section 6-801's intent is clear: Contributory negligence is not to be a complete bar to recovery; instead, liability is to be apportioned between the parties based on the degree of fault for which each is responsible.
>
> We find no reason that justifies the continued use of assumption of risk as an absolute bar to recovery in light of I.C. § 6-801's mandate and intent. Rather, we think reason and logic compel us to hold that § 6-801 applies to any use of assumption of risk as a defense, **** Therefore, assumption of risk shall no longer be available as an absolute bar to recovery in any action instituted in this state. As we mentioned above, to hold otherwise, would be to perpetuate a gross legal inconsistency by prohibiting the use of contributory negligence as an absolute bar yet allow its effect to continue under the guise of assumption of risk. []

We find support for this approach to the relationship of comparative negligence to assumption of risk in the language of Professor Schwartz:

> A rigorous application of implied assumption of risk as an absolute defense could serve to undermine seriously the general purpose of a comparative negligence statute to apportion damages on the basis of fault. This is perhaps the reason that every commentator who has addressed himself to this specific problem has agreed that plaintiff should not have his claim barred if he has impliedly assumed the risk, but rather that this conduct should be considered in apportioning damages under the statute.

V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 9.5, at 180 (2d ed. 1986). He notes only one jurisdiction "vigorously applies" assumption of risk as an absolute defense after the adoption of comparative negligence. []

We believe there are no significant differences between the implied assumption of risk and the open and obvious danger defenses. In fact, in this jurisdiction the doctrine first appeared in a case which virtually equated assumption of risk with the open and obvious defense:

> *The invitee assumes all normal, obvious and ordinary risks attendant on the use of the premises* and the owner is under no duty to reconstruct or alter the premises so as to obviate known or obvious dangers. []

*Alsup v. Saratoga Hotel*, 71 Idaho 229,229 P.2d 985 (1951), cited in *Otts v. Brough*, 90 Idaho 124,409 P.2d 95 (1965).

The open and obvious danger doctrine is recognized as a corollary rule to assumption of risk. [] The words are different, but the conduct of a person injured when confronting a known danger is the same. Where Salinas has cut the heart out of assumption of risk, the same rationale and reasoning mandates an identical operation upon the open and obvious danger defense. []

That the open and obvious danger defense operates inappropriately to bar recovery under the comparative negligence regime of I.C. §6-801 was recognized by our Court of Appeals in its *Keller v. Holiday Inns, Inc.,* 105 Idaho 649, 671 P.2d 1112 (ct. App. 1983):

> There is also a statutory reason in Idaho to treat an invitee's knowledge or the obviousness of a danger as a limitation of liability rather than as an excuse of duty. Since 1971, Idaho has been a comparative negligence state. I.C. § 6-801 provides that the plaintiff's contributory negligence does not bar recovery in a negligence action, so long as his negligence is not as great as the negligence of the person against whom recovery is sought. Rather, any

damages awarded to the plaintiff are reduced in proportion to the amount of causal negligence attributable to him.

Prior to the advent of comparative negligence, contributory negligence was an absolute bar to recovery. Thus, it made little difference whether a known or obvious condition excused a land possessor's duty to an invitee, or simply insulated the possessor from liability for any breach of such duty. In either event, the injured invitee could not recover. But under the comparative negligence system, the difference is profound. If duty is not excused by a known or obvious danger, the injured invitee might recover, albeit in a diminished amount, if his negligence in encountering the risk is found to be less than the land possessor's negligence in allowing the dangerous condition or activity on his property. In contrast, if the invitee's voluntary encounter with a known or obvious danger were deemed to excuse the land owner's duty, then there would be no negligence to compare- and, therefore, no recovery. The effect would be to resurrect contributory negligence as an absolute bar to recovery in cases involving a land possessor's liability to invitees.

[]

[W]e join ... numerous state and federal courts ...and hereby retire the open and obvious danger doctrine. Henceforward, owners and occupiers of land will be under a duty of ordinary care under the circumstances towards invitees who come upon their premises....

Today's opinion harmonizes our case law with the comparative negligence statute passed by the legislature in 1971. We have been already operating in the context of comparative negligence; now the legislative policy expressed in I.C. § 6-801 will operate freely. The jury will compare the owner or occupier of land's behavior versus that of invitees who come upon the premises. Disputes in this area will normally present a jury question under particular facts, unless reasonable minds could not differ. *McKinley v. Fanning*, 100 Idaho 189,595 P.2d 1084 (1979).

OLIVER & TOWLES, JJ. PROTEM., concur.

JOHNSON, J., dissenting.

SHEPARD, C.J., concurs.

NOTES

(1) Recall that I.C. § 6-801 provides "[c]ontributory negligence or comparative responsibility shall not bar recovery in an action by any person or his legal representative to recover damages for negligence, gross negligence or comparative responsibility resulting in death or in injury to person or property." Is "contributory negligence" simply a synonym for "plaintiff's conduct that contributes to an injury-causing event?

This issue has been examined in cases excerpted earlier in these materials. In addition to the court of appeals consideration of the question in *Keller v. Holiday Inns, Inc.,* 105 Idaho 649, 671 P.2d 1112 (Ct. App. 1983), aff'd on other grounds, 107 Idaho 593, 691 P.2d 1208 (1984) which is excerpted in Harrison- the majority and dissent in *McKinley v. Fanning*, 100 Idaho 189, 595 P.2d 1084 (1979),also debated the proper classification of the plaintiff lessee's conduct and the defendant lessor's obligation: should plaintiff's knowledge be treated as a limitation on defendants potential liability, i.e., comparative fault, or as an excuse of duty, i.e., as the basis for a no duty rule? As Harrison, Keller, and McKinley suggest, the effect of comparative fault on duty rules is potentially significant.

(2) "Natural" vs. human conditions: Plaintiff slipped and fell in a snow-covered parking lot. The Idaho Supreme Court rejected the defendant’s argument that Harrison should apply only to man-made conditions:

> we are not able to discern how we could construe the statute to allow an exemption for negligence as to natural accumulations. To do so would require us to construe the statute as allowing us to apply comparative negligence in some cases but not in others. As we read the statute, it does not allow us to do that. The statute speaks categorically about actions in negligence.

*Robertson v. Magic Valley Regional Medical Center*, 117 Idaho 979, 793 P.2d 211 (1990). Justice Bakes dissented, arguing that there was a difference between contributory negligence and no duty

**(3)** ***Orthman v. Idaho Power Co***.: A rural residential customer was electrocuted while attempting to reconnect his electrical service. He brought suit against the electricity provider alleging in part that it was liable for his injuries because it had negligently terminated his service. The district court dismissed the complaint.

> On appeal, the Idaho Supreme Court reversed:
>
> > the district court determined that Russell Orthman's actions in attempting self help to reconnect his electrical service was an intervening cause which would intervene in the causal link between Idaho Power's breach of duty and the cause of the injuries.... In light of our previous holdings requiring an act by a third person or other force to establish an intervening, superseding cause, *Mico Mobile Sales & Leasing, Inc. v. Skyline Corp*., [].
> >
> > It seems unlikely that Russell Orthman's actions could be viewed as an intervening cause and there is no allegation that a third party was the intervening, superseding cause.

*Orthman v. Idaho Power Co*., 895 P.2d 561, 126 Idaho 960 (1995).

The court reaffirmed this holding in *Brooks v. Logan*. Decedent was a student who committed suicide; his parents brought a wrongful death action against the school district, arguing that one of the student's teachers should have taken steps to prevent the suicide. The defendants argued in part that the students' act of taking his own life was a superseding cause that precluded their liability. The court rejected this argument because a superseding cause is an act of a third party and there was no party. *Brooks v. Logan*, 127 Idaho 484, 903 P.2d 73 (1995).

**(4)** **A confusion of doctrines**: An example of the confusion of doctrines that can be applied to bar plaintiff's recovery when plaintiff's conduct contributes the injury-causing event is presented in Jacobsen. Grace O'Connor was separated from her husband, Dan. When Ms. O'Connor heard that her husband intended to shoot her, she took refuge in a third person's house. In attempting to protect her, the third person was shot and wounded by Mr. O'Connor. Mr. O'Connor subsequently was determined to be insane and confined to the state hospital in Blackfoot. He walked away from the hospital, returned, and shot Martin Jacobsen who had been employed by Ms. O'Connor to protect her. The court upheld a dismissal of plaintiff's action against the director of the state hospital and the county sheriff. Its decision, however, offered a jumble of reasons:

> It is clear from the complaint, that [plaintiff] was apprised and knew of O'Connor's affliction with homicidal insanity ...Possessed of such knowledge, [plaintiff] took employment and voluntarily placed himself in a position, subjecting himself to any attack that might be made by O'Connor. In cases of personal injury, the law looks to the proximate and not the remote cause. [] The proximate cause of [plaintiffs] injuries was his acceptance of employment, going to and remaining at the place when and where he knew the offense was likely to be committed, if at all.

*Jacobsen v. McMillan*, 64 Idaho 351, 132 P.2d 773 (1943). Was plaintiff precluded from recovering because he accepted the risk? Because his knowledge of the danger was an intervening, superseding cause? Such confusion is not uncommon and was of comparatively little practical effect as long as the all-or-nothing principle remained central to common law negligence. Should plaintiff's conduct ever be a legal bar to recovery or should the issue always go to the jury for a determination of the percentage contribution of that conduct?

For other examples, see *Joyner v. Jones*, 97 Idaho 647,551 P.2d 602 (1976) ("danger [of another visitor's presence] was either known by [decedent] or so obvious and apparent as to charge him with knowledge of it" and thus the landowner owed decedent not duty); *Metz v. Haskell*, 91 Idaho 160, 417 P.2d 898 (1966) ("as a matter of law ... the ladder involved in this case was a 'simple tool,' that the 'simple tool doctrine' applies, that the defendant owed no duty to inspect, warn or protect and that there was, therefore, no negligence on the part of defendant").

## [B] ASSUMPTION OF RISK

### ROUNTREE v. BOISE BASEBALL, LLC

Supreme Court of Idaho
-Idaho-, 296 P.3d 373 (2013)

J. JONES, J.- [Bud Rountree has been a Boise Hawks season ticket holder for over 20 years. On August 13, 2008, he took his wife and two grandchildren to a Boise Hawks game at Memorial Stadium in Garden City. He was struck a foul ball and lost his eye. The Hawk's owner moved for summary judgment, arguing that Rountree impliedly consented to the risk of being hit by a foul ball. The district court denied the motion. The Idaho Supreme Court granted defendant's motion for permission to appeal the district courts order.]

**III.**
**DISCUSSION**

**C. Primary implied assumption of risk is not a valid defense in Idaho**

In ...*Salinas v. Vierstra*, 107 Idaho 984, 989, 695 P.2d 369, 374 (1985), ...this Court held that "assumption of risk shall no longer be available as an absolute bar to recovery."...

The sole issue here is whether, in light of Salinas and *Winn v. Frasher*, 116 Idaho 500, 7n P2d 722 (1989)], primary implied assumption of risk is a viable defense in Idaho. We reaffirm Salinas's holding that assumption of the risk has no legal effect as a defense, except in instances of express written or oral consent. Thus, primary implied assumption of the risk is not a valid defense.

Generally speaking, the implied assumption of risk doctrine "is divided into two subcategories: 'primary' and 'secondary.'" []. Secondary implied assumption of risk "is an affirmative defense to an established breach of duty and as such is a phase of contributory negligence." [] Conversely, primary implied assumption of risk essentially means that the defendant was not negligent because there was no breach, or no duty. *Id*. Primary implied assumption of risk arises when "the plaintiff impliedly assumes those risks that are inherent in a particular activity." [] In contrasting the two subcategories, some courts have held that primary implied assumption of the risk, because it is "treat[ed] as part of the initial duty analysis, rather than as an affirmative defense," is compatible with comparative negligence schemes. *Id*.; but see *Pfenning v. Lineman*, 947N.E.2d392, 399-400(ind. 2011) (holding to the contrary that "incurred risk, even when characterized as objectively-assessed primary assumption of risk, cannot be a basis to find the absence of duty on the part of the alleged tortfeasor").

Idaho uses a comparative negligence standard. I.C. § 6-801 ("Contributory negligence or comparative responsibility shall not bar recovery in an action by any person or his legal representative to recover damages for negligence...."). This creates a logical inconsistency with assumption of risk, which by definition bars recovery based on comparative responsibility. See Salinas, 107 Idaho at 989, 695 P.2d at 374. Thus, this Court held in Salinas that, "the use of assumption of risk as a defense shall have no legal effect in this state." *Id*. At the same time, Salinas identified limited circumstances in which assumption of the risk may still be used as a defense.

> The one exception to our holding today involves a situation where a plaintiff, either in writing or orally, expressly assumes the risk involved. In such a case, the plaintiffs assumption of the risk will continue to be a complete bar to recovery. Again, in order to avoid misunderstanding and confusion, the terminology of assumption of risk, however, should not be used. Rather, since express assumption of risk clearly sounds in contract and not tort, [] the correct terminology to use to assert this defense should be that of "consent" or something of a similar nature.

*Id*.

Four years later the *Winn* Court revisited Salinas, and in particular, its import on primary implied assumption of risk. Winn, []. While noting the disparate ways in which courts framed the duty at issue there, the Winn Court explained that:

> Defendants have suggested that we use assumption of the risk in the "primary sense" as the basis for our acceptance of the fireman's rule, despite the general rejection of assumption of the risk as a defense in *Salinas v. Vierstra*, 107 Idaho 984, 695 P.2d 369 (1985).We note with interest at that the special concurrence of Justice Spear in *Fawcett v. lrby*, 92 Idaho 48, 54-6, 436 P.2d 714, 720-21 (1968), that was relied upon by Justice Bistline in Salinas, (107 Idaho at 988, 990, 695 P.2d 369), carefully distinguished assumption of the risk in the "primary sense" from assumption of the risk in the "secondary sense," i.e., as a form of contributory negligence. Our reading of Salinas convinces us, however, that any implied rejection of assumption of the risk in the "primary sense" by the majority there was only dicta. The facts of Salinas were appropriate for the application of assumption of the risk in the "secondary sense" only. We do not, therefore, feel bound not to consider whether Salinas declared assumption of the risk in the "primary sense" no longer viable. Nevertheless, we decline to premise our decision here upon such a nebulous and confounded concept.

