

Presumption of Negligence  
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## Introduction

- Negligence as a separate and independent basis of tort liability began to be recognized about the year 1825.
- Rise coincided with rise of industry and machinery, railroads.
- Intentional injuries began to be classified as a distinct field of liability.
- Negligence remained as the main basis for unintentional torts.

## Elements of Negligence Cause of Action

Traditional formula for a cause of action sounding in negligence:

- A duty, or obligation, recognized by law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risk.
- A failure on his part to conform to the standard required. **(This is traditionally what makes up negligence. The following two elements are necessary for a cause of action)**
- A reasonably close causal connection between the conduct and the resulting injury. **(legal cause or proximate cause).**
- Actual loss or damages resulting to the interests of another.\*

\* Various references to general negligence principals contained throughout this document are credited to Prosser, Law of Torts, 4<sup>th</sup> Edition, West Publishing Co., St. Paul, Minn. 1971.

## Elements of Negligence in Pa.

Elements of a negligence claim under Pa. law are:

- Duty or obligation recognized by law, requiring actor to conform to certain standard of conduct for protection of others against unreasonable risks;
- Failure to conform to standard required;
- Causal connection between conduct and resulting injury;
- Actual loss or damage resulting in harm to interests of another.\*

\*Northw. Mut. Life Ins. Co. v. Babayan, 430 F.3d 121 (2005); Farabaugh v. Pa. Turnpike Com., 911 A.2d 1264 (2006).

## The “reasonable man standard”

The whole theory of negligence presupposes some uniform standard of behavior

**PROBLEM:** the infinite number of situations which can arise makes it impossible to fix definite rules in advance for all conceivable human conduct

**SOLUTION:** devise a formula, the application of which in each particular case must be left to a jury or court

## The “reasonable man standard”

- Formula:
  - Must be an external and objective one, rather than the judgment, good or bad, of an individual
  - Must be the same for all persons, since law should not have any favorites
  - At same time, must make allowances for:
    - The risk apparent to the actor
    - The actor’s capacity to meet the risk
    - The circumstances under which he must act

## The “reasonable man standard”

- Thus, jurisprudence has derived one standard, reference as an one of the following:
  - Reasonable man standard
  - Prudent man standard
  - Man of average prudence standard
  - Man of ordinary sense using ordinary care and skill

## The “reasonable man standard”

Actor in a negligence cause of action is supposed to do what this ideal “reasonable man” would be supposed to do in his place.

A model of all proper qualities, with only those human shortcomings and weaknesses which the community will tolerate on the occasion

## The “reasonable man standard”

- Abstract and hypothetical character of this mystical person
  - Not identified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful person, who is always up to standard
  - Not to be identified with even any member of the jury that is to apply the standard; he is the personification of a community ideal of reasonable behavior, determined by the jury’s social judgment

## The “reasonable man standard”

### Attributes of the reasonable man:

Physical Attributes – Generally, the reasonable man may be seen to be identical with the actor when it comes to physical attributes:

What would a reasonable blind man do?

What would a reasonable physically challenged man do?

## The “reasonable man standard”

A person with physical limitations cannot be required to do the impossible by conforming to reasonable standards which he cannot meet.

The conduct of the challenged individual must be reasonable in light of the knowledge of the limitation, which is treated merely as one of the circumstances under which he acts.

# The “reasonable man standard”

## Physical attributes

- **Davis v. Feinstein, 8 A.2d 695, 370 Pa. 449 (1938)** – A blind person is not bound to discover everything which a person of normal vision would but he is bound to use due care under the circumstances.
  - *Argo v. Goodstein*, 438 Pa. 468 (1970).
  - *Cook. v. City of Winston-Salem*, 241 N.C. 422 (1954)
  - *Balcom v. City of Independence*, 178 Iowa 685 (1916)

## The “reasonable man standard”

- An impaired person must be reasonable in light of his own knowledge of his limitations;
  - A blind person may be negligent in going into a place of known danger
  - A person subject to seizures or knows he is about to fall asleep may be negligent in driving a car
    - **Eleason v. NY Rd. Co., 254 Wis. 134 (1948)**
    - **Manser v. Ede, 263 Mich.107 (1933)**

## The “reasonable man standard”

### **Mental Attributes**

- **Epstein v. Fatzinger, 45 D&C 3d 1 (1987)** – Insanity defense may not be asserted in negligence case as mental deficiency does not relieve actor for liability for conduct which does not conform to the standard of a reasonable man under like circumstances.

### *BUT*

The degree of care of a person who voluntarily becomes intoxicated does not differ from that required of a sober person.

**McMichael v. Pa. Rd. Co., 331 Pa. 584, 1 A.2d 242 (1938).**

**Scott v. Gardner, 137 Tex. 628 (1941).**

**Lynch v. Clark, 183 Or. 431 (1948).**

## The “reasonable man standard”

### Age

When measuring the conduct of children, courts depart from the well-known objective test of the care of a reasonable and prudent man, the test generally utilized to judge adult behavior, *Gift v. Palmer*, 392 Pa. 628, 141 A.2d 408 (1958); *Aquadro v. Crandall, Inc.*, 182 Pa.Super.435, 128 A.2d 147 (1956), and make allowance for immaturity. A child is held to that measure of care that other minors of like age, experience, capacity and development would ordinarily exercise under similar circumstances. *Kuhns v. Brugger*, 390 Pa. 331, 135 A.2d 395 (1957); *Koenig v. Flaherty*, 383 Pa. 187, 117 A.2d 719 (1955).