*Id*. In sum, although Salinas barred assumption of risk in general, our decision in Winn forestalled resolving whether primary assumption of risk was somehow different.

We reaffirm our holding in Salinas: the use of assumption of risk as a defense shall have no legal effect. Furthermore, we resolve the question left open by Winn, and hold that the general rule from Salinas applies to both primary and secondary assumption of the risk. Thus, primary implied assumption of the risk is not a valid defense. As this Court explained in Salinas, "Section 6-801's intent is clear: Contributory negligence is not to be a complete bar to recovery; instead, liability is to be apportioned between the parties based on the degree of fault for which each is responsible." Salinas, 107 Idaho at 989, 695 P.2dat 374. Accordingly, the Salinas Court warned of the "gross legal inconsistency [of] prohibiting the use of contributory negligence as an absolute bar," while allowing "its effect to continue" through assumption of risk defenses. *Id*. Because "[t]he types of issues raised by a plaintiff's non-express assumption of risk are readily handled by contributory negligence principles," we concluded that "issues should be discussed in terms of contributory negligence, not assumption of risk, and applied accordingly under our comparative negligence laws." *Id*.

Based on this analysis, we are not persuaded that primary implied assumption of the risk should be treated any differently. Allowing assumption of risk as an absolute bar is inconsistent with our comparative negligence system, whether the risks are inherent in an activity, or not. Moreover, cases involving primary implied assumption of the risk are "readily handled" by comparative negligence principles; as in any case, fault will be assessed, and liability apportioned, based on the actions of the parties. Whether a party participated in something inherently dangerous will simply inform the comparison, rather than wholly preclude it. Here, whether watching baseball is inherently dangerous, and the degrees of fault to be apportioned to Rountree and Boise Baseball, are questions for the jury. Because comparative negligence can adroitly resolve these questions, there is no need for this Court to disturb its holding in Salinas: assumption of the risk - whether primary or secondary - shall not act as a defense.

**IV.**
**CONCLUSION**

.... We ... hold that, apart from express written and oral consent, assumption of the risk, whether primary or secondary, is not a valid defense in Idaho.

Chief Justice BURDICK, and Justices EISMANN, W. JONES and HORTON, Concur.

NOTES

{1) What was the basis for the court's decision?

{2) Consent rather than assumption of risk? *Lee v. Sun Valley Co*.: The decision in Salinas was announced on January 10; four days later the court denied rehearing in *Lee v. Sun Valley Co*. Lee was a tourist from New Jersey who signed up for a trail ride. He signed a form entitled "Rental Agreement-Saddle Animals For Hire" which stated:

> Upon my acceptance of horse and equipment, I acknowledge that I assume full responsibility for my safety. I further understand that I ride at my own risk, and I agree to hold the above entity, its officers, employees, etc., harmless from every and all claim which may arise from injury, which might occur from use of said horse and/or equipment, in favor of myself, my heirs, representatives or dependents. I understand that the stable does not represent or warrant the quality or character of the horse furnished.

Halfway through the ride, plaintiffs saddle loosened and began to slide forward on the horse. Since plaintiff was riding the last horse in the group, his calls for help were not heard by the trail guide who was riding the first horse. "Plaintiff stopped the horse and, while attempting to dismount, the saddle rotated on the horse. The horse reared and threw the plaintiff to the ground causing injuries to his back." Plaintiff sued for his injuries, attacking the exculpatory clause. The court began its analysis by noting that it had

> previously held that parties to a transaction may agree by contract to limit liability for negligence or contractually waive rights and remedies, subject to certain exceptions. *See Steiner Corp. v. American District Telegraph*, 106 Idaho 787, 683 P.2d 435 (1984); *Anderson & Nafziger v. G.T. Newcomb, Inc*., 100 Idaho 175, 595 P.2d 709 (1979); *Rawlings v. Layne & Bowler Pump Co*., 93 Idaho 496, 465 P.2d 107 (1970). The validity of the exculpatory contract in the present case is not attacked on the basis of defects in formation since plaintiff admits that he read and signed the contract, and he alleges no failure of consideration. Plaintiff does argue that the language of the contract is ambiguous and should be construed against Sun Valley; however, we find no merit in this argument. The agreement clearly and simply states that Sun Valley should be held "harmless for every and all claim which may arise from injury, which might occur from use of said horse and/or equipment," which is both unambiguous and applicable to the facts alleged by plaintiff. Therefore, it appears that unless the exculpatory contract falls within some exception to the general rule set out in the *Steiner, Anderson* & *Nafziger*, and *Rawlings* cases, the agreement signed by the plaintiff absolves Sun Valley of any liability.
>
> The general rule that "express agreements exempting one of the parties for negligence are to be sustained" is subject to exceptions where: "(1) one party is at an obvious disadvantage in bargaining power; (2) a public duty is involved (public utility companies, common carriers)." *Rawlings v. Layne & Bowler Pump Co*., 93 Idaho at 499-500, 465 P.2d at 110-111. Plaintiff concedes that he had no disadvantage in bargaining power but argues that the second exception applies on the theory that the statutes regulating outfitters and guides impose a public duty upon Sun Valley. Utilities and carriers were named in the *Rawlings* case as obvious examples of parties owing a public duty, but there may be others who also owe a public duty in Idaho. The

idea of a public duty is closely related to the idea of public policy and it is within the domain of the legislature, elected by the public, to determine such duties and policies.

After reviewing the statutes establishing standards for licensing guides and outfitters, the court concludes that the statutes do not establish a "public duty." *Lee v. Sun Valley Co*., 107 Idaho 976, 695 P.2d 361 (1984).

Is *Lee* still good law after *Rountree*?

## [C] IMMUNITIES

At the common law there were four major immunities based upon the status of the alleged tortfeasor:

A. charitable
B. governmental
C. interspousal
D. parental

These immunities are an area in which dramatic change has occurred over the past thirty years. The interspousal and parental immunities have been replaced with the limited duty rules that were examined in the materials on duty. The common-law immunity for the conduct of governmental employees has been replaced by a statutory waiver of sovereign immunity - a waiver that, as is discussed below, is less than complete. Finally, there are a miscellaneous collection of statutory immunities.

### 1. CHARITABLE IMMUNITY

NOTES

{1) Rationales for charitable immunities: Three rationales have traditionally been advanced to justify an immunity for charitable institutions:

trust fund: the donations that support the charity comprise a trust fund which could not be diverted to satisfy tort judgments. implied waiver: a person who accepts charity is presumed to have voluntarily waived any right to maintain an action for tortious treatment by her benefactor. inapplicability of respondeat superior: the doctrine is inapplicable to doctors and nurses because of the degree of skill exercised by such employees and because of the lack of control over their conduct.

{2) *Wilcox v. Idaho Falls Latter Day Saints Hospital, Inc*.: Idaho originally recognized and applied the doctrine of charitable immunity in Wilcox. A paying patient brought an action for the alleged negligence of a student nurse employed by the hospital. Following a jury verdict for the plaintiff, the hospital appealed arguing that it was immune from suit as a charity. The court reviewed the three rationales which had been adopted by various jurisdictions, concluding that immunity resulted from the implied waiver of the patient: "one who accepts the benefit of a charity enters into a relation which exempts one's benefactor from liability for the negligence of his servants in administering the charity." {Quoting *Schoendorff v. Society of New York Hospital*, 211 N.Y. 125,105 N.E. 92, 93{1915) (Cardozo, J.)). The majority found no incongruity in applying this theory to a plaintiff who was a paying rather than charity patient. *Wilcox v. Idaho Falls Latter Day Saints Hospital, Inc*., 59 Idaho 350, 82 P.2d 849 (1938).

{3) *Wheat v. Idaho Falls Latter Day Saints Hospital*: Eighteen years later, the inconsistency of implying a waiver in exchange for a charitable benefit when the benefit was not gratuitously conferred led to the rejection of the doctrine as applied to paying patients in Wheat.
The court noted that

> it seems illogical to say that a patient, who pays for the services of a hospital, is a recipient of charity, or waives any rights merely by becoming a patient in an institution which renders services to others on a charitable basis.

*Wheat v. Idaho Falls Latter Day Saints Hospital*, 78 Idaho 60, 62, 297 P.2d 1041, 1042 (1956).

(4) *Bell v. Presbytery of Boise*: In Bell, the court completed the work begun in Wheat. The plaintiffs were the parents of a minor child who was injured on a church outing. The defendant argued that it was immune from suit as a charity engaged in charitable conduct. The court rejected this argument:

> In Idaho two cases, *Wilcox v. Idaho Falls L.D.S. Hospital*, 59 Idaho 350, 82 P.2d 849 (1938), and *Wheat v. Idaho Falls L.D.S. Hospital*, 78 Idaho 60, 62,297 P.2d 1041, 1042(1956}, rejected all three classic grounds for charitable immunity, i.e., public policy, trust fund doctrine, and implied waiver by acceptance of benefits, excepting only the non-paying recipients of charity under the third category. Now it is time to go all the way and abrogate this doctrine in toto. Personal injury is no less painful, disabling, costly or damage-producing simply because negligent harm is inflicted by a charitable institution rather than a non-charitable one. As the author of one opinion stated: "It has not been right, is not now right, nor could it ever be right for the law to forgive any person or association of persons wronging any other person." This reasoning is equally applicable to non-paying recipients of charity as to those recipients who are able to pay for the services rendered.

*Bell v. Presbytery of Boise*, 91 Idaho 374,421 P.2d 745 (1966).

(5) *Steed v. Grand Teton Council of the Boy Scouts of America, Inc*.: In response to a request to revisit an immunity for charitable organizations, the court noted:

> Subject to certain exceptions, parties to a transaction may agree by contract to limit liability or waive rights and remedies. *Lee v. Sun Valley Co*., 107 Idaho 976, 695 P.2d 361 (1984). It would be improper for the Court to step in and imply a waiver that the parties did not agree to.

*Steed v. Grand Teton Council of the Boy Scouts of America, Inc.*, 144 Idaho 848, 172 P.3d 1123 (2007).

(6) The legislative response: One provision in the 1987 legislature's "tort reform" package applied to "charitable organizations." In 1990, the legislature amended the provision to apply to "nonprofit corporations":

§6-1605: Limitation on Liability of Volunteers, Officers and Directors of Nonprofit Corporations and Organizations –

(1) In any nonprofit corporation or organization as defined in6-1601(6), Idaho Code, officers, directors and volunteers who serve the nonprofit corporation or organization shall be personally immune from civil liability arising out of their conduct as an officer, director or volunteer, if such conduct is within the course and scope of the duties and functions of the individual officer, director or volunteer and at the direction of the corporation or organization .The provisions of this section shall not eliminate or limit, and no immunity is hereby granted for the liability of an officer, director or volunteer :

(a) For conduct that is willful, wanton, or which involves fraud or knowing violation of the law;

(b) To the extent coverage for such conduct under a policy of liability insurance, whether the policy is purchased by the corporation or organization, the individual officer, director, volunteer or some third party;

(c) For any intentional breach or a fiduciary duty or duty of loyalty owed by the officer, director or volunteer to the corporation, organization or the members thereof;

(d) For acts or omissions not in good faith or which involve intentional misconduct, fraud or knowing violation of law;

(e) For any transaction from which the officer, director or volunteer derived an improper personal benefit;

(f) For any violation of the provisions of sections 30-321 (prohibiting loans by nonprofit corporations to its directors or officers] and 30-322 [making directors personally liable for wrongful distribution of the assets of a corporation], Idaho Code; or

(g) For damages which result from the operation of a motor vehicle.

Section 6-1601 defines

(1) "Charitable corporation or organization" means a corporation or organization including community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision or athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.

(6) "Nonprofit corporation or organization" means a charitable corporation or organization; any other corporation organized or existing under chapter 3, title 10, Idaho Code, or an equivalent provision of the law of another state; or an unincorporated association; which corporation or unincorporated association is organized and existing exclusively for nonprofit purposes, which regularly bestows benefits to the community at large and no part of the net income of which is distributable to its members, directors or officers.

## 2. GOVERNMENTAL IMMUNITY

### a. State-Law Limitations on Governmental Immunity

Prior to 1970, the doctrine of sovereign immunity in Idaho was built upon a number of distinctions. For example, in *Strickfadden v. Greencreek Highway District*, 42 Idaho 738, 248 P. 456 (1926), plaintiff and his family were injured when their car ran into an unlighted pile of rock and dirt from an excavation in the roadway. Defendant argued that it was immune from suit as "a quasi-public corporation having the particular characteristics of a county." Plaintiff, on the other hand, contended that a highway district is "a quasi-municipal corporation such as a city." The court offered the following discussion of the differences:

> Counties may be said to be true public corporations. They are local organizations, which for the purposes of civil administration are invested with a few functions characteristic of a corporate existence. They are legal political subdivisions of the state, created or superimposed by the sovereign power of the state of its own sovereign will, without any particular solicitation or consent of the people within the territory affected. []
>
> Cities, towns and villages may be classified as true municipal corporations, voluntarily organized under the general law at the request and with the concurrent consent of their members, and in addition to the exercise of the functions of self-government, transact matters of a quasi-private or business character not governmental in their nature but rather proprietary or for the acquisition of private gain for the municipality and its citizens. []
>
> Highway districts as intended by the Highway District Law, cannot be said to correspond identically, [], with either public corporations, or counties, or municipal corporations, or cities, towns or villages. They are quasi-municipal corporations, not political municipalities, not created

> for purposes of government, but for a special purpose, namely, that of improving the highways within the district....
>
> It is well settled that in the absence of an express statute to that effect, the state is not liable for damages either for nonperformance of its powers or for their improper exercise by those charged with their execution. Counties are generally likewise relieved from liability, for the same reason. They are involuntary subdivisions or arms of the state through which the state operates for convenience in the performance of its functions. In other words, the county is merely an agent of the state and since the state cannot be sued without its consent, neither may the agent be sued. []
>
> It is well recognized that there are two kinds of duties imposed or conferred upon municipal corporations; those termed public governmental functions, where the municipality performs certain duties as an agent or arm of the state; and those other municipal activities which are sometimes termed administrative, ministerial, corporate, private, or proprietary functions, performed for the municipality's own benefit or for the benefit of its citizens, and while acting in the performance of its governmental functions or in a public capacity as an arm or agency of the state the municipality is not liable for its failure to exercise these powers or for their negligent exercise, unless such liability has been imposed by state. []
>
> In its capacity as a private corporation a municipality stands on the same footing as would an individual or body of person upon whom a like special franchise had been conferred. Hence it is liable in the same manner as such individual or private corporation would be under like circumstances. [] Thus, municipalities are held liable for their torts in the performance of ministerial, private, corporate or proprietary functions. []
>
> Since it has been held in this state that the building of roads is not a governmental duty but a ministerial one, *Carson v. Genesee*, 9 Idaho 244, 74 P. 862 (1903), and that a highway district does not perform governmental duties, []it does not appear necessary to lay down any exact rule for the determination of what is a governmental or proprietary function.

It was against this background that the Idaho Supreme Court abrogated the doctrine of sovereign immunity in *Smith v. State*, 93 Idaho 795, 473 P.2d 937 (1970). The court gave the legislature two years to draft legislation. The legislature responded by adopting the Idaho Tort Claims Act (ITCA) modeled on the Federal Torts Claims Act:

**TORT CLAIMS AGAINST GOVERNMENTAL ENTITIES**

| | |
|---|---|
| §6-901: | Short title |
| §6-902: | Definitions |
| §6-903: | Liability of governmental entities-Defense of employees |
| §6-904: | Exceptions to governmental liability |
| §6-905: | Filing claims against state or employee-Time |
| §6-906: | Filing claims against political subdivision or employee-Time |
| §6-907: | Contents of claims-Filing by agent or attorney-Effect of inaccuracies |
| §6-908: | Restriction on allowance of claims |
| §6-909: | Time for allowance or denial of claims- Effect of failure to act |
| §6-910: | Suit on denied claims permitted |
| §6-911: | Limitation of actions |
| §6-912: | Compromise and settlement by governing body |
| §6-913: | Compromise and settlement by board of examiners |
| §6-914: | Jurisdiction- Rules of procedure |
| §6-915: | Venue |
| §6-916: | Service of summons |
| §6-917: | Recovery against governmental entity bar to action against employee |
| §6-918: | No punitive damages |
| §6-918A: | Attorneys' fees |

§6-919: Liability insurance for state- Comprehensive plan by risk manager in the division of purchasing

§6-920: Liability insurance for state procured only by risk manager in division of purchasing

§6-921: Apportionment of cost of state plan
§6-922: Payment by state of claims or judgments when no insurance
§6-923: Authority of political subdivisions to purchase insurance
§6-924: Policy limits- Minimum requirements
§6-925: Policy terms not complying with act- Construction- Exception
§6-926: Judgment or claim in excess of comprehensive liability plan- Reduction by court- Limits of liability

§6-927: Tax levy to pay comprehensive liability plan
§6-928: Tax levy to pay claim or judgment

§6-901: Short title -This act shall be known and may be cited as the "Idaho tort claims act."

§6-902: Definitions - As used in this act:

1. "State" means the state of Idaho or any office, department, agency, authority, commission, board, institution, hospital, college, university or other instrumentality thereof.

2. "Political subdivision" means any county, city, municipal corporation, health district, school district, irrigation district, special improvement or taxing district, or any other political subdivision or public corporation.

3. "Governmental entity" means and includes the state and political subdivisions as herein defined.

4. "Employee" means an officer, employee, or servant of a governmental entity, including elected or appointed officials, and persons acting on behalf of the governmental entity in any official capacity, temporarily or permanently in the service of the governmental entity, whether with or without compensation, but the term employee shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the governmental entity to which this act applies in the event of a claim.

5. "Bodily injury" means any bodily injury, sickness, disease or death sustained by any person and caused by an occurrence.

6. "Property damage" means injury or destruction to tangible property caused by an occurrence.

7. "Claim" means any written demand to recover money damages from a governmental entity or its employee which any person is legally entitled to recover under this act as compensation for the negligent or otherwise wrongful act or omission of a governmental entity or its employee when acting within the course or scope of his employment.

§6-903: Liability of governmental entities - Defense of employees –

a. Except as otherwise provided in this act, every governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment or duties, whether arising out of a governmental or proprietary function, where the governmental entity if a private person or entity would be liable for money damages under the laws of the state of Idaho, provided that the

governmental entity is subject to liability only for the pro rata share of the total damages awarded in favor of the claimant which is attributable to the negligent or otherwise wrongful acts or omissions of the governmental entity or its employees.

b. A governmental entity shall provide a defense to its employee and be responsible for the payment of any judgment on any claim or civil lawsuit against an employee for money damages arising out of any act or omission within the course and scope of his employment; provided that the governmental entity and its employee shall be subject to liability only for the pro rata share of the total damages awarded in favor of a claimant which is attributable to the act or omission of the employee; provided further, that to the extent there is valid and collectible, applicable insurance or any other right to defense or indemnification legally available to and for the protection of such employee, the governmental entity's duty hereunder to indemnify and/or defend such claim on behalf of such employee shall be secondary to the obligation of such insurer or indemnitor, whose obligation shall be primary and provided finally, this paragraph shall not be construed to alter or relieve any such indemnitor or insurer of any legal obligation to such employee or to any governmental entity vicariously liable on account of or legally responsible for damages due to the allegedly wrongful error, omissions, conduct, act or deed of such employee.

c. The defense of its employee by the governmental entity shall be undertaken whether the claim and civil lawsuit is brought in Idaho district court under Idaho law or is brought in a United States court under federal law. The governmental entity may refuse a defense or disavow and refuse to pay any judgment for its employee if it is determined that the act or omission of the employee is not within the course and scope of his employment or included malice or criminal intent.

d. A governmental entity shall not be entitled to contribution or indemnification, or reimbursement for legal fees and expenses from its employee unless a court shall find that the act or omission of the employee was outside the course and scope of his employment or included malice or criminal intent. Any action by a governmental entity against its employee and any action by an employee against the governmental entity for contribution, indemnification, or necessary legal fees and expenses shall be tried to the court in the same civil lawsuit brought on the claim against the governmental entity or its employee.

e. For the purposes of this act and not otherwise, it shall be a rebuttable presumption that any act or omission of an employee within the time and the place of his employment is within the course and scope of his employment and without malice or criminal intent.

f. Nothing in this act shall enlarge or otherwise adversely affect the liability of an employee or a governmental entity. Any immunity or other bar to a civil lawsuit under Idaho or federal law shall remain in effect. The fact that a governmental entity may relieve an employee from all necessary legal fees and expenses and any judgment arising from the civil lawsuit shall not under any circumstances be communicated to the trier of fact in the civil lawsuit.

**§6-904: Exceptions to governmental liability**- A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

1. Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

2. Arises out of the imposition or establishment of a quarantine by a governmental entity, whether such quarantine relates to persons or property.

3. Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

4. Arises out of the activities of the Idaho national guard when engaged in training or duty under sections 316, 502, 503, 503, 505 or 709, title 32, United States Code.
5. Arises out of the activities of the Idaho national guard when engaged in combatant activities during a time or war.

6. Arises out of or results from riots, unlawful assemblies, public demonstrations, mob violence or civil disturbances.

7. Arises out of a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such plan or design is prepared in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design or approved in advance of the construction by the legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.

§6-904A: Exceptions of Governmental Liability- A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without reckless, willful and wanton conduct as defined in section 6-904C, Idaho Code, shall not be liable for any claim which:

1. Arises out of the assessment or collection of any tax or fee.

2. Arises out of injury to a person or property by a person under the supervision, custody or care of a governmental entity or by or to a person who is on probation or parole or any work-release program, or by or to a person receiving services from a mental health center, hospital or similar facility.

§6-9048: Exceptions to Governmental Liability- A governmental entity and its employees while acting within the course and scope of their employment and without gross negligence or reckless, willful and wanton conduct as defined in section 6-904C, Idaho Code, shall not be liable for any claim which:

1. Arises out of the detention of any goods or merchandise by any Jaw enforcement officer.

2. Arises out of the cancellation or recision, or the failure to cancel or rescind, any motor vehicle registration and license plates for failure of the owner to verify or maintain motor vehicle liability insurance coverage.

3. Arises out of the issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend, or revoke a permit, license, certificate, approval, order or similar authorization.

4. Arises out of the failure to make an inspection, or the making of an inadequate inspection of any property, real or personal, other than the property of the governmental entity performing the inspection.

5. Arises out of any act or omission providing or failing to provide medical care to a prisoner, inmate or person in custody of any city, county or state jail, detention center or correctional facility.

§6-904C: Definitions - For the purposes of this chapter, and this chapter only, the following words shall be defined as follows:

1. "Gross negligence" is the doing or failing to do an act which a reasonable person in a similar situation and of similar responsibility would, with a minimum of contemplation, ne inescapably drawn to recognize his or her duty to do or not to do such act and that failing that duty shows deliberate indifference to the harmful consequences to others.

2. "Reckless, willful and wanton conduct" is present only when a person intentionally and knowingly does or fails to do an act creating unreasonable risk of harm to another, and which involves a high degree of probability that such harm will result.

§6-926: Judgment or claim in excess of comprehensive liability plan - Reduction by court -Limits of liability -

a. *Property damage* -The combined, aggregate liability of a governmental entity and its employees for damages, costs and attorney fees under this act, on account of damage to property, shall not exceed and is limited to one hundred thousand dollars ($100,000) per occurrence, unless the governmental entity has purchased applicable, valid, collectible liability insurance coverage in excess of said amount, in which event the controlling limit shall be the then remaining available proceeds of such insurance. If any judgment or judgments, including costs and attorneys' fees that may be awarded, are returned or entered, and in the aggregate total more than one hundred thousand dollars ($100,000), whether in one (1)or more such cases, the court shall reduce the amount of the award or awards, verdict or verdicts, or judgment or judgments in any case or cases within its jurisdiction so as to reduce said aggregate loss to said sum of one hundred thousand dollars ($100,000) or the limits provided by said valid, collectible insurance, if any, whichever was greater. In no case shall any court enter judgment, or allow any judgment to stand, which results in the limit of liability herein provided to the exceeded in any manner or respect. If any court has jurisdiction of two (2) or more such claims in litigation in which the adjudication is simultaneous and, in the aggregate, exceeds the limits above provided, the reduction shall be pro rata in a proportion consistent with the relative amounts of loss of the claimants before the court; otherwise, the reduction shall be determined and made in view of limits remaining after the prior settlement of any other such claims or the prior satisfaction of any other such judgments, and no consideration shall be given to other such outstanding claims, if any, which have not been settled or satisfied prior thereto.

b. Bodily or personal injury or death- The combined, aggregate liability of a governmental entity and its employees for damages, costs and attorney fees under this act, on account of bodily or personal injury or death of any person, shall not exceed and is limited to one hundred thousand dollars ($100,000) subject to the further limitation of three hundred thousand dollars ($300,000) in any one (1) accident or occurrence arising out of any occurrence wherein two (2) or more persons sustained such injury and/or death, unless the governmental entity has purchased applicable, valid, collectible liability insurance coverage in excess of said limits in which event the controlling limit shall be then remaining available proceeds of such insurance. If any judgment or judgments, including costs and attorney fees that may be awarded, are returned or entered, and in the aggregate total more than the applicable limit, whether in one (1)or more cases, the court shall reduce the amount of the award or awards, verdict or verdicts, or judgment or judgments, in any case or cases within its jurisdiction as to reduce said aggregate loss to said applicable statutory limit or the limits provided by said valid, collectible insurance, if any, whichever was [is] greater.

Limits of liability above specified shall not be increased or altered by the fact that a decedent on account of whose death a wrongful death claim is asserted hereunder left surviving him or her more than (1) person entitled to make claim therefor, nor shall the aggregate recovery exceed the single limit provided for injury or death to any one (1) person in those cases in which there is both an injury claim and a death claim arising out of the injury to one (1) person, the intent of this section being to limit such liabilities and recoveries in the aggregate to one (1) limit only.

The entire exposure of the entity and its employee or employees hereunder shall not be enlarged by the number of liable employees or the theory of concurrent or consecutive torts of tortfeasors or of a sequence of accidents or incidents if the injury or injuries or their consequences stem from one (1) occurrence or accident.

In no case shall any court enter judgment, or allow any judgment to stand, which results in the limit of liability herein provided to be exceeded in any manner or respect. If any court has jurisdiction of two (2) or more such claims in litigation in which the adjudication is simultaneous and, in the aggregate, exceeds the limits above provided, the reduction shall be pro rata in a proportion consistent with the relative amounts of loss of the claimants before the court; otherwise, the reduction shall be determined and made in view of limits remaining after the prior settlement of any other claims or the prior satisfaction of any other such judgments, and no consideration shall be given to other such outstanding claims, if any, which have not been settled or satisfied prior thereto.

The court shall reduce any judgment in excess of the limits provided by this act in any matter within its jurisdiction, whether by reason of the adjudication in said proceedings alone or of the total or aggregate of all such awards, judgments, settlements, voluntary payments or other such loss relevant to the limits above provided.

NOTES

(1) The Act also specifies a detailed series of steps that the claimant must pursue. First, she must file notice of the claim with the governmental entity within 120 days of "the date the claim arose or reasonably should have been discovered." §§ 6-905, 6-906 The governmental entity then has 90 days to accept or reject the claim. § 6-909 If the claim is rejected, the claimant must file suit within two years. § 6-911.

(2) The Tort Claims Act has three primary components:

(a) it adopts a rule of liability (§ 6-903);

(b) it sets outs exceptions to that liability (§§ 6-904 to -9048); and

(c) it creates special procedures applicable to claims against governmental units.

As you examine the case excerpts, determine what is required for governmental liability under §§ 6-903 to -9048.

**SHERER v. POCATELLO SCHOOL DISTRICT No. 25**

Idaho Supreme Court
143 Idaho 486, 148 P.3d 1232 (2006)

SCHROEDER, C.K.: Alyssa Sherer and Nicole Santillanes appeal from the district court's order granting summary dismissal of their claims against Pocatello School District No. 25 based on the Idaho Tort Claims Act, Idaho Code §§ 6-901 et seq.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

Alameda Junior High School sponsored a carnival to celebrate the last day of the school year and hired Cliffhanger Recreation, a local business, to provide activities for the students. One of the activities was a "bungee run," in which participants donned a harness tethered to a fixed object by a bungee cord. Participants ran on an inflated rubberized surface to see who could reach the farthest point before being snapped back by the bungee cord. Alyssa Sherer, a student at the school, was injured while participating in the bungee run.