*Dunn v. Teti*, 421 A.2d 782 (Pa. Super.1980).

## The “reasonable man standard”

- The application of this standard is clarified by the use of several presumptions delineating convenient points to aid in drawing the uncertain line between capacity to appreciate and guard against danger and incapacity: (1) minors under the age of seven years are conclusively presumed incapable of negligence; (2) minors between [\*\*\*4] the ages of seven and fourteen years are presumed incapable of negligence, but the presumption is a rebuttable one that weakens as the [\*403] fourteenth year is approached; (3) minors over the age of fourteen years are presumptively capable of negligence, with the burden placed on the minor to prove incapacity. [Kuhns v. Brugger, supra.](#)

## Custom or Practice as Evidence of Standard of Care

- Customary methods of conduct do not furnish test which is conclusive or controlling on question of negligence, or fix standards by which negligence is to be gauged.
- What ought to be done is fixed by standard of reasonable prudence, regardless of whether it is usually complied with. Customary methods, machinery or appliance is evidence of exercise of reasonable care, not a conclusive test.

Thomas v. Arvon Products Co., 227 A.2d 897 (Pa. 1967); McAdoo v. Autenreith's Dollar Stores, 109 A.2d 156 (Pa. 1954); Rotshteyn v. Agnati, 149 F.Appx. 63 (3d Cir. 2005).

## Custom or Practice as Evidence of Standard of Care

Similarly, the fact that a thing is done in an unusual manner is merely evidence to be considered in determining negligence, and is not in itself conclusive.

Turner v. Chicago Housing Authority, 11 Ill. App. 60 (1956); Silver Falls Timber Co. v. Eastern and Western Lumber Co., 149 Or. 126 (1935); Levine v. Russell Blaine Co., 273 N.Y. 386 (1937).

## Unavoidable Accident

An occurrence which was not intended and which, under all the circumstances, could not have been foreseen or prevented by the exercise of reasonable precautions. Examples:

- runaway horse
- driver of automobile with heart attack, etc.
- car thrown out of control by another vehicle
- child darts out from between cars

## Unavoidable Accident

- Mere happening of accident does not prove negligence by either party; still must be proof that defendant transgressed some duty of care required under the circumstances.

Schofield v. King, 130 A.2 93 (1957); Dorn V. Leibowitz, 127 A. 2d 734 (1956); Gutteridge v. A.P. Green Services, Inc. 804 A.2d 643, re-argument denied, appeal denied, 829 A. 2d 1158, 574 Pa. 748 (Pa. Super. 2002).

## Proximate Cause v. Causation in Fact

- “Causation in fact” – all things that have so far contributed to the result that without them it would not have occurred.
- “Proximate cause” – a material element and a substantial factor in bringing it about

## Proximate Cause v. Causation in Fact

- Causation in fact
  - many courts have derived a rule, commonly known as the “but for” or “sine qua non” rule: if the event would not have occurred “but for” the defendant’s negligence – generally has no bearing on legal liability

## Proximate Cause v. Causation in Fact

- Proximate cause
  - if the defendant's conduct was a substantial factor in causing the injury, he will not be absolved from liability merely because many other “causes in fact” have contributed to the result

## Negligence Per Se

- Negligence Per Se -

In Pennsylvania, to prove negligence per se the plaintiff must show that the defendant's conduct, whether of action or omission, violated a the statute or ordinance, and that said conduct caused harm of the kind the statute was intended to avoid and that the plaintiff is within the class of persons the statute was intended to protect.

## Negligence Per Se

- McCloud v. McLoughlin, 2003 PA Super 451
  - McCloud appealed from a judgment on jury verdict of the Court of Common Pleas of Philadelphia County that awarded her damages against McLoughlin, the owner of a dog that attacked her but found McLoughlin not liable. McCloud argued that the McLoughlin's violation of a dog control ordinance made her negligent per se and that she was absolutely liable as well. The court affirmed the order denying the pedestrian's motion for new trial, as well as the underlying judgment.

## Negligence Per Se

- McCloud proceeded to trial solely on a theory of ordinary negligence, but argued on appeal that by the phrasing of certain requests for admissions to which the McLoughlin had not responded, she had also preserved for review, as required by Pa. R. App. P. 302(a), claims for recovery under theories of absolute liability and negligence per se. The appellate court held that the two liability theories were quite distinct from ordinary negligence (absolute liability for dog injuries was not even recognized in Pennsylvania, and negligence per se would only be found if injuries were shown to be causally related to an ordinance violation), and McCloud's failure to mention either one at trial precluded review.

## Negligence Per Se

### Holdings

**"Negligence per se" may be defined as conduct, whether of action or omission, that may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal ordinance, or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it.**

## Negligence Per Se

- **There can be no finding of negligence per se without there first being a statute that regulates conduct and an actual violation of that statute. Further, before an individual can be held negligent per se, his violation of the statute or ordinance must cause harm of the kind the statute was intended to avoid and to a person within the class of persons the statute was intended to protect.**

## Negligence Per Se

- **Negligence per se and common law negligence impose different standards that have their basis under two different theories of law and can lead to two different outcomes at trial.**
- **Under an ordinary negligence theory, before a jury can find a defendant negligent, it has to first find that the defendant breached a duty to the plaintiff. This duty is based on the common law standard of care.**
- **Under a negligence per se theory, a defendant's standard of care is defined in accordance with the statute itself, not under the common law.**

## Negligence Per Se

- Cabiroy v. Scipione, 2001 PA Super 29

Cabiroy brought an action alleging Scipione committed medical malpractice when he treated Cabiroy with injections of liquid silicone to cosmetically improve a nasal deformity. The jury returned a verdict in favor of appellant. Cabiroy filed post-trial motions, claiming, inter alia, the trial court erred in granting a non-suit on the issue of negligence per se. The trial court ordered a new trial. On appeal, Scipione argued the trial court erred in ruling the jury should have been permitted to consider the claim of negligence per se.