Alyssa and her mother, Nicole Santillanes, filed suit ... alleging that the injury was proximately caused by the school's negligence.... Shaylon and Roma Christiansen, who owned and operated Cliffhanger Recreation, were also named as defendants but are not part of this appeal. They have settled the claim against them ....

The school district moved for summary judgment on the grounds that it was immune from tort liability under section 6-904A of the Idaho Tort Claims Act which provides limited immunity for injuries caused by persons "under supervision, custody or care of a governmental entity." The district court granted the motion, finding that the school's conduct did not rise to the level of recklessness and holding that the school district was therefore immune from liability under section 6-904A. The Appellants' motion for reconsideration was denied. They appeal to this Court, arguing that the district court erred in finding the school district was immune from liability for negligence ....

## III. THE TORT CLAIMS ACT

Under the Idaho Tort Claims Act (ITCA), I.C. §§ 6-901 et seq., state governmental entities that commit torts may generally be held liable for money damages to the same extent a private person would be liable under the circumstances:

> Except as otherwise provided in this act, every governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions ...where the governmental entity if a private person or entity would be liable for money damages under the laws of the state of Idaho.... I.C. § 6-903.

A plaintiff seeking to recover on a tort claim against a governmental entity must survive three stages of analysis. [) First, the plaintiff must state a cause of action for which tort recovery would be allowed under the laws of Idaho, that is, "whether there is such a tort under Idaho law." [] Second, the plaintiff must show that "[no] exception to liability under the ITCA shields the alleged misconduct from liability." [] Third, if no exception applies, the plaintiff still must meet its burden of showing that it is entitled to recovery based on the merits of its claim. On a motion for summary judgment, therefore, a court must first determine whether the plaintiff has stated a valid tort under Idaho law and whether the ITCA provides immunity, after which it proceeds to consider "whether the merits of the claim as presented for consideration on the motion for summary judgment entitle the moving party to judgment]." []

In this case there were apparently affidavits before the district court that are cited to this Court but not included in the record on appeal. However, there is a verified complaint which sets forth facts that would constitute negligence by the school district if established. These factual allegations are sufficient to analyze the applicability of the school district's claim of immunity for negligence.

## IV. IDAHO CODE SECTION 6-904A (2) DOES NOT PROVIDE IMMUNITY TO THE DISTRICT FOR THE CLAIM OF NEGLIGENCE

### A. The Appellants Have Stated a Cause of Action

The school district bears "a common law duty to protect against the reasonably foreseeable risk of harm to a student while in the [d]istrict's custody." *Rife v. Long*, 127 Idaho 841, 846, 908 P.2d 143, 148 (1995) (emphasis omitted). This duty is not restricted to activities in the classroom: "Generally, schools owe a duty to supervise the activities of their students whether they be engaged in curricular activities or non-required but school sponsored extra-curricular activities." *Bauer v. Minidoka School District No. 331*, 116 Idaho 586, 590, 778 P.2d 336, 340 (1989) (quoting *Albers v. Independent School District No. 302*, 94 Idaho 342, 344,487 P.2d936, 938 (1971)).

The duty is not an absolute mandate to prevent all harm; rather, schools are obligated to exercise due care and take reasonable precautions to protect their students. *See Doe v. Durtschi*, 110 Idaho at 472, 716 P.2d at 1244.... The school's duty includes "anticipat[ing] reasonably foreseeable dangers and [taking] precautions protecting the child in its custody from such dangers." Bauer, (]. For that reason, "the fact that [a plaintiff's] injuries were caused by a third party does not absolve [a]school district from liability for its negligence" if the third party's actions were the foreseeable result of the school's negligence. *Doe v. Durtschi*, [].

The negligence claim relies upon a number of acts and omissions attributable to the school which, if proved, would constitute a breach of duty sufficient to allow a recovery for Alyssa's injuries. Alyssa was a student in the custody of the school and was injured while participating in a school-sponsored activity. The Appellants allege that the school was negligent in choosing to conduct an unreasonably hazardous activity, in failing to supervise Alyssa during her participation in that activity, and in failing to supervise Cliffhanger to ensure that they provided adequate instruction and supervision. These allegations are sufficient to state a claim under Idaho law and for which they would be entitled to money damages against a private individual if established.

**B. The District Court Erred in Holding that the School District was Immune**

The ITCA was amended in 1988 by the addition of section 6-904A to provide limited immunity for government entities against tort claims arising out of injuries caused by third persons under the state's supervision. The statute in relevant part reads as follows:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without reckless, willful and wanton conduct as defined in section 6-904C, Idaho Code, shall not be liable for any claim which:
> 2. Arises out of injury to a person or property by a person under supervision, custody or care of a governmental entity....

I.C. § 6-904A.[21] The effect of the statute is to require a heightened showing of recklessness, as opposed to mere negligence, for such claims. In this way, "[t]he statute protects against ordinary negligence claims which would significantly impair effective governmental process yet allows fair compensation for egregious wrongs*." Harris v. State, Dep't of Health & Welfare*, 123 Idaho 295, 301,847 P.2d 1156, 1162 (1992).

The school district's reading of section 6-904A would rewrite the language in subparagraph 2 to read, "Arises out of injury to a person or property of a person under supervision, custody or care of a governmental entity" rather than "Arises out of injury to a person or property by a person under supervision, custody or care of a governmental entity ..."(emphasis added). However, the legislative history and the language of the statute make it clear that the intent of the statute was to prevent recovery for negligence based upon a particular theory of recovery, i.e., that the government negligently failed to prevent third persons under its care from causing injury to members of the public. See Harris, [] (noting that the statute reflects a "deliberate policy choice "to overrule *Sterling v. Bloom*, 111 Idaho 211, 723 P.2d755 (1986),2 and was based on a legislative finding that the courts had extended liability too far in the other direction)....Section 6-904A(2) limits from negligence liability one particular causal pathway upon which a valid claim for relief might otherwise proceed, i.e., that the school failed to exercise reasonable care in preventing a person under its supervision from causing injury. The limitation upon that theory of liability does not limit other negligence claims.

The district court held that because Alyssa was under the school's supervision the school was immune from liability unless the Appellants could show that the school was guilty of reckless, willful or wanton conduct. Finding no evidence of reckless conduct, the court granted the school's motion for summary judgment. The district court's ruling is correct to the extent the Appellants' claims might rely upon the school district's failure to prevent Alyssa from harming herself. A school district is immune "to the extent [a plaintiff] premises the negligent supervision claim on the School District's alleged failure to use reasonable care in supervising her, as a student, for any alleged harm she inflicted on herself...." *Hei v. Holzer,* 139 Idaho 81, 73 P.3d94 (2003); *see also Brooks v. Logan*, 130 Idaho 574, 944 P.2d 709 (1997) (school district immune from liability for negligent failure to supervise student so as to prevent him from committing suicide). However, "the immunity arises from the status of the person(s) causing the

[21] Section 6-904C(2) states:
"Reckless, willful and wanton conduct" is present only when a person intentionally and knowingly does or fails to do an act creating unreasonable risk of harm to another, and which involves a high degree of probability that such harm will result.
Sterling arose out of injuries caused by a probationer who was in violation of the terms of his probation. The Court allowed the possibility of recovery against the probation officer, noting the broad purpose of the ITCA of "attaining substantial justice.The legislature in response adopted Section 6-904A to limit the state's liability in such situations. See Harris, []

injury, not the status of the person injured." Coonse, 132 Idaho at 806, 979P.2d at 1164.The fact that Alyssa was a student under the school's supervision would be relevant as to claims that the school failed to prevent her from harming herself. However, section 6-904A (2) does not limit her claims that she was injured as a consequence of the school's negligence in conducting a dangerous activity and failing to provide or ensure adequate supervision. Similarly, the allegation that the school planned and sponsored an unreasonably dangerous activity is premised on a theory of direct liability and does not rely on any claim that the injury was caused by a person under the school's supervision. Appellants should have been allowed to proceed on a theory of ordinary negligence with respect to this claim.

The application of section 6-904A to the claim that the school district failed to properly supervise Cliffhanger depends on whether Cliffhanger was "under supervision, custody or care" of the school district within the meaning of the statute. Broadly interpreted, this phrase could be construed to include all employees or other persons acting on behalf of the government. However, if liability is to be the rule and immunity the exception, this language should be given a construction that avoids undoing section 6-903's creation of a right to recover against the state for its negligence. See Hei, [].

The purpose of section 6-904A was to render the state immune from the unpredictable acts of third persons ...." Harris, [] In Hei, the Court declared that a school employee was not under the supervision, custody or care" of the school district within the meaning of section 6-904A. [] Thus, the school district is not immune from negligence liability for the acts of its employees under section 6-904A, even though it might be said to have negligently failed to supervise the employees under its supervision.

In addition to "supervision, custody or care," section 6-904A (2) lists other categories including probation, parole, drug court programs, work-release programs, mental health centers, and hospitals. Each of these categories is a nonconsensual, custodial relationship under which it is primarily the government, rather than the individual, that bears a duty. The legislature was concerned with the unpredictable acts of third parties, Harris, [], not with the government's ability to control its own agents and contractors. Thus, although an independent contractor may be a third person whose performance is monitored by the government entity that hired it, the existence of a consensual, contractual relationship does not place that person under "supervision, custody or care" within the meaning of the statute.

To the extent the Appellants' claims are premised upon the school's negligent supervision of Cliffhanger, section 6-904A does not limit the school district's liability. The claim that the school negligently failed to supervise Cliffhanger should not have been dismissed on summary judgment.

## VI. CONCLUSION

The summary judgment entered in favor of the school district is reversed and the case is remanded for further proceedings consistent with this opinion.

JUSTICES TROUT, EISMANN, BURDICK AND JONES CONCUR.

NOTES

(1) The ITCA imposes two hurdles on plaintiffs:

(a) First, the plaintiff must state a cause of action for which tort recovery is possible under Idaho law. That is, there has to be a tort. What was the tort in *Sherer*? A garden-variety negligence action? Defendant was engaged in conduct (the bungee run) that involved a foreseeable risk of harm is the actions wasn't carried out carefully?

Isn't the question: Would a private person engaged in the same conduct be potentially liable? If Bob Smith hired Cliffhanger Recreation to provide bungee runs to his daughter's friends at her birthday party, would he be liable if Cliffhanger was less than reasonably careful?

(b) Second, the plaintiff must show that there is no exception to liability under the ITCA that shields the allegedly tortious conduct.

(3) Exceptions to liability - arises out of an intentional tort:

I.C. § 6-904 provides:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which ... (3) Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

Recall *White v. University of Idaho*, the case involving the piano teacher and his student in which the student argued that the teacher's conduct was negligence rather than intentional. She did so to avoid §6-904(3).

In *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238(1986), the parents of children who had been sexually molested by a teacher brought an action against the school district. The court held that the school district was potentially liable for its negligent supervision of the teacher. Less than two years later in *Sheridan v. United States*, 487 U.S. 392 (1988), the United States Supreme Court agreed with the majority of the Idaho Supreme Court, holding that the United States could be held liable for injuries caused by an intoxicated sailor who fired several shots into an automobile.

(3) There are a multitude of ITCA cases.

## b. Federal-Law Limitations on Governmental Immunity

**SHIELDS v. MARTIN**

Supreme Court of Idaho
109 Idaho 132, 706 P.2d 21 (1985)

BISTLINE, J. - [Stephen Shields and Laurie Halsey were divorced and custody of their child, Christopher, was awarded to Shields. Using a superseding court order, Halsey enlisted a Boise policeman, James Martin, to assist her in abducting Christopher from a daycare center. Following a verdict for Shields, Martin appealed.]

Martin next argues that the district court erred in allowing the action to proceed against him on a theory of negligence, and that the liability imposed upon him must be reversed since negligence is an insufficient basis upon which to base a §1983 claim.

Martin relies upon *Parratt v. Taylor*, 451 U.S. 527 (1981), to support his argument. Our review of Parratt leads us to the opposite conclusion. In that case, a prison inmate claimed a deprivation of property without due process in violation of the fourteenth amendment and 42 U.S.C. §1983 as a result of the negligent loss by prison officials of a mail-ordered hobby kit. The Supreme Court denied the inmate's claim. Holding that due process was not denied since state tort remedies were available to remedy the loss, the High Court stated:

> Nothing in the language of §1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights. In *Baker v. McCollan*, [443 U.S. 137 (1979)] we suggested that simply because a wrong was negligently as opposed to intentionally committed did not foreclose the possibility that such action could be brought under §1983.

[] The Court went on to add:

> Both *Baker v. McCollan* and *Monroe v. Pape*, [365 U.S. 167(1961)] suggest that §1983 affords a "civil remedy" for deprivations of federally protected rights caused by persons acting under color of state Jaw without any express requirement of a particular state of mind. Accordingly, in any §1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprive a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. []

In response to these statements, Justice Powell disagreed. Believing that the Court decided this issue without fully addressing it, he concurred only in the result and wrote: "I do not believe that *** negligent acts by state officials constitute a deprivation of property within the meaning of the Fourteenth Amendment, regardless of whatever subsequent procedure a state may or may not provide." []

Justice Marshall concurring in part and dissenting in part, made clear that he did concur in that part of the opinion which held that negligent conduct by persons acting under color of state law may be actionable under §1983. [] As the majority opinion and Justice Marshall point out, the crux of whether a negligent cause of action under § 1983 may be made out is whether the alleged constitutional deprivation is redressable through resort to an adequate state tort remedy procedure. [] Thus, if an adequate state tort remedy is available, no § 1983 cause of action is maintainable; however, if an adequate remedy is not available, such an action is maintainable.

Our analysis of Parratt is in accord with the conclusions reached by two Ninth Circuit Court of Appeals panels, *Haygood v. Younger*, 718 F.2d 1472 (9th Cir. 1983) ("[N]egligence alone can support a section 1983 cause of action."); *Hirst v. Gertzen*, 676 F.2d 1252 (9th Cir. 1982)("In Parratt, the Supreme Court held that negligent conduct by persons acting under color of state law may be actionable under 42 U.S.C. 1983.There is no express requirement of a particular state of mind in Section 1983."), and two First Circuit Court of Appeals panels, *Fernandez v. Chardon*, 681 F.2d 42 (ist Cir. 1982), cert. denied in part, 103 S. Ct. 343 (1982), affd on other grounds sub nom. *Chardon v. Sate*, 103 S. Ct. 2611 (1983) ("Liability may be grounded on negligence alone.").

In this case, no adequate state tort remedy exists. Both parties concede, and the district court below held, that under current Idaho law Martin is immune from any state tort remedy under the Idaho Tart Claims Act in light of the interpretation given to that Act by this Court in *Chandler v. City of Boise*, 104 Idaho 480, 660 P.2d 770 (1983). Thus, we hold that a negligent cause of action is maintainable in this case under 42 U.S.C. § 1983.

NOTES

**(1) 42 U.S.C. §1983**: Originally enacted in 1871, § 1983 is one of a series of civil rights statutes: Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The number of cases applying and construing §1983 is voluminous: the U.S.C.S. volume containing § 1983 - and only § 1983 - is more than 1,000 pages long. For our purposes, the important point is to recognize that § 1983 exists and is a major limitation on governmental immunity.

(2) Section 1983 has a voluminous body of caselaw construing its application

## 3. Familial Immunities

### a. From Inter-spousal Immunities to Inter-spousal Duties

**ROGERS v. YELLOWSTONE PARK CO.**

Supreme Court of Idaho
97 Idaho 14, S39 P.2d S66 (1975)

McFADDEN, J.- [Betty Rogers was injured in a one-car accident that occurred near Ashton. She was a passenger in a car owned by the Yellowstone Park Company and driven by Peter Rogers, her husband who was employed by the company. The company have given her husband permission to operate the vehicle and agreed that plaintiff and her son could accompany her husband on this trip. While both the company and her husband were named as defendants, the husband was never served with process. The company filed a motion for summary judgment, contending that a wife living with her husband cannot recover from her husband's employer for the husband's negligent acts, since any recovery by the wife would be community property that would inure to the benefit of the husband tortfeasor. The trial court agreed and granted the motion. The supreme court reversed:]

Presented for resolution by this court is the fundamental issue of whether the plaintiff wife may maintain an action for personal injuries against her husband and his employer for her husband's negligence during the course and scope of the husband's employment. Plaintiff relies heavily on the case of *Lorang v. Hays*, 69 Idaho 440,209 P.2d 733 (1949), an action involving a tort committed by a husband on his wife, as authority that such an action may be maintained. Plaintiff has also cited cases from other community property jurisdictions where actions were allowed by one spouse against the other for negligent torts.

Defendant points to a number of cases decided prior to *Lorang v. Hays*, supra, where this court held that damages for personal injuries to a spouse were community property. *Giffen v. City of Lewiston*, 6 Idaho 231, SSP. 54S (1898); *Lindsay v. Oregon Short UneRy*., 13 Idaho 477, 90 P.984 (1907); *LaBonte v. Davidson*, 31 Idaho 644,17S P.588 (1918); *Muir v. City of Pocatello*, 36 Idaho S32, 212 P. 34S (1922); *Sprouse v. Magee*,46 Idaho 622, 269 P. 993 (1928) [dictum]; *Swager v. Peterson*, 49 Idaho 78S, 291 P. 1049(1930). See also the following two cases decided subsequent to *Lorang v. Hays, Doggett v. Boiler Engineering & Supply Co.*, 93 Idaho 888, 477 P.2d S11 (1970) (concerning survival of claims for personal injuries), and *Clark v. Foster*, 87 Idaho 134, 391 P.2d8S3 (1964). In each of those cases a spouse instituted an action against a third-party defendant without joining the husband as a party. Without exception, the court did not examine the nature of the interest damaged but assumed the recovery to be community property. None of these involved the issue of one spouse suing the other for damages arising out of the other's negligence. The principal issue in those cases was whether the proper parties were before the court, and the court held that since the husband was the manager of the community property under I.C. § 32 -912[22]: he was a necessary and proper party to bring an action belonging to the community.

Defendant relied upon an annotation that set out the policy arguments that supported an interspousal tort immunity: (1) maintenance of an interspousal immunity rule is necessary for the preservation of domestic peace; (2) its abrogation would encourage litigation which, at least where a spouse is protected by insurance, might be collusive; and (3} any change in the rule should be for the

[22] I.C. § 32-912 has been amended by 1974 Sess. Laws ch. 194, to provide for both spouses to have equal management and control of community property except that neither spouse may sell of convey community real property unless both join the conveyance nor may either spouse incur community debts and obligate the other's separate property without the other's written consent.

legislature. Plaintiff contends these policy arguments are without merit and refers to WILLIAM PROSSER, LAW OF TORTS § 122 (4th ed. 1971), where the author states concerning such traditional arguments, Stress has been laid upon the danger of fictitious and fraudulent claims, on the very dubious assumption that a wife's love for her husband is such that she is more likely to bring a false suit against him than a genuine one; and likewise the possibility of trivial actions for minor annoyances, which might well be taken care of by finding consent to all ordinary frictions of wedlock- or at least assumption of risk! The chief reason relied upon by all these courts, however, is that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home, which is against the policy of the law. This is on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy- and this even though she has left him or divorced him for that very ground, and although the same courts refuse to find any disruption of domestic tranquility if she sues him for a tort to her property, or brings a criminal prosecution against him. If this reasoning appeals to the reader, let him by all means adopt it.

Implicit in defendant's argument is that the judicial system is inadequate to safeguard against collusion intort actions between spouses. We reject this contention, for courts in this state presently weed out fraud and collusion in other cases not involving actions between spouses. We find nothing unusual or peculiar in interspousal suits to frustrate the capability of the judicial system to avoid or anticipate such abuses. [] It is difficult to perceive how a personal action would disrupt the tranquility of the marital state to any greater degree than would actions in partition, ejectment or for contesting of wills, all of which actions now may be maintained by a wife against her husband when such actions involve her separate property. [] It is the conclusion of the court that the policy arguments referred to by defendant in support of its position are fully answered by the quotation from Prosser quoted above.

We now come to the critical issue concerning the nature of the interest which plaintiff by this action seeks to protect. If one relies on the cases previously cited by respondent involving tort claims against third party tortfeasors, it is clear that there is only one answer, i.e., plaintiff's recovery for damages suffered in the automobile accident would be community property and this present action would be barred. However, without exception none of those cases considered the character of the right harmed for which the damages were sought.

Separate property is defined by statute to include:

> "All property of either the husband or the wife owned by him or her before marriage, and that acquired afterward either by gift, bequest, devise or descent, or that which either he or she shall acquire with the proceeds of his or her separate property, byway of moneys or other property, shall remain his or her sole and separate property."

I.C. §32-903. Community property, on the other hand, includes

> "All other property acquired after marriage by either husband or wife, including the rents and profits of the separate property of the husband and wife, is community property* *

I.C. § 32-906.

The cases previously referred to herein cited by respondent relied on the concept that all property acquired during marriage was community property, and that any recovery for damages for personal injuries was "property acquired after marriage" but not acquired by "gift, bequest, devise or descent." Hence, such recovery was community property. However, we believe the correct concept is first to consider the nature of the right or interest invaded or harmed by the negligence of a defendant, and based on a determination of the nature of this right, then to characterize the damages recovered in relation to the right violated. Thus, the character of any judgment in this type of case as separate or community would take its character from the nature of the right violated. []

When a couple marry they bring to the marriage not only their property, but also themselves as individuals. While they enter into common bonds, still they are entitled to maintain certain individual rights.

One of those rights is that of personal security and freedom from harm to one's person from the spouse. [] Any physical injury to a spouse, and the pain and suffering therefrom is an injury to the spouse as an individual. Compensation byway of damages for such an injury would partake of the same character as that which has been injured or has suffered loss. [] Although not articulated in terms of personal security, nonetheless, in *Lorang v. Hays*, 69 Idaho 440, 209 P.2d733 (1949), this court recognized the right of a wife to maintain an action against her husband for a tort committed while the parties were married. Even though at the time the action was brought the parties had separated, this court stated We, therefore, conclude that a cause of action for damages to the person or character of a married woman, which accrue while she is living separate and apart from her husband, is 'an accumulation,' is her separate property; that the husband is not a necessary party plaintiff and is not entitled to any of the recovery. This rule is particularly applicable where the husband is himself the wrongdoer. []

Courts in other community property jurisdictions have similarly recognized the right of a spouse to maintain a tort action for a personal injury and to recover damages as separate property....

It is the conclusion of this court that the plaintiff is entitled to pursue her remedy for damages arising out of the alleged accident, notwithstanding that the tortfeasor was her husband and was named as a party defendant....

One additional issue is presented by this appeal concerning what damages would be allowable to a spouse in an action such as this.

It is our conclusion that the Washington Supreme Court in *Freehe v. Freehe*, [ TI has established a workable rule concerning damages in this type of case, an action for personal injuries sustained by the wife. Therefore, itis the conclusion of this court that plaintiff in this action is entitled to pursue her remedy for damages arising out of the accident alleged notwithstanding that she has named her husband as a party defendant. Plaintiff seeks recovery of special damages, including established future specials. She also seeks general damages for loss of future earnings, and also general damages as compensation for pain and suffering. Plaintiff is entitled to recover her special damage, including established future specials, as these are actual out of pocket expenses which are a community liability. And the fact her spouse would be relieved of this financial burden is outweighed by the fact such damages are strictly compensatory in nature inuring to the benefit of the injured spouse. General damages for loss of Mure earnings which would be community property would be recoverable only in the fraction of on half as the separate property of the injured spouse, and general damages for pain and suffering and emotional distress would be fully recoverable as the injured spouse's separate property.

DONALDSON AND McQUADE, JJ., CONCUR.

SHEPARD, C.J., DISSENTING -I respectfully dissent from the opinion of the majority for a number of reasons.... The threshold question in this case is whether or not the long-standing principle of common law commonly known as "interspousal immunity" should be overruled in Idaho.

It is necessary to point out a number of matters of preliminary importance. Idaho, as distinguished from a number of other states, has enacted no legislation directly affecting this question nor has the majority opinion utilized statutory construction as a method to obtain its result. []

The mere fact that a doctrine has existed in the common law for many centuries does not In and of itself give any reason for its perpetration. At the same time the mere fact that a doctrine has been inexistence for hundreds of years is no excuse to discard it as archaic and without merit to our society of today without at least a passing analysis as to its merit. Unfortunately, the majority opinion does not indulge in such analysis.

It is clear upon analysis that from time immemorial a husband and wife have legally been considered as a unit. Many other units are recognized by the law such as corporations, partnerships, voluntary associations and others. Persons who voluntarily enter into a particular relationship recognized

by the law acquire certain rights and sacrifice others. By the entry into such relationship they render nonactionable many acts and/or omissions which without the relationship would be actionable. Conduct within a family differs from ordinary conduct since the members are in a common establishment and engaged in a common domestic enterprise.

The questions arising from a change in such relationship are voluminous and staggering. Just a few examples may suffice. To what standard of care are members of the family to be held? Is that standard the same that applied to one living outside the family relationship or is it something special? Is the standard of due care required of a wife in the preparation of food the same standard as one outside the family relationship? What of the standard of care of a husband to maintain a staircase? What of the doctrine of assumption of the risk? What of the doctrine of contributory negligence? What of the doctrine of comparative negligence? Does every touching against the will of the other constitute a battery? What of the right of privacy?

While the preceding parade of horribles may appear facetious, it nevertheless demonstrates questions which the majority opinion has not faced, and which should be considered in the proposed abolition of a doctrine so fundamental to the common law.

I would hold that the threshold question as to the abolition of the doctrine of interspousal immunity should be answered in the negative. The process used by the majority herein and in numerous other cases. [] We are told that the only support for the doctrine of interspousal immunity is, (1) the fear of collusion and fraud between spouses to mulct insurance companies; (2) perpetuation of domestic tranquility. Professor Prosser, various other courts and the majority herein then set forth to destroy the two strawrnen and conclude that since those are the only reasons for the perpetuation of the doctrine it should be abolished. I suggest such reasoning is fallacious in the extreme and furnishes no answer to the threshold question of whether four hundred years of doctrine of the unitary aspect of husband and wife should be abolished. I suggest also that the majority must in the future answer the question faced by other courts who have abolished interspousal immunity and who have subsequently and logically been required to abolish the immunity between parent and child for negligent torts. []

I suggest that the decision of the majority today will have results and consequences which will reach far beyond those envisioned in the humorous comments of Professor Prosser regarding interspousal harmony and the bland assumption that the doctrine of interspousal immunity serves and protects only insurance carriers.

BAKES, J., DISSENTING:…

NOTES

(1) Is Shepard correct that the majority had opened Pandora's box? Note that plaintiff did not serve her husband with papers and he thus was not a party to the suit. If there had been another person in the car with Peter and Betty Rogers, that person could have sued Peter and Peter's employer. Given this, is there a sufficient reason to preclude Betty from recovering from the employer for her injuries? Note that while Shepard argues that no one should profit from his wrongdoing (and that Peter will profit from Betty's recovery), he ignores the fact that Betty loses if she is denied recovery based on her relationship to the tortfeasor. Thus, the question turns at least in part on the characterization of Betty's recovery as community or individual.

(2) Policy rationales for interspousal tort immunity: Defendant cited two policy rationales for the interspousal tort immunity:

(a) The rule is necessary for the preservation of domestic peace. Does the quote from Prosser that the majority relies upon rebut the rationales? For example, is domestic harmony more likely to have already been destroyed when the action is for an intentional tort such as battery and rather than negligence? Is a suit to settle a property dispute less likely to damage domestic tranquility that a tort action?

(b) Abrogation of the rule would encourage litigation which, at least where a spouse is protected by insurance, might be collusive. Is the court's response - "courts in this state presently weed out fraud and collusion in other cases not involving actions between spouses" - sufficient? Ultimately, there is a circularity in the two policies: if the litigation destroys domestic peace, then collusion seems unlikely- an vice versa.