## Negligence Per Se

- Cabiroy v. Scipione, 2001 PA Super 29 (continued)

The appellate court affirmed the order, determining the trial court properly reversed its ruling granting a non-suit on the issue of negligence per se. The appellate court reasoned that through proof of Scipione's violation of 21 U.S.C.S. § 331(c), Cabiroy proved as a matter of law the first two elements of his cause of action, the duty and the breach of duty. This coupled with any evidence presented on causation and damages were matters for the jury's consideration.

## Negligence Per Se

- Holdings

**The concept of negligence per se establishes both duty and the required breach of duty where an individual violates an applicable statute, ordinance or regulation designed to prevent a public harm. A plaintiff, however, having proven negligence per se, cannot recover unless it can be proven that such negligence was the proximate cause of the injury.**

## Negligence Per Se

**A violation of a statute may be negligence per se and liability may be grounded on such negligence but the plaintiff cannot recover unless such negligence is the proximate and efficient cause of the injury in question. The doctrine of negligence per se does no more than satisfy a plaintiff's burden of establishing a defendant's negligence. It does not end the inquiry. The plaintiff still bears the burden of establishing causation.**

## Negligence Per Se

- Negligence per se – Florida
- *In Florida, A violation of any statute is not necessarily negligence per se; for some, a violation may be only evidence of negligence. A violation of a "strict liability" type of statute is negligence per se. Also negligence per se is a violation of any other statute which establishes a duty to take precautions to protect a particular class of persons from a particular injury or type of injury. Contributory negligence is a defense to negligence based on a violation of this type of statute. Also, the fact of negligence per se resulting from a violation of this type of statute does not necessarily mean there is actionable negligence. It must also be established by a plaintiff that he is of the class the statute was intended to protect, that he suffered injury of the type the statute was designed to prevent, and that the violation of the statute was the proximate cause of his injury. Violation of any other type of statute may be considered only as prima facie evidence of negligence. deJesus v. Seaboard C. L. R. Co., 281 So. 2d 198*

## Negligence Per Se

- Negligence per se – Florida

*deJesus v. Seaboard C. L. R. Co.*, 281 So. 2d 198

- The Second District Court of Appeal certified a question to the court regarding whether, in a negligence action brought by petitioners against respondent railroad, the trial court erred in giving a jury instruction that a railroad's violation of Fla. Stat. ch. 357.08 was "negligence per se." The court answered the certified question in the negative, holding that the trial court had not erred in giving such an instruction. Therefore, the court reversed the appellate court order, which had reversed the trial court judgment for petitioners in their negligence action against respondent railroad.

## Negligence Per Se

- (deJesus, continued) Petitioner husband was driving his car with petitioner wife as a passenger when he collided at night with a tank car of respondent railroad. Petitioners brought a negligence action against respondent. One of the instructions to the jury specified that an alleged violation by respondent of Fla. Stat. ch. 357.08 was "negligence per se." The jury returned a verdict for petitioners. On appeal, the district court held that the giving of the "negligence per se" instruction was error. It reversed and remanded the case, and certified a question to the supreme court.

## Negligence Per Se

- (deJesus, continued)
- Reviewing the record, the supreme court concluded that the statute imposed upon respondent, as a railroad, a duty to protect automobile drivers and their passengers from colliding with unlighted trains blocking highways at night at unlighted crossings. The violation of the statute was "negligence per se," and the district court order reversing the trial court decision for petitioners was reversed.

## Negligence Per Se

*Chevron U.S.A., Inc. v. Forbes*, 783 So. 2d 1215

- Appellee sued appellants in the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County (Florida) for injuries he received when he slipped and fell in a puddle of gas at a gas station. Appellants challenged the verdict for appellee. The judgment was reversed and the matter was remanded.

## Negligence Per Se

- (Chevron continued)

Appellee pumped gas into his minivan and went inside the station to pay for the gas and purchase cigarettes. As he was returning to his car, his feet "just went up" in front of him and he landed on his back, striking his buttocks, back, and head. During his struggle to stand up, appellee discovered that he had slipped in a puddle of liquid. The issue on appeal was whether the trial court erred in instructing the jury that a violation of Fla. Stat. ch. 526.141 (1997), was negligence per se.

## Negligence Per Se

- (Chevron continued)
- There was no language in Fla. Stat. ch. 526.141 that suggested a legislative purpose to protect against slip and falls. Absent such intent, appellee could not sustain a cause of action based on violation of the statute. Because there was a reasonable possibility that the instruction misled the jury and contributed to its verdict for appellee, the appellate court was unable to conclude that it was harmless.

## Negligence Per Se

- **The Florida Third District Court of Appeal has summarized the three categories of statutory violations as follows: (1) violation of a strict liability statute designed to protect a particular class of persons who are unable to protect themselves, constituting negligence per se; (2) violation of a statute establishing a duty to take precautions to protect a particular class of persons from a particular type of injury, also constituting negligence per se; (3) violation of any other kind of statute, constituting mere prima facie evidence of negligence.**

## Negligence Per Se

- *Lingle v. Dion, 776 So. 2d 1073 (Florida)*

Involved negligence in the implantation of artificial pectoral muscles and statute requiring hospital staff privileges

- **Violations of statutes or ordinances, other than those imposing a form of strict liability, may be either negligence per se or evidence of negligence. A cause of action in negligence per se is created when a penal statute is designed to protect a class of persons, of which the plaintiff is a member, against a particular type of harm. Violation of a statute, code, or ordinance which is designed to protect the general public, and not a particular class of persons, constitutes evidence of negligence and not negligence per se.**

## Negligence Per Se

- *Eckelbarger v. Frank*, 732 So. 2d 433 (Florida)

Involved Ordinance 82-19, which required appellants to install a gate with a spring lock in a fence around their pool, was a strict liability statute, and that appellants, who did not have a spring lock on their gate, were thus strictly liable for the death of appellee's child who drowned in appellants' swimming pool.

***Held:* Statute was a negligence per se statute, not a strict liability statute, because it did not supersede appellee's duty to watch her children.**

## Negligence Per Se

- Negligence Per Se - Illinois
- In Illinois, the violation of a statute or ordinance designed to protect human life or property is prima facie evidence of negligence. The violation of such a statute does not constitute negligence per se, however. Therefore a defendant may prevail by showing that he acted reasonably under the circumstances. A party injured by such a violation may recover upon showing that the violation proximately caused the injury, that the statute or ordinance was intended to protect the class of persons to which the party belongs, and that the injury suffered was of the type the statute or ordinance was designed to protect against. Bier v. Leanna Lakeside Prop. Ass'n, 305 Ill. App. 3d 45

## Negligence Per Se

- *Davis v. Marathon Oil Co.*, 64 Ill. 2d 380 (Illinois)
- **Violation of a statute or ordinance designed for the protection of human life or property does not constitute negligence per se, for the evidence of negligence may be rebutted by proof that the party acted reasonably under the circumstances, despite the violation. And proven negligence results in liability only when the injury was proximately caused by the violation**

## Negligence Per Se

- *Abbasi by & ex rel. Abbasi v. Paraskevoulakos*, 187 Ill. 2d 386
- Involved private causes of action based on defendants' violations of the Lead Poisoning Prevention Act (Act), 410 Ill. Comp. Stat. 45/1 et seq., and several chapters of the Chicago Municipal Code (Code).
- **Held - The violation of a statute is not negligence per se, which refers to strict liability, but rather only prima facie evidence of negligence, unless the legislature clearly intends to impose strict liability.**

## Negligence Per Se

- *Bier v. Leanna Lakeside Prop. Ass'n*, 305 Ill. App. 3d 45
- The complaint alleged defendant was negligent in inviting swimmers to swing from the rope when it was not safe to do so and in failing to meet safety provisions of the Beach Act, 210 Ill. Comp. Stat. 125/4 and 125/5.
- **Held: Court allowed plaintiffs to proceed with their statutory claim because a finding that defendant violated the Beach Act would be prima facie evidence of negligence. The court noted that the open and obvious nature of the condition would go to the issue of proximate cause to be resolved by a jury.**

## Negligence Per Se

- Negligence per se – Louisiana
- In Louisiana, violation of a statute or ordinance constitutes negligence per se. However, to be actionable the negligence must also be a legal cause of the accident. Actionable conduct is both a cause in fact of the injury and a legal cause of the harm incurred. To satisfy the cause in fact requirement, the finder of fact must determine that the injury would not have been sustained "but for" the conduct of the party allegedly negligent. To be a legal cause of the harm, there must be a "substantial relationship" between the conduct and the harm incurred. Hood v. Sartor, 882 So. 2d 700

## Negligence Per Se

- *Osawe v. Deep S. Surplus, Inc.*, 806 So. 2d 170 (Louisiana)

The victim was a cab driver who claimed he was injured when the driver made a right hand turn in front of the victim's cab and their vehicles collided. The victim claimed he was in the right hand lane and the driver had made his turn from the center lane. The driver claimed he was in the right hand lane and the collision occurred when the victim pulled away from a taxi stand in front of a hotel.

## Negligence Per Se

- *Osawe v. Deep S. Surplus, Inc* (continued)
  - The fact that the driver had been cited for making an improper turn was not controlling as, even if that gave rise to a claim of negligence per se, the driver's negligence still had to have been the cause of the accident for negligence per se to apply.
- **The breach of a statute that creates a standard of care would be considered negligence per se. However, for the negligence to be actionable, it must have a causal connection to the accident.**

## Negligence Per Se

- Jones v. Lawrence, 940 So. 2d 34 (Louisiana)
- The following driver stopped before proceeding to pass the leading driver on the right using the shoulder. Despite the reasonableness of finding that the leading driver was at fault because of his "unexplained and bizarre" behavior, the appellate court held that the trial court erred in not assessing some fault for the accident to the following driver because of his improper passing. The following driver passed the leading driver on the right driving, at least partially, on the shoulder. Passing on the right was prohibited by La. Rev. Stat. Ann. § 32:74.