**(3) Community property and interspousal tort immunity**: Was Idaho's original "adoption" of interspousal immunity- an adoption assumed by each of the justices despite the fact that no Idaho case has so held-error? Remember that Idaho adopted the common law only insofar as it was not inconsistent with statutory law. Consider the following introduction to community property:

> The community property or ganancial system is of afar greater antiquity than the common law principles relating to marital rights in property. ln fact, its antiquity is so great that it first obtained recognition inwritten form in 693 A.D., in Visigothic Spain, in the so called Visigothic Code or Fuero Juzgo, centuries before the development and formation of the common law. It is a concept of property that is entirely alien and foreign to that of common law as to the conjugal relationship and marital rights in property, although the community system itself can hardly be called a "foreign" institution.
>
> We are not here concerned with tracing the origin and development of the common law, but in its developed form in England, it embodied the basic concept that in marriage the husband and wife were merged into one and, in effect, the husband was that "one." The wife was subject to the husband to the extent that she was only his mere shadow, or at most his alter ego. It is a concept which considers the wife only another chattel or belonging of the husband. She is not recognized, perhaps through some element of male vanity or obtuseness, as an individual, as having a character, a mind, a personality of her own. Whatever movables the wife has at the date of the marriage become the husband's and he is entitled to take possession and make his own any movables to which she becomes entitled during the marriage. Whatever realty the wife has at the time of the marriage, or to which she becomes entitled during the marriage the husband has the administration thereof and in entitled to the usufructs thereof. The wife cannot alienate her land without the husband's concurrence. In other words, she is practically without proprietary capacity.
>
> Under the community or ganancial system the wife retains her own personality as an individual and is an equal partner with the husband in the conjugal relationship. Moreover, her property rights and her rights to enter into transactions with her husband as an equal have long represented the community property system the advanced state that is only now being reached through statutory modifications in common law jurisdictions. This recognition of the wife as a person in her own right is one of the outstanding principles of the civil law and is one of those in which it diverges sharply from the common law....
>
> Because the legal concept of the community property or ganancial system is so foreign to that of the common law, it is frequently very difficult for the judge or lawyer, trained and versed in the common law, to grasp and understand its principles. He usually makes the primary mistake of trying to understand it and interpret it by the principles and terminology of the common law; a serious mistake, for those principles and terminology are not in the least applicable....

W. DEFUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY §§ 2-3 (2d ed. 1971).

In as much as the community property system did not submerge the wife's independent identity but instead is predicated upon equality, isn't the underlying rationale for interspousal immunity simply inapplicable in a community property state? The interspousal tort immunity doctrine thus demonstrates again the dangers of assuming too facilely that there is such a thing as "the common law" and that this mythical entity is automatically applicable.

### b. From Absolute Parental Immunities to Qualified Parental Immunities

**PEDIGO v. ROWLEY**

Supreme Court of Idaho
101 Idaho 201,610 P.2d 560 (1980)

SHEPARD, J. -This is an appeal from a summary judgment in favor of third party defendants and respondents here, Garren. Debra Pedigo brought action against the Rowleys for personal injury and the Rowleys, in turn, sought to join Earl Garren, Debra's father, for contribution since he was allegedly negligent in failing to supervise properly Debra Pedigo. Garren moved for summary judgment on the theory that the doctrine of parental immunity barred any liability and the district court granted the motion for summary judgment. We affirm.

In late 1974, eleven-year-old Debra Pedigo was floating on an air mattress a short distance off the north shore of Lake Coeur d'Alene. She was struck by a speed boat operated by Cindy Rowley and owned by George Rowley. Pedigo sustained injuries which resulted in the amputation of one leg. Debra Pedigo had come to the lake with her father, who was sitting on the lake shore at the time of the accident. For purposes of summary judgment, we assume that Earl Garren did not warn Debra Pedigo of the alleged dangers of floating on an air mattress in the lake.

The Rowleys asserted that Garren was negligent in his supervision of the activities of Debra Pedigo; Garren, therefore, was a joint tortfeasor and is, or could be, liable to the Rowleys for contribution in the event that Pedigo recovered a judgment against the Rowleys. The Garrens respond that any action by Pedigo against the Garrens was barred by the doctrine of parental immunity; hence, they could not be joint tortfeasors and no contribution could be sought from them by the Rowleys.

The doctrine of parental immunity is dispositive in this case and is a matter of first impression in Idaho. The doctrine was first articulated in *Hewellette v. George*, 68 Miss. 703, 9 So. 885 (1891), wherein the court, citing no authority but relying exclusively on policy, declined to interject itself into the family relationship between a mother and minor daughter, stating:

> The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand.

That doctrine was adopted in a majority of jurisdictions. []

Thereafter, courts began carving out exceptions to the doctrine. For example, courts have refused to apply the doctrine when the child is suing the parent's estate, []; a parent is acting in his business capacity; a willful or malicious tort is involved, []; the child is an emancipated minor, []; or the dispute is contractual, [].

Reasons that have traditionally been given as basis for the parental immunity doctrine have included: (1) the disruption of family tranquility and subsequent impairment of the foundations of American society, []; (2) the threat to parental discipline and control, []; (3) the proliferation of fraudulent and collusive suits between family adversaries, see, e. g.; and (4) the depletion of the family exchequer [].

These policy arguments, however, have been rebutted by other courts. For example, some courts believe that the public interest in protecting society's members from losses caused by another's negligence outweighs the possibility of family discord. [] Additionally, the prevalence of insurance shifts

the controversy to a third party, thereby avoiding family conflict. [] Regarding the fraud or collusion argument, its mere possibility is too tenuous to serve as a basis to bar all parent-child tort suits. [] As in any other tort action, judges and juries can be relied upon to ferret out fraudulent and collusive claims. [] It is also argued that the impact of the lawsuit on the family exchequer is diminished, if not completely eliminated, by the presence of insurance. [] Even if the family exchequer argument is valid, it nevertheless ignores the question of compensation for the injuries of the child. [] Finally, some courts have noted that their previous elimination of interspousal immunity destroys the validity of arguments against parent-child immunity. []

Courts that have recently addressed this issue have dealt with parental immunity in one of four different ways. First, Wisconsin eliminated the doctrine except in two situations. Second, California replaced parental immunity with a reasonable parent standard. Other courts have eliminated the doctrine completely. Finally, some jurisdictions still retain parental immunity.

Wisconsin was the first jurisdiction to abrogate the parental immunity doctrine. *Goller v. White*, 122 N.W.2d 193 (Wis. 1963). Wisconsin, however, retained parental immunity in the narrowly defined situations when the alleged negligence involved parental authority or parental discretion regarding "food, clothing, housing, medical and dental services, and other care." [] A later Wisconsin case has made it clear that other "care" does not encompass ordinary discretion in day-to-day affairs. [] According to this view, in order to be immune from suit a parent must show that the alleged negligence falls within one of the two exempt categories. That requirement may lead to arbitrary distinctions. []; compare *Lemmen v. Servais*, [] (failure to warn a child to watch for traffic was within parental discretion and immune under Goller) with *Cole v. Sears, Roebuck & Co.,* [] (allowing a two-year-old child to play on a swing set was not within the Goller immunity).

Other jurisdictions have followed the Wisconsin rationale. [citing Kentucky, Michigan, Minnesota, and New Jersey cases.]

The California Supreme Court, however, rejected the Wisconsin approach, because it would theoretically allow a parent an unequivocal right to act negligently toward a child in certain specified instances. Instead, California requires a parent to act as a reasonable parent regardless of the type of conduct involved. *Gibson v. Gibson*, 479 P.2d 648 (Cal. 1971}. The California approach assumes that a common set of standards independent of already existing criminal sanctions applies to all parent-child relationships. The reasonable parent standard, however, has been criticized because of the impossibility of applying a uniform standard across economic, educational, cultural, religious and ethnic backgrounds, *Holodook v. Spencer*, 324 N.E.2d 338 (N.Y. 1974}. To apply the reasonable parent standard "would be to circumscribe the wide range of discretion a parent ought to have in permitting his child to undertake responsibility and gain independence." []

A small minority of jurisdictions have eliminated the doctrine of parental immunity entirely. [citing Hawai'i, Massachusetts, New Jersey, and Nevada cases.]

Some jurisdictions have eliminated the doctrine of parental immunity in the context of automobile accidents. [] But many of those jurisdictions expressly limit their holdings to the individual facts of those particular cases. However, New Hampshire, ...completely eliminated the doctrine of parental immunity in broad sweeping language in a case involving an automobile accident. Two jurisdictions have expressly refused to extend the analogy of automobile circumstance cases to other cases involving parental discretion. [] In New York, the doctrine of parental immunity was judicially eliminated in the context of an automobile suit, *Gelbman v. Gelbman*, but the impact of that decision was narrowed in *Holodook v. Spencer*. In *Holodook*, the Court held that a parent's negligent failure to supervise a child is not a tort since a parent owes the child no legal duty to supervise beyond the minimal standards imposed by the criminal statutes.

On the other hand, notwithstanding the abolition or curtailment of parental immunity in some states, other jurisdictions continue to uphold the doctrine. [] These courts hold that any changed

conditions in society that may have occurred since the enunciation of the parental immunity doctrine in Hewellette are merely superficial and do not warrant a change of policy.

We come then, finally, to the adoption of a policy regarding the continuation of parental immunity doctrine in Idaho. We believe that the integrity of the family plays an essential role in the welfare of our society. To that extent, we agree with those jurisdictions which still retain the doctrine of parental immunity. We reject the California notion that all parent-child relationships may be judicially supervised by a "reasonable parent" standard. The people of Idaho are too diverse and independent to be judged by a common standard in such a delicate area as the parent-child relationship. Our legislature has established certain standards of parental conduct in the area of physical abuse or neglect; a parent who violates those standards risks criminal sanction or the removal of the child. Short of such acts, our judiciary cannot order a "reasonable" parent standard. Our geography, our population, and most importantly, the diversity in our religious, ethnic and cultural backgrounds make a common standard inapplicable.

All of us, as parents, have hopes for our children. All of us want our children to grow safely into adulthood, but most of us also realize that children cannot mature in a vacuum. To become responsible adults, children must learn to assume responsibility and make judgments. This is a process and not an instantaneous miracle that automatically occurs at age eighteen, nineteen, or twenty-one. In the area of supervision, what one parent may perceive as too dangerous or unnecessary may be thought by another parent as desirable for the formation of growth abilities. To suggest that a child should be able to sue its parent in such circumstances and that a jury should judge the parent on the basis of some common standard is, we believe, nothing short of impossible. For example, how could the same standard apply to both the suburban parent of Boise and the rural parent of St. Maries?

We are unwilling to adopt a categorical rule that universally prohibits parent-child actions on the basis of a total and absolute parental immunity. It is enough to say in the instant case, involving the relatively narrow area of parental immunity for alleged negligent supervision, no cause of action exists beyond that specified by our existing legislatively imposed sanctions.

There can be little argument but that the parental immunity of Mr. Garren from suit brought by his daughter Pedigo also bars third parties who are tortfeasors from seeking contribution....

> ...The reality of the family is that, except in cases of great wealth, it is a single economic unit and recovery by a third party against the parent, ultimately diminishes the value of the child's recovery. Even if scrupulous care were taken to see that the parent's *** contribution did not come out of the child's recovery***, there would still be a strain on the family relationship, a result which our courts have consistently sought to avoid.

*Holodook v. Spencer*, 324 N.E.2d at 344. We agree with the *Holodook* statement.

The summary judgment of the district court is affirmed.

DONALDSON, C.J., AND McFADDEN, & BISTLINE, JJ., CONCUR.

DONALDSON, C.J., SPECIALLY CONCURRING -It is appropriate to add a word in response to the view tendered in Part I of the dissenting opinion. Itis there implied that, unless it can be shown that the reasons advanced in support of parental immunity are significantly different from those advanced in support of interspousal immunity, "we should be consistent, follow our decision in Yellowstone, and reject the doctrine of parental immunity."

The relationship of parent and child is simply not the same as that of husband and wife, a distinction the dissent ignores. While some of the bases for interspousal and parental immunity doubtless overlap, the doctrine of parental immunity is mandated by at least one fundamental policy which is wholly independent of those offered in support of interspousal immunity. Our society has traditionally entrusted to parents the delicate process of rearing and training children, and it is not the province of courts to second-guess the daily workings of that process.

In the spousal relationship, there is no comparable process of rearing and training.

Although we might safely assume that sometime during the course of any marriage, each spouse may well attempt to "train" the other in one or more particulars, perhaps even successfully, the principles involved are simply not the same.

In sum, our recognition today of a narrow parental immunity in a case involving alleged passive negligence in the supervision of a child, is not inconsistent with our prior rejection of the doctrine of interspousal immunity in a case which involved active negligence in the operation of an automobile.

McFADDEN, J., CONCURS.

BAKES, J., DISSENTING- .... I do not believe that the majority's adoption of the doctrine of parental immunity in this case can be reconciled with this Court's abrogation of interspousal immunity in *Rogers v. Yellowstone Park Co.,* 97 Idaho 14,539 P.2d 566 (1975). In my mind, the paramount rationale traditionally advanced in support of both parental and interspousal immunity has been the preservation of the family unit. Since that argument was previously rejected by a majority of this Court, we should be consistent, follow our decision in Yellowstone, and reject the doctrine of parental immunity. As Justice Shepard observed in his Yellowstone dissent, courts which have abolished interspousal immunity "have subsequently and logically been required to abolish the immunity between parent and child for negligent torts. []

In the case at bar, Justice Shepard, now speaking for the majority, asserts that it would be difficult, if not impossible, for this Court to establish a standard of care to be applied by the finder of fact in determining whether a parent was negligent in supervising his child. Not surprisingly, this same argument was advanced by Justice Shepard in his Yellowstone dissent, but was apparently found to be unpersuasive by the majority in that case. The reappearance of a dissenting rationale in this majority opinion will no doubt cause confusion in the trial courts with respect to the continuing vitality of the Yellowstone rule. I, too, dissented in Yellowstone, and for some of the same reasons set forth by Justice Shepard in his dissent. I still do not favor the abrogation of any type of interfamilial immunity. However, for the sake of consistency, we should adhere to the rationale expressed in Yellowstone.

Furthermore, it is one thing to cloak a family member with immunity when he is being sued directly by another family member, as was the case in Yellowstone. It is quite another matter to invoke the doctrine against a third party as the Court is doing here. In 1971, our legislature enacted I.C. §6-803, the "Contribution Among Joint Tortfeasors" statute. That statute specifically provides that a defendant in a tort action can bring a claim for contribution. The majority opinion has, in effect, given precedence to the 1891 decision of the Mississippi Supreme Court in *Hewellette v. George*, [], which apparently started this common law doctrine, over a 1971 pronouncement of the Idaho legislature.