## Negligence Per Se

- Jones v. Lawrence (continued)
  - The accident would not have occurred "but for" the following driver attempting to pass the leading driver on the shoulder. The violation of § 32:74 was not a strained or tangential cause of the accident. Attempting to pass on the shoulder directly and substantially resulted in the accident. The trial court was clearly wrong to have found the following driver without fault.
- **For a violation of a statute to be actionable under negligence per se, the conduct must be both the cause in fact and the legal cause of the injury. A party satisfies cause in fact if he shows that, "but for" the alleged negligent act, the injury would not have occurred. Legal cause requires that the alleged negligent act have a substantial relationship to the harm incurred.**

## Res Ipsa Loquitur

- Pennsylvania
- *In Pennsylvania res ipsa loquitur has been formulated as follows: (1) It may be inferred that harm suffered by a plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff. (2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn. (3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached. Quinby v. Plumsteadville Family Practice, Inc., 589 Pa. 183*

## Res Ipsa Loquitur

- Quinby v. Plumsteadville Family Practice, Inc., 589 Pa. 183
- The decedent, who was a quadriplegic, suffered injuries when he fell from an examination table while unattended after a minor operative procedure performed by the doctor in which the nurse assisted. According to the decedent, he was placed on the examination table on his right side with a pillow behind his back. The nurse and doctor claimed that the decedent was flat on his back in the middle of the table.

## Res Ipsa Loquitur

- Quinby v. Plusteadville Family Practice, Inc., (continued)
  - The trial court should have permitted a res ipsa loquitur inference of negligence. It was uncontested that the alleged negligence was within the scope of the duty of the doctor and nurse to the decedent. The decedent's fall from the examination table was an event of a kind that ordinarily did not occur in the absence of negligence. The decedent could not move his lower limbs, trunk, and right upper limb, and he had only very slight use of his upper left limb. The decedent was not secured by straps or by side rails. Other reasonable causes, including the conduct of the decedent and third persons, were sufficiently eliminated by the evidence. Given the decedent's paralysis, he could not have been responsible for the fall.

## Res Ipsa Loquitur

- Quinby v. Plusteadville Family Practice, Inc., (continued)
- **The res ipsa loquitur inference is permitted if: (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.**
- **In the context of res ipsa loquitur, it is a rule that provides that a plaintiff may satisfy his burden of producing evidence of a defendant's negligence by proving that he has been injured by a casualty of a sort that normally would not have occurred in the absence of the defendant's negligence. Res ipsa loquitur is a simple matter of circumstantial evidence.**

## Res Ipsa Loquitur

- *Kelly v. St. Mary Hosp.*, 2001 PA Super 175
- Patient claimed that she was injured when, on three separate occasions while she was a patient, a bed rail fell and struck her wrist while she attempted to manipulate the controls on her bed. The doctrine of res ipsa loquitur was inapplicable, as it patient failed to present evidence that this event was of a kind which ordinarily does not occur in the absence of negligence or that the alleged negligence was within the scope of hospital's duty to patient, required elements for a claim of res ipsa loquitur.

## Res Ipsa Loquitur

- *Williams v. Otis Elevator Co.*, 409 Pa. Super. 486
- Plaintiff passenger fell and sustained injury when an elevator in which she was riding, manufactured and maintained by defendant manufacturer, lurched as she was exiting.
- **A res ipsa loquitur charge is appropriate where the facts of a case lie somewhere in a grey zone between the case in which the plaintiff brings in no evidence of specific acts of negligence, and therefore must rely on the res ipsa loquitur inference alone, and the case in which the defendant's negligence can be clearly and indubitably ascertained' from the plaintiff's evidence, and therefore the plaintiff need not rely on the res ipsa loquitur inference at all.**

## Res Ipsa Loquitur

### Florida

- *In Florida, to state a claim under the res ipsa loquitur doctrine an injured plaintiff must establish two things: 1) that the cause of his or her injury was under the exclusive control of the defendant, and 2) that the injury would not, in the ordinary course of events, have occurred without negligence on the part of the defendant, who was in control.*  
Kenyon v. Miller, 756 So. 2d 133

## Res Ipsa Loquitur

- Kenyon (continued)
- Trial court's res ipsa instruction improperly permitted the jury to disregard the conflicting expert testimony and infer negligence solely on the facts that all of the mesh in appellee's body was not removed, and that appellee's infection recurred a year and a half later. The mere fact that she was unconscious during surgery was not, by itself, sufficient to satisfy the first element of invoking res ipsa loquitur.

## Res Ipsa Loquitur

Goodyear Tire & Rubber Co. v. Hughes Supply, 358 So. 2d 1339 (Florida)  
(alleged negligent manufacture of tires in personal injury actions)

The court held that res ipsa loquitur was unavailable because the parties introduced specific evidence regarding negligence and that res ipsa loquitur was only available when direct evidence of negligence was unavailable due to the unusual circumstances of the injuring incident. The court determined that the facts surrounding the incidents were discoverable and provable and that they were not of a nature typically suggestive of negligence by petitioners. Further, respondents failed to allege and prove the essential element of petitioners' exclusive control over the injury-causing instrumentality.

## Res Ipsa Loquitur

- Goodyear Tire (continued)
- **The doctrine of res ipsa loquitur may not be invoked unless it appears that the thing causing the injury was so completely in the control of defendant that, in the ordinary course of events, the mishap could not have occurred had there been proper care on defendant's part.**

## Res Ipsa Loquitur

- Illinois
- *In Illinois, in order for the doctrine of res ipsa loquitur to apply plaintiff must demonstrate: (1) that the agency or instrumentality causing personal injury or property damage was, at the time of the creation of the condition causing injury or damage, under the management or control of the party charged with negligence and (2) that the accident occurred under circumstances that in the ordinary course of events it would not have occurred if the party so charged had used proper care while the agency or instrumentality was under his management or control. Indiana H. B. R.R. Co. v. American Cyanamid Co., 1991 U.S. Dist. LEXIS 13983*

## Res Ipsa Loquitur

- Indiana H. B. R.R (continued)
- The court denied the railway's motion for summary judgment on both issues. As to the railway's contention that the company was negligent in using a bottom-outlet tank to transport the chemical, the court found that the company's customer brochure discouraging bottom unloading was insufficient in proving negligence for purposes of a summary judgment. Any foreseeable risk associated with unloading from a bottom-outlet tank was not a proximate cause of the spillage.

## Res Ipsa Loquitur

- Indiana H. B. R.R (continued)
- Addressing the railway's reliance on a res ipsa loquitur theory to infer that condition of the tank car as it left the company's plant, the court concluded that the weight or strength of an inference of negligence depended on the facts and circumstances which was a question of fact determinable by a jury. Here, the company contended the accident was caused by debris left on the track or vandalism, resulting in an impact that dislodged the valve and caused it to open. Defendant's theory was backed by expert testimony. Resolving the issue of who was at fault, if anyone, fell within the province of the jury, making summary judgment inappropriate.

## Res Ipsa Loquitur

- Indiana H. B. R.R (continued)
- Held:
  - **Res ipsa loquitur is an avenue which relieves a plaintiff from proving negligence when the circumstances of an unexplained occurrence are such that an inference of negligence against the party charged is a reasonable one. Whether the doctrine applies is a question of law for the courts. Therefore, the court must first consider whether res ipsa loquitur should be applied as a possible theory of recovery, and if so, whether the inference of negligence, which the doctrine yields, is so strong as to support summary judgment for plaintiff.**

## Res Ipsa Loquitur

- **A plaintiff need not conclusively prove all the elements of res ipsa loquitur in order to invoke the doctrine. He need only present evidence reasonably showing that elements exist that allow an inference that the occurrence is one that ordinarily does not occur without negligence.**

## Res Ipsa Loquitur

- *Harms v. Laboratory Corp. of America*, 155 F. Supp. 2d 891 (Illinois) (blood tests)
- **Whether the doctrine of res ipsa loquitur applies to a specific case is a question of law which the court must decide in the first instance based on whether the plaintiff has presented sufficient facts that could establish that the defendant had exclusive control over the instrumentality and that the injury is otherwise unexplainable absent defendant's negligence. Once that decision is made, however, it becomes the function of the trier of fact to weigh the strength of the inference of general negligence.**

## Res Ipsa Loquitur

- **Specifically, the Illinois Supreme Court has held that the weight or strength of such inference will necessarily depend on the particular facts and circumstances of each case and is normally a question of fact to be determined by the jury. This is because res ipsa loquitur, when properly established, raises a permissive -- not a mandatory -- inference that plaintiff's injury arose from defendant's negligence. Courts are very reluctant to grant summary judgment for a plaintiff under the doctrine of res ipsa loquitur.**

## Res Ipsa Loquitur

- Turner v. Wallace, 71 Ill. App. 2d 160
- **The res ipsa instruction is to be used only where the evidence at the close of a case has failed to reveal the actual specific forces which initiated the instrumentality that produced the effect, and there is sufficient proof to sustain an affirmative finding on each of the basic facts from which the res ipsa loquitur inference is permitted.**

## Res Ipsa Loquitur

- **Rejection of the res ipsa maxim does not mean that actionable negligence may not have been established, as a matter of law, by the circumstantial or direct proof.**

## Sudden Emergency Doctrine

- **Sudden Emergency:** A sudden an unexpected occurrence of a transitory nature which demanded immediate action without time for reflection or deliberation and not created by the defendant. *Hatala v. Craft*, 165 Ohio App3d 602, 2006-Ohio-789.

## Sudden Emergency Doctrine

- Pa – Generally, an individual will not be held to the usual degree of care or be required to exercise his or her best judgment when confronted with a sudden and unexpected position of peril created in whole or in part by someone other than the person claiming protection under the doctrine. Carpiner v. Mitchell, 853 A.2d 366, rearg. den., appeal den., 889 A.2d 1212, 586 Pa. 706 (Pa. Super. 2004).
- Doctrine does not apply to vehicles moving in the same direction or in emergency created by person seeking protection. Com. v. Matroni, 923 A.2d 444, app. den. 952 A.2d 675 (Pa. Super. 2007).

## Premises Liability – Different Degrees of Care

- Pa. – Duty of possessor of land toward a third party entering the land depends upon whether the entrant is a trespasser, licensee or invitee. Cresswell v. End, 831 A.2d 671 (Pa. Super 2003).

## Premises Liability – Different Degrees of Care

### Invitee

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he:

- 1. knows or by the exercise of reasonable care would discover the condition, and should realize it involves an unreasonable risk of harm to such invitees;
- 2. should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and
- 3. fails to exercise reasonable care to protect them against the danger.

Chenot v. A.P. Green Services, Inc., 895 A. 2d 55 (Pa. Super. 2006)

## Premises Liability – Different Degrees of Care

### Licensee

Possessor of land owes duty to warn of a dangerous condition only if the possessor has knowledge of it and realizes that the condition involves an unreasonable risk of harm to the licensee and that the licensee is not likely to discover its existence.

Phillips v. Winters' Cleaners & Tailors, Inc., 344 F.Supp. 1040, aff'd. 485 F.2d 681 (3d Cir. 1972).

## Premises Liability – Different Degrees of Care

### Trespassers

Trespassers may recover for injuries sustained on land only if the possessor of land was guilty of wanton or willful negligence or misconduct.