## NOTES

(1) The courts, while rejecting an absolute privilege, have been concerned with the need to maintain some area of parental authority and discretion immune for judicial oversight. Which of the various rationales for rejecting parental immunity is most consistent with the desired results?

(2) *Owen v. Burcham*: The parents of a nine-year-old boy brought a wrongful death action against the motorist whose vehicle struck the decedent's bicycle. The motorist argued that the parents had been negligent in allowing their son to bike on the road. The Idaho Supreme Court disagreed:

> we see no negligence on the part of the parents in allowing their son to ride his bicycle on Castleford Road. Even assuming the existence of sufficient evidence of negligence on their part, we nevertheless hold that this is a proper circumstance to invoke the rule that is the child commits no act which would be considered negligent if committed by an adult, then any negligence on the part of the parent in permitting the child to go onto the road would be, at best, a remote cause of the injury and not a proximate cause and not sufficient to preclude recovery.

*Owen v. Burcham*, 100 Idaho 441, 599 P.2d 1012 (1979). Since *Owen* predated *Pedigo* the court was not presented with the issue of whether allowing their son to ride his bicycle on a rural road fell within the immunized area of parental discretion.

(3) Wrongful death and parental supervision: Does *Pedigo* bar the use of negligent supervision as a possible affirmative defense in a wrongful death action brought by the parents of a deceased child? Plaintiffs in *Nelson*, argued that "the failure to properly supervise one's children is not a legally recognizable basis for negligence in Idaho, "citing *Pedigo* for this proposition. The court disagreed:

> In *Pedigo*, an eleven-year-old girl was struck by a speed boat while she was floating on an air mattress in Lake Coeur d'Alene. She, through her guardian, brought suit against the owners of the boat for her injuries. The defendants sought to join the father of the child as a third-party defendant on the theory that his negligent supervision of the child was a contributing proximate cause of the accident. It was asserted in *Pedigo* that the father was negligent in his supervision of the child, that such negligence would form the basis of a cause of action by the child against the parent, that her father was, therefore, a joint tortfeasor, and that he was or could have been liable for contribution in the event the child recovered a judgment against the owners of the boat. In *Pedigo* we disagree with the basic premise of that assertion, i.e., that the child had a cause of action against its parent and stated:
>
> "We are willing to adopt a categorical rule that universally prohibits parent-child actions on the basis of a total and absolute parental immunity. It is enough to say in the instant case, involving the relatively narrow area of parental immunity for alleged negligent supervision, no cause of action exists beyond that specified by our existing legislatively imposed sanctions.
>
> "There can be little argument but that the parental immunity of Mr. Garren from suit brought by his daughter Pedigo also bars third parties who are tortfeasors from seeking contribution."
>
> *Pedigo* does not require a change in the long-standing rule in Idaho and other jurisdictions that the negligence of the parents may be asserted as a defense in an action brought by the parents for the wrongful death of a child. *Pedigo* was an action brought on behalf of the child. In the case at bar, the action is brought by the parents for their sole benefit. Under *Pedigo* parents may not be sued directly for the negligent supervision of their children, but on the other hand, as demonstrated in the case at bar today, parents may not personally profit from their own negligence.

*Nelson v. Northern Leasing Co*., 104 Idaho 185,657 P.2d 482 (1983).

(4) *Schiess v. Bates*: Several people set out for a fishing trip on Palisades Reservoir in a boat owned and operated by Mr. Schiess. As it was travelling back to the dock from where they had been fishing, a sudden storm arose which capsized the boat. All eight people were thrown into the reservoir. Holding onto the boat, Mr. Bates was able to reach and retrieve three persons: his own son, one of Mr. Schiess' children, and another boy. The four other individuals, unable to reach the boat, drowned. Mrs. Schiess subsequently filed suit for herself and her surviving children, alleging that Mr. Bates' negligence caused the boating accident. After denying any negligence on his part, Mr. Bates also moved for leave to file a third-party complaint against the estate of Mr. Schiess for the purpose of seeking indemnity or contribution for the alleged negligence of Mr. Schiess in causing the death of his daughter. Mrs. Schiess responded by arguing that the doctrine of parental immunity precludes the third-party complaint. The court, in an opinion by Justice Huntley, rejected the parental immunity defense:

> Mrs. Schiess' reliance on the doctrine of parental immunity as authority for precluding the maintenance of Mr. Bates' third-party complaint is ... misplaced. That doctrine - founded on the idea that family unity should not be disrupted by allowing children to sue their parents for injuries sustained as a result of the parent's negligence has no applicability to the facts of this case.

> The action Mrs. Schiess is bringing against Mr. Bates is under I.C. § 5-310.it is a wrongful death action brought by Mrs. Schiess for the loss of her daughter. It is not an action brought by Mrs. Schiess on behalf of her daughter's injuries. It is patently clear, then, that no claim is being brought by Mrs. Schiess' deceased daughter. This is significant, because the doctrine of parental immunity only applies to claims brought by living children.
>
> Likewise, reliance on parental immunity as a bar to the third-party action on the ground that it in effect converts Mr. Bates' claim against Mr. Schiess' estate into a claim by the children against their father is misplaced, since the Schiess children are not proper party plaintiffs.
>
> The order denying leave to file a third-party complaint is reversed, the parent-child immunity doctrine being inapplicable to this case. Further, the trial court is directed to order the dismissal of the surviving Schiess children as parties' plaintiff.

*Schiess v. Bates*, 107 Idaho 794,693 P.2d 440 (1984). *See also Jacobsen v. Schroder*, 117 Idaho 442, 788 P.2d 843 (1990).

## 4. A MISCELLANY OF STATUTORY IMMUNITIES

Another example of the recurrent tension between legislative and judicial, between statutory and common law, is the creation of statutory immunities. Recall the immunity for liability for negligence that the legislature extended to the drivers of emergency vehicles that was the subject of the Athay decisions in the introductory materials. Should the legislature be allowed to single out certain classes of individuals and immunize their tortious conduct? What limits ought to be imposed on such special interest legislation?

### a. Workers' Compensation

**LOUIE v. BAMBOO GARDENS**

(1) Perhaps the most significant legislatively enacted immunity is Compensation Act. Originally adopted in 1917, the Workers' Compensation Act was extensively amended and recodified in 1971. The Act's purposes are:

> The common law system governing the remedy of workmen against employers for injuries received, and occupational diseases contracted in industrial and public work is inconsistent with modem industrial conditions. The welfare of the state depends upon its industries and even more upon the welfare of its wage-workers. The state of Idaho, therefore, exercising herein its police and sovereign powers, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy proceeding or compensation, except as provided in this act, and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished except as in this law provided.

I.C. §72-201. The Act subsequently states that "the liability of the employer under this law shall be exclusive and in place of all other liability of the employer to the employee, his spouse, dependents, [or] heirs." Furthermore,

> [the] liability of an employer to another person who may be liable for or who has paid damages on account of an injury or occupational disease or death arising out of and in the course of employment of an employee of the employer and caused by the breach of any duty or obligation owed by the employer to such other person, shall be limited to the amount of compensation for

which the employer is liable under this law on account of such injury, disease, or death, unless such other person and the employer agree to share liability in a different manner.

I.C. §72-209(1), (2).

## b. Cows

**I.C. § 25-2118. Animals on open range- No duty to keep from highway**. No person owning, or controlling the possession of, any domestic animal running on open range, shall have the duty to keep such animal off any highway on such range, and shall not be liable for damage to any vehicle or for injury to any person riding therein, caused by a collision between the vehicle and the animal. "Open range" means all unenclosed lands outside of cities, villages and herd districts, upon which cattle by custom, license, lease, or permit, are grazed or permitted to roam.

**MORELAND v. ADAMS**

Idaho Supreme Court
143 Idaho 687, 152 P.3d 558 (2007)

TROUT, J: This case arises from a wrongful death action and addresses the definition of "open range" under Idaho Code section 25-2118. Plaintiffs, the family of the decedent, appeal the trial court's grant of summary judgment to defendants Royce and Randy Adams, whom the court found were entitled to immunity for cattle running on open range.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

On March 19,2004, Rodney Moreland was riding a motorcycle down 4 Mile North Road in Lincoln County, Idaho. While corrals and fencing appeared in some areas on the land alongside the road, signs posted around the area designated the land as open range. As Rodney Moreland drove his motorcycle over a rise in the road, he collided with a calf and was killed. The calf was owned by Randy Adams and the land adjacent to the road was owned in part by Royce Adams (Randy, Royce or collectively, the Adamses).

In their appeal, the Morelands argue that the trial court erred in its legal conclusions by failing to apply a three-prong test for open range immunity under I.C. § 25-2118, requiring land qualifying as open range to be (1) unenclosed, (2) outside of cities, villages, and herd districts, and (3) land on which cattle by custom, license, lease, or permit, are grazed or permitted to roam.

**III. DISCUSSION**

The question before this Court is whether the trial court erred in granting summary judgment to the Adamses. The trial judge granted summary judgment based on his conclusions that the collision occurred on open range land and that livestock owners in open range areas enjoy absolute immunity against claims for damages caused by livestock. The Morelands challenge the judge's finding that the site of the collision qualifies as open range land and argue that the judge failed to apply a three-prong statutory test for open range land as required by I.C. § 25-2118. To determine whether the judge erred in granting summary judgment, we must first determine how Idaho law defines open range.

In *Maguire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1978), this Court discussed the history of laws relating to the liability of a livestock owner for damage caused by his stock straying on another's land. Under common law, it was the duty of a livestock owner to fence in stock to keep them from causing damage ("fence in" rule), but Idaho and other western cattle states rejected that concept for a rule

allowing livestock to roam freely and imposing the duty on landowners to fence livestock out ("fence out" rule). [] As this Court noted, "the 'fence out' rule prevails" in Idaho. [] There are important legislative exceptions to the "fence out" rule and landowners may revert to a "fence in" rule by following statutory procedures to create a herd district. I.C. §§25-2401, -2402.

The Adamses claim open range immunity under I.C. §25-2118 ...The Morelands read the statute to grant open range immunity against liability to motorists only when three specific statutory requirements are met: the land is (1)"unenclosed," (2) falls "outside of cities, villages and herd districts," and (3) is land "upon which cattle by custom, license, lease, or permit, are grazed or permitted to roam." The trial judge disagreed and focused solely whether the land fell outside of any city, village, or herd district. On the uncontroverted facts presented by this case, the district court was correct in determining that the land in question was open range.

Our opinion in *Adamson v. Blanchard*, 133 Idaho 602, 990 P.2d 1213 (1999), is instructive to this case. In Adamson, a federal court certified to this Court the question of whether I.C. § 25-2119 grants absolute immunity from liability for negligence to owners of domestic animals involved in accidents on public highways. The Court held that where owners could show their animals were lawfully on the highway at the time of an accident, they were immune from liability under § 25-2119. [] The Court explained that '[l]ivestock areas in Idaho fall into two categories outside cities and villages: open range areas and herd districts. 'Open range' is defined by I.C. §25-2402 as all areas of the state not within cities, villages, or herd districts." [] Significantly, I.C. §§ 25-2402 and 25-2118 define open range in virtually identical terms. The definition of open range was not an issue before the Court in Adamson; however, the discussion of the meaning of open range was both necessary and instructive in differentiating between statutory provisions relating to open range, where there is absolute immunity, and provisions relating to herd districts, in which there is immunity only if cattle are legally on the road. Adamson makes it clear there is no third "hybrid" category for land outside of cities and villages.

This Court recognizes that, in interpreting the definition of open range in I.C. §25-2118, "all parts of a statute should be given meaning," and the Court "will construe a statute so that effect is given to its provisions, and no part is rendered superfluous or insignificant." [] The Morelands' attempt to create a three-part test for open range immunity from I.C. § 25-2118, however, does not square with the statutory language. Neither does it square with the companion herd district statutes or the historical meaning of open range under Idaho law. To read "unenclosed" as a requirement that open range land contain no fences is to create a test that is unworkable and could not have been intended by the legislature in adopting this statutory scheme. In contrast to a rule that all land outside cities, villages and herd districts is open range, courts would be analyzing cases on a very fact specific basis. Courts would be forced to ask: what type of fence makes land enclosed; is immunity lost only when the livestock owner, as opposed to anyone else, erects a fence; must the fence enclose cattle and be gated; does a fence erected for any purpose render the land no longer "unenclosed"? As a policy matter, requiring that land contain no fences whatsoever in order to qualify as open range would discourage ranchers from erecting fences, for any purpose, on open range land, lest they waive their open range immunity. Further, the herd district provisions would be meaningless, with de facto herd districts created anytime a fence was constructed, thereby shifting liability to livestock owners for damage caused by unfenced animals. The statutory reading the Morelands propose violates Idaho's historical policy that open range land is "fence out." Indeed, the Morelands would construe the statute to violate the inherent presumption of Idaho's "fence out" fence in" system that both open range and herd districts will contain fences, with the difference lying in the purpose the fencing serves.

In this case, it is uncontroverted that the site of the collision fell outside any city, village, or herd district. The district court was correct in concluding that the land was open range, and that the Adamses were entitled to summary judgment based on open range immunity...The judge correctly placed the burden of proof on the Adamses to demonstrate the land fell outside a city, village, or herd district. Consequently, no genuine issue of material fact remains, and summary judgment was appropriately granted.

CHIEF JUSTICE SCHROEDER AND JUSTICES EISMANN, BURDICK AND JONES CONCUR.

NOTES

(1) Is the court's construction of the statute persuasive? What is the court's rationale? That the history of cattle grazing in Idaho requires the statute to be read by ignoring some its language?