Rossino v. Kovacs, 718 A. 2d 755 (Pa. 1998).

## Attractive Nuisance

- Possessor of land is liable for injuries to trespassing children caused by structure or other artificial condition maintained on land which possessor knows or should know that children are likely to trespass upon without discovering condition or realizing risk
  - Only where landowner brings on his land or permits thereon something of artificial nature which is both attractive and dangerous to children

Cousins v. Yaeger, 394 F. Supp. 595 (E.D.Pa., 1975).

## Assumption of the Risk

- An affirmative defense which will bar a Plaintiff's claim based on ordinary negligence. This is the risk that is inherent in the activity, and as a result, the defendant owes no duty to the plaintiff. The classic example is the risk of a spectator being hit by a foul ball at a baseball game, or the ordinary risk associated with participation in sporting activities. *Cincinnati Baseball Club v. Eno* (1925), 112 Ohio St. 175; *Barakat v. Pordash*, 164 OhioApp.3d 328, 2005-Ohio-6095. Primary assumption of the risk is not a defense to a claim based on willful or wanton misconduct.

## Assumption of the Risk

- Pa. – Assumption of the risk is essentially a form of estoppel in a tort context; even if defendant was assumed to be negligent, nevertheless, the plaintiff is essentially estopped from pursuing an action against the defendant because it is fundamentally unfair to allow the plaintiff to shift the responsibility for the injury to the defendant when the risk was known, appreciated and voluntarily assumed by the plaintiff.

Bullman v. Giuntoli, 761 A.2d 566, rearg. den., app. den., 775 A. 2d 800 (Pa. Super 2000); Beck-Hummel v. Ski Shawnee, Inc., 902 A.2d 1266 (Pa. Super. 2006).

Injury sustained must be the result of the same risk appreciated and assumed. Bullman, *supra*.

## Assumption of the Risk

- Implied Assumption of the Risk is Merged With Comparative Fault

## Comparative Fault

- The concept of comparative negligence has been replaced by comparative fault, and the statutory schemes set forth in S.B. 120 effective April 9, 2003. R.C. 2315.32 (Ohio) codifies comparative fault as an affirmative defense to a negligence claim or other tort claim except for an intentional tort claim.

## Comparative Fault

- If the plaintiff's comparative fault is greater than the combined tortious conduct of all persons from whom the plaintiff seeks recovery and all other persons from whom the plaintiff does not seek recovery [but tortiously caused the plaintiff's injury], then the plaintiff's claim is barred.

## Comparative Fault

- If the plaintiff's comparative fault is less than 50% then his recovery is diminished by his proportionate share of comparative fault. A big change made pursuant to S.B. 120, is that the plaintiff's comparative fault is not just compared to the fault of the defendant's named in the lawsuit, but to that of all other individuals whose tortious conduct proximately caused plaintiff's injury. (Ohio - Apportionment)

## PA - Contribution

### **Joint and Several Liability**

- reflects the concept that when two or more defendants are found liable for the same injury, any and all of the defendants can be held responsible for the entire amount of damages. For instance, if Plaintiff Z is awarded a \$100,000 judgment and Defendant X and Defendant Y were found 25% and 75% negligent, respectively, then Plaintiff Z could choose to recover \$100,000 from either party. If Plaintiff Z recovered the entire \$100,000 judgment from Defendant X, Defendant X could then seek \$75,000 in contribution from Defendant Y.

## CERTIFICATE/AFFIDAVIT OF MERIT REQUIREMENTS IN PROFESSIONAL NEGLIGENCE CASES

**Purpose:** with the increasing number of frivolous claims against licensed professionals, states have enacted laws requiring the plaintiff to initially demonstrate that the claim has merit as preliminarily determined by a licensed professional.

**What's required:** Plaintiff is required to file an affidavit or certificate that the professional negligence claim has merit.



CERTIFICATE/AFFIDAVIT OF MERIT REQUIREMENTS  
IN PROFESSIONAL NEGLIGENCE CASES

**Applies to licensed professionals, such as:**

Architects

Engineers

Land Surveyors

## CERTIFICATE/AFFIDAVIT OF MERIT REQUIREMENTS IN PROFESSIONAL NEGLIGENCE CASES

Also applies to:

Licensed Health Care Providers

Attorneys

Accountants

Veterinarian

Insurance Producers (New Jersey)

## CERTIFICATE/AFFIDAVIT OF MERIT REQUIREMENTS IN PROFESSIONAL NEGLIGENCE CASES

### **Various State Rules/Statutes: Different Names For Same Animal**

Pa.: Procedural Rule “Governing Professional Liability Actions” a/k/a  
“**Certificate of Merit**” rule

Md.: “**Certificate of Qualified Expert**” statute (“Certificate of Merit”)

N.J.: “**Affidavit of Merit**” statute (“Affidavit of Lack of Care in Action for Professional, Medical Malpractice or Negligence”)

Ga.: “**Affidavit of Merit**” statute (“Affidavit to Accompany Charge of Professional Malpractice”)

## CERTIFICATE/AFFIDAVIT OF MERIT REQUIREMENTS IN PROFESSIONAL NEGLIGENCE CASES

Other states have limited the merit requirement to medical malpractice cases:

- IL – “**Healing Art Malpractice**” statute
- FL – “**Medical Malpractice**” statute – statutorily-required pre-suit investigation and Notice before filing action and submission of verified written medical expert opinion re: basis; statute further requires pre-suit investigation by perspective defendant and submission of expert opinion which “shall corroborate reasonable grounds for lack of negligent injury”.
- WV – “**Medical Professional Liability Act**”