(2) *Griffith v. Schmidt* Plaintiffs vehicle struck two of defendant's horses, which were running loose on the road:

> A nighttime collision between a domestic animal and a vehicle is not uncommon in Idaho. Our research finds six such cases authored by this Court dealing with rights and liabilities between the animal and vehicle owners. The first such case, *Shepard v. Smith*, 74 Idaho 459, 263 P.2d 985 (1953), ... ruled that "res ipsa loquitur should be applied at least to the extent of requiring the owner of animals unattended upon a heavily traveled highway *** to satisfactorily explain their presence in order to avoid an otherwise justifiable inference of negligence." [Shepard was followed in *O'Connor v. Black*, 80 Idaho 96, 326 P.2d 376 (1958).]
>
> Subsequent to these first two cases the legislature enacted statutes granting immunity from liability and negligence to the animal owner in accidents stemming from a domestic animal's collision with a vehicle if:(1) the animal is running on "open range," I.C. § 25-2118; or (2) if the animal is "lawfully" on any highway, I.C. § 25-2119. The term "lawfully" is not defined, but its definition is not at issue in cases of nighttime vehicle collisions with unattended domestic animals running at large wherein we can presume the animals' presence on the highway does not fall within any reasonable definition of "lawfully." The plaintiff vehicle owner in the present case argues that if the statutes grant immunity as a matter of law when the animal is in "open range" or is "lawfully" on the highway, then the statutes also impose liability as a matter of law when the animal is not in "open range" or "lawfully" on the highway. We disagree, since a grant of immunity in specific circumstances cannot be equated to an imposition of strict liability as a matter of law when those specific circumstances are not found. Further, nighttime vehicle-animal collision cases considered by this Court subsequent to the enactment of the statutes have never held the animal owner negligent as a matter of law. Rather, the most recent opinion of *Cunningham v. Bundy*, 100 Idaho 456, 600 P.2d 132 (1979), continued to cite with approval Shepard and O'Connor, the two original cases prior to the statutes, and their limited application of res ipsa loquitur which supplies an inference of negligence "unless satisfactorily explained by the [animal] owner." [] The animal owner may rebut the inference by submitting evidence of the proper care, proper enclosures, fence conditions, fence inspections, diligent searches, etc. *See Cunningham v. Bundy*, []; *Whitt v. Jarnagin*, 91 Idaho 181, 418 P.2d 278 (1966); *Corthell v. Pearson*, 88 Idaho 295, 399 P.2d266 (1965); *Saran v. Schoessler*, 87 Idaho 425, 394 P.2d 160 (1964); *O'Connor v. Black*, 80 Idaho 96, 326 P.2d376 (1958); *Shepard v. Smith*, 74 Idaho 459, 263 P.2d985 (1953). *See also Maguire v. Yanke*,99 Idaho 829, 590 P.2d 85 (1978) (crop damage by cattle at large); *Stanberry v. Gem County*, 90 Idaho 222,409 P.2d430 (1965) (owner not liable for negligence of bailee in possession of animal). To summarize the law: (1) the owners of domestic animals are not liable or negligent when the animals cause a highway collision in "open range" or when the animals are "lawfully on any highway," I.C. §§ 25- 2118, 25-2119; (2) if the "open range" or "lawful" conditions are not present, then the doctrine of res ipsa loquitur supplies an inference that the animal owner was negligent; (3) the inference can be supplemented by other evidence of the owner's negligence; (4) the inference can be rebutted by a satisfactory explanation or showing by the animal owner of proper care, enclosures, and any other evidence tending to negate the Inference of the owner's negligence; (5)when properly placed at issue by the parties, the issues of lawful presence, inference of negligence, and rebuttal of the inference, are questions for the trier of facts: and (6), in any event, the vehicle owner may be liable for contributory negligence under various theories.

*Griffith v. Schmidt*, 110 Idaho 235, 715 P .2d 905 (1986). *See also Adamson v. Blanchard*, 133 Idaho 602, 990 P.2d 1213 (1999).

**d. Recreational Land Use**

In 1976, the legislature adopted - and in 1988 amended - a statute to expand recreational opportunities on private lands:

> § 36-1004: Limitation of liability of landowner- (a) Statement of Purpose. The purpose of this section is to encourage owners of land to make land and water areas available to the public without charge for recreational purposes by limiting their liability toward persons entering thereon for such purposes.
>
> (b) Definitions. As used in this section:
>
> 1. "Land" means private or public land, roads, trails, water, watercourses, Irrigation dams, water control structures, head gates, private or public ways and buildings, structures, and machinery or equipment when attached to or used on the realty.
>
> 2. "Owner" means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises.
>
> 3. "Recreational Purposes" includes, but is not limited to, any of the following or any combination thereof: Hunting, fishing, swimming, boating, rafting, tubing, camping, picnicking, hiking, pleasure driving, nature study, water skiing, animal riding, motorcycling, snowmobiling, recreational vehicles, winter sports, and viewing or enjoying historical, archeological, scenic, or scientific sites, when done with charge of the owner.
>
> (c) Owner Exempt from Warning. An owner of land owes no duty of care to keep the premises safe for entry by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes. Neither the installation of a sign or other form of warning of a dangerous condition, use, structure, or activity, nor any modification made for the purpose of improving the safety of others, nor the failure to maintain or keep in place any sign, other form of warning, or modification made to improve safety, shall create liability on the part of an owner of land where there is no other basis for such liability.
>
> (d) Owner Assumes No Liability. An owner of land or equipment who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:
>
> 1. Extend any assurance that the premises are safe for any purpose.
>
> 2. Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.
>
> 3. Assume responsibility for or incur liability for any injury to person or property caused by an act of omission of such persons.
>
> (e) Provisions Apply to Leased Public land. Unless otherwise agreed inwriting, the provisions of this section shall be deemed applicable to the duties and liability of an owner of land leased to the state or any subdivision thereof for recreational purposes.
>
> (f) Owner Not Required to Keep Land Safe. Nothing In this section shall be construed to:
>
> 1. Create a duty of care or ground of liability for injury to person or property.
>
> 2. Relieve any person using the land of another for recreational purposes for any obligation which he may have in the absence of this section to exercise care in

his use of such land and in his activities thereon, or from legal consequences or failure to employ such care.

3. Apply to any person or persons who for compensation permits the land to be used for recreational purposes.

(g) User Liable for Damages. Any person using the land of another for recreational purposes, with or without permission, shall be liable for any damage to property, livestock or crops which he may cause while on said property.

The most significant aspect of the 1988amendment was the addition of the second sentence to §36-1604(C).

**McGHEE v. CITY OF GLENNS FERRY**

Supreme Court of Idaho
111 Idaho 921, 729 P.2d 396 (1986)

DONALDSON, C.J.-The facts in this case are undisputed and can be simply stated as follows: On August 16, 1982, appellant, Johanna McGhee was injured when she fell from a swing located at Hull Memorial Park in Glenns Ferry, Idaho. Her mother, Pamela McGhee, brought suit against the city, the owner of the park, based on theories of negligence and strict liability. The district court granted summary judgment to the city and held that the city was immune from liability pursuant to I.C. §36-1604. This appeal followed.

.... Since the facts in this case are not disputed, we need only determine whether the district court properly applied I.C. § 36-1604 in granting respondent's motion for summary judgment.

The statute provides Limited liability to landowners who gratuitously allow others to use the land, or equipment attached to or used on the land, for recreational purposes. Appellants argue the legislature did not intend the statute to apply to public entities and that the operation of a city park falls outside the scope of "Recreational Purposes." We disagree.

I.C. §36-1604 provides in part

In reviewing statutory language, we "will assume the legislature intended what it said in the statute, and we will construe statutory terms according to their plain, obvious and rational meanings." [] Here the statute in (b)1 defines "land" as "private or public land," and in (b)2, it defines "owner" as "the possessor of a fee interest.***" Based on the plain meaning of this language we conclude that the city of Glenns Ferry is the "owner" and Hull Memorial Park is "public land" as defined by the statute. Therefore, the statute applies to public entities. This conclusion is supported by *Corey v. State*, 108 Idaho 921, 703 P.2d 685 (1985), where we held the same statute applicable to the state which also owned and operated a park.

Appellants' contention that the operation of a city park is outside the scope of "Recreational Purposes" is mischaracterized. If what they are asserting is that operation of a city park does not fall within the purview of the statute, we have already addressed that issue above. If not, the focus is not on the operation of the park, but whether appellants' use of a park swing is a "Recreational Purpose" within the meaning of the statute. Although the statute lists several activities in the definition of "Recreational Purposes," the statute expressly provides that the list is not exhaustive. Additionally, appellants have not argued that using the park swing is not recreational in nature. Nevertheless, applying the plain and obvious meaning of "Recreational Purpose," it is clear that such activity is recreational and, therefore, we conclude that appellants' activities were within the meaning of the statute.

Accordingly, the district court's judgment is affirmed and, respondent's request for attorney fees is denied.

SHEPARD & BAKES, JJ., CONCUR.

BISTLINE, J., DISSENTING

HUNTLEY, J., CONCURS.

NOTES

(1) The statute was held to be constitutional in *Johnson v. Sunshine Mining Co*., 106 Idaho 866, 684 P.2d 268 (1984).

**(2)** ***In Jacobsen v. City of Rathdrum****,* 115 Idaho 266, 766 P .2d 736 (1988), the Supreme Court reversed a summary judgment for the defendant in a case where a two-year old child suffered brain damage from a near-drowning in a city park. The Court held that there was a factual issue on whether the city's conduct in maintaining a dangerous bridge was willful or wanton. The Court also held that the recreational use statute did not preclude liability under the attractive nuisance doctrine.

In *Corey v. State*, 108 Idaho 921, 703 P.2d 685 (1985), the Court held that the statue barred the suit of a snowmobile operator who struck a chain across a road at Farragut State Park.

(3) In *Bauer v. Minidoka School District No. 331*, 116 Idaho 586, 778 P.2d 336 (1989), plaintiff was a junior high school student who broke his leg when he tripped over sprinkler pipes while playing football at the school prior to the beginning of classes. The district court granted summary judgment to the school district, concluding that the recreational use statute was applicable. The Supreme Court reversed. Justice Johnson offered the following explanation:

> [Plaintiff] was not the type of recreational user contemplated in the recreational use statute. He was a public school student who came to school early before classes began to play football with his classmates. If he had come to the school grounds to play a game of football that was not organized or sanctioned by the school on a day when school was not in session, we would have no trouble in applying the statute to limit the liability of the district. Nor would we have any difficulty in applying the statute, if he had come to the school grounds on a school day to play a game of football that was not organized or sanctioned by the school before the faculty and other students who were not involved in the game began arriving. The problem we have in applying the recreational use statute to these facts in that Tregg arrived to play football at the very time that the school was beginning its operations for the day, although no classes had begun. He was not just a member of the public: referred to in the recreational use statute. He was there as a student to begin the school day with a game of football. Some students may come early to talk to their teachers, some to visit with their classmates, some to study and others to participate in informal activities such as football. All of these are legitimate activities within the scope of a student's special relationship with the school.
>
> It would be entirely artificial to apply the recreational use statute to activities of students up to the moment the first bell rings and classes begin. No purpose would be served by drawing this line for application of the recreational use statute. When the principal is present, some faculty members are on duty and students have arrived, the school day has begun, and the recreational use statute has no application to a student who is injured on the school grounds.

*(iv) Miscellaneous Immunities*

(1) Ski area operators: I.C. §§ 6-1101 to -1107 limits the potential liability of ski area operators by specifying (i) a limited number of duties, §§ 6-1103 and 6-1104; (ii) that skiers expressly assume the risks of the sport, § 6-1106; and (iii) that any skier who violates duties imposed upon the skier may not recover, § 6-1107. *See generally Northcutt v. Sun Valley Co.,* 117 Idaho 351,787 P.2d 1159 (1990). The immunity if available only to the operator and hence does not apply to an "educational"

foundation set up to teach skiing. *Davis v. Sun Valley Ski Education Foundation, Inc*., 130 Idaho 400,941 P.2d 1301 (1997). *See also Withers v. Bogus Basin Recreational Association, Inc.*, 144 Idaho 78, 156 P.3d 579 (2007).

(2) State inspection of dams and mine tailing impoundment structures: I.C. §42-1717 requires the state to inspect all dams and mine tailing impoundments for their safety, but expressly precludes imposition of liability upon the state for its actions. *See generally Marty v. State*, 117 Idaho 133,786 P.2d 524 (1990).

**(3) Dramshop liability**: I.C. § 23-308 prohibits suits (1)by intoxicated individuals who suffer injury against the vendor or provider who furnished that intoxicated person the alcohol; (2) by a third party who is injured by an intoxicated person against the vendor or provider, unless (a) the intoxicated person was less than the legal age for consuming alcohol and the vendor or provider knew or should have known that the person was under age, or (b) the intoxicated person was obviously intoxicated. The statute was upheld against a constitutional challenge by an intoxicated person who was injured in a fall from a fire escape. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 987 P.2d 300 (1999).

**(4) Disasters**: I.C. §46-1011 empowers a mayor or the chair of the county commissioners to declare a local disaster emergency. The declaration may be continued beyond 7days only with the consent of the governing board of the political subdivision. The declaration triggers the applicable local and intergovernmental disaster emergency plans. In addition, I.C. §46-1017 provides a broad immunity:

> Neither the state nor any political subdivision thereof nor other agencies, nor, except in cases of willful misconduct, the agents, employees or representatives of any of them engaged in any civil defense or disaster relief activities, acting under a declaration by proper authority nor, except in cases of willful misconduct or gross negligence, any person, firm, corporation or entity under contract with them to provide equipment or work on a cost basis to be used in disaster relief, while complying with or attempting to comply with this act or any rule or regulation promulgated pursuant to the provisions of the act, shall be liable for the death of or any injury to persons or damage to property as a result of such activity. The provisions of this section shall not affect the right of any person to receive benefits to which he would otherwise be entitled under this act or under the workmen's compensation law or under any pension law, nor the right of any such person to receive any benefits or compensation under any act of congress.

These provisions have been applied in several contexts.

*Inama v. Boise County*, the owners of a front-end loader that was destroyed while the county was using it, without owners' permission, to clear roads during a natural disaster brought action again t county to recover value of loader. The district court granted the county's motion for summary judgment and the owners appealed. The supreme court affirmed, holding that (1) the county was immune under Disaster Preparedness Act, and (2) the owners were not entitled to recover compensation for inverse condemnation under eminent domain provision of Idaho Constitution*. Inama v. Boise County*, 138 Idaho 324, 63 P.3d 450 (2003).

In *S. Griffin Construction, Inc. v. City of Lewiston*, a building owner brought a variety of claims against the city, its officials, and wrecking ball operator. The claims were based upon the demolition of common wall between owner's building and fire-damaged building. The district court granted summary judgment and the building's owner appealed. The supreme court held that, since the city properly declared an emergency under the Disaster Preparedness Act as a result of a major fire in the business district, the wrecking ball operator was entitled to contractor immunity, under the Act, as to owner's negligence claims. *S. Griffin Construction, Inc. v. City of Lewiston*, 135 Idaho 181, 16 P.3d 278 (2000).