# CERTIFICATE/AFFIDAVIT OF MERIT REQUIREMENTS IN PROFESSIONAL NEGLIGENCE CASES

## What Do These Laws Require?

### Pa. Certificate of Merit rule

Plaintiff “shall file with a complaint or within sixty days after the filing of the complaint, a Certificate of Merit signed by the attorney or party that ... **an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill, or knowledge exercised or exhibited in the treatment, practiced or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm....**”

(Pa.R.C.P. 1042.3(a)(1))

## CERTIFICATE/AFFIDAVIT OF MERIT REQUIREMENTS IN PROFESSIONAL NEGLIGENCE CASES

### Md.: “Certificate of Qualified Expert” statute

“A certificate of a qualified expert shall . . . contain a statement from a qualified expert attesting that the licensed professional failed to meet an applicable standard of professional care . . . shall be filed within 90 days after the claim is filed . . . .

(§3-2C-02 Md. Code Ann.)

## CERTIFICATE/AFFIDAVIT OF MERIT REQUIREMENTS IN PROFESSIONAL NEGLIGENCE CASES

### N.J. Affidavit of Merit statute

“The plaintiff shall, within 60 days following the date of the filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that . . . [identical to Pa.], fell outside acceptable professional or occupational standards or treatment practices.”

(N.J. ann. stat. §2A:53A-27)

# CERTIFICATE/AFFIDAVIT OF MERIT REQUIREMENTS IN PROFESSIONAL NEGLIGENCE CASES

## Ga. Affidavit of Merit Statute

**“The plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist in the factual basis of each such claim.”**

(O.C.G.A. §9-11-9.1)

# CERTIFICATE/AFFIDAVIT OF MERIT REQUIREMENTS IN PROFESSIONAL NEGLIGENCE CASES

## How Do These Laws Work?

Pa.: -within 60 days of filing *complaint*

-Certificate that appropriate licensed person  
supplied a “written statement” (statement is not submitted nor  
discoverable)

-2008 Amendment: only claims asserted by/on  
behalf of a **patient/client of licensed professional**

-Must address causation

## CERTIFICATE/AFFIDAVIT OF MERIT REQUIREMENTS IN PROFESSIONAL NEGLIGENCE CASES

### Md.:

-within 60 days of filing *complaint*

-Certificate must contain statement of expert

-Plaintiff can request Deft. to produce documentary evidence that is “reasonably necessary” to obtain a certificate

## CERTIFICATE/AFFIDAVIT OF MERIT REQUIREMENTS IN PROFESSIONAL NEGLIGENCE CASES

N.J.: -within 60 days following the *defendant's answer*

-*affidavit* of “appropriate licensed” person

-Need not address causation

## CERTIFICATE/AFFIDAVIT OF MERIT REQUIREMENTS IN PROFESSIONAL NEGLIGENCE CASES

Ga.: -contemporaneous filing with complaint (unless certain compelling time constraints as set forth in an affidavit filed by the plaintiff's attorneys)

-Affidavit of “*expert*” competent to “testify”

-Need not address causation but must provide “factual basis”

## CERTIFICATE/AFFIDAVIT OF MERIT REQUIREMENTS IN PROFESSIONAL NEGLIGENCE CASES

### Judgment of non pros for failure to file certificate of merit (Pa.)

- Original rule -“snap” judgment
- Amended rule – 30 day Notice of Intent
- In response to Notice, Plaintiff may file motion seeking a determination by court as to the necessity of filing certificate of merit.

# CERTIFICATE/AFFIDAVIT OF MERIT REQUIREMENTS IN PROFESSIONAL NEGLIGENCE CASES

## Common Defenses/Arguments Re: Applicability of Merit Rules

### Common Knowledge

N.J. case law: affidavit not required when no expert will be called

Pa.: certificate of merit still required which indicates that “expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.”

## CERTIFICATE/AFFIDAVIT OF MERIT REQUIREMENTS IN PROFESSIONAL NEGLIGENCE CASES

### Ordinary Negligence v. Professional Negligence

Pa. Supreme Court: pending appeal re:  
engineer's failure to plot out Right of Way for water  
line/negligent research re: RW

Pa.Super. Court: ruled that engineer's services were  
not professional in nature

Other Pa.Super. Ct. case: expert testimony =  
professional negligence

## CERTIFICATE/AFFIDAVIT OF MERIT REQUIREMENTS IN PROFESSIONAL NEGLIGENCE CASES

### Defendant is an entity, not licensed professional

Pa. '08 revision: applies to claims against entities that are “*responsible for a licensed professional who deviated from an acceptable professional standard*”

N.J.: Court ruled that architectural firm was a “licensed person” under affidavit of merit statute because defendant firm’s leadership consisted of licensed individuals per statute.

Md.: Certificate of Merit requirement is not applicable to suits against corporate firms. (*Baltimore Co. v. RTKL Associates*, Md. Ct. of Appeals 2004).

# CERTIFICATE/AFFIDAVIT OF MERIT REQUIREMENTS IN PROFESSIONAL NEGLIGENCE CASES

## **Failure to Timely Comply**

Plaintiff may ask court for 60 day extension

N.J. - not more than one 60 day extension

Pa. - unlimited 60 day extensions

Md.- Ct. may waive/modify requirement at  
Plaintiff's request

## Disclaimer

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