Negligence and Duty—
General Concept

1-1 WHAT IS NEGLIGENCE?

A fundamental purpose of our tort laws is to encourage reasonable conduct. Conduct that creates an unreasonable risk of injury to others should be discouraged. The deterrent goal of the tort laws comes about by the legal recognition of a duty to exercise reasonable care and the imposition of liability for damages when there is a breach of that duty. Lest we ever forget, this is what the civil justice system is all about. “The right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government.”

Negligence is tested by whether a reasonably prudent person, under the same circumstances, would recognize and foresee an unreasonable risk or likelihood of harm. The standard of care is what a reasonable person of ordinary prudence would have done in the same situation. Sometimes this obligation is stated as requiring reasonable care. Reasonable care requires varying levels of care in relation to the variable elements of risk of harm that are present. In other words, as the danger becomes greater, a person is required to exercise the degree of caution commensurate with the level of danger.

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Chapter 1 Negligence and Duty—General Concept

No matter how complex a set of facts may be, these basic principles comprise the essence of negligence law. Judges and lawyers should strive to keep cases anchored to these basics, avoiding unnecessary complexity. Jury charges need not contain excess baggage that masks the basic thrust of the reasonable care principle.
The Model Civil Jury Charge on negligence is as follows:

Model Civil Jury Charge 5.10A

5.10A NEGLIGENCE AND ORDINARY CARE—GENERAL
(Approved before 1984)
1. Negligence may be defined as a failure to exercise, in the given circumstances, that degree of care for the safety of others, which a person of ordinary prudence would exercise under similar circumstances. It may be the doing of an act which the ordinary prudent person would not have done, or the failure to do that which the ordinary prudent person would have done, under the circumstances then existing.

[Where a more detailed definition is desired, the following may be used:]
2. Negligence is the failure to use that degree of care, precaution and vigilance which a reasonably prudent person would use under the same or similar circumstances. It includes both affirmative acts which a reasonably prudent person would not have done and the omission of acts or precautions which a reasonably prudent person would have done or taken in the circumstances.

By “a reasonably prudent person” it is not meant the most cautious person nor one who is unusually bold but rather one of reasonable vigilance, caution and prudence.

In order to establish negligence, it is not necessary that it be shown that the defendant had an evil heart or an intent to do harm.

To summarize, every person is required to exercise the foresight, prudence and caution which a reasonably prudent person would exercise under the same or similar circumstances. Negligence then is a departure from that standard of care.

Cases:
Negligence is defined as conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. 2 Restatement, Torts, Sec. 282; Harpell v. Public Service Coord. Transport, 20 N.J. 309, 316 (1956); Prosser, Torts, p. 119.


“The conduct of the reasonable man will vary with the situation with which he is confronted. The jury must therefore be instructed to take the circumstances into
EXISTENCE OF A DUTY

In order for a plaintiff to recover on a negligence claim, a threshold requirement is that the defendant owes a duty to the plaintiff. The determination of the existence of a duty to exercise reasonable care toward another is one of fairness and policy that takes into account many factors. The determination of whether there is a duty owed is generally considered to be a matter of law decided by the court. This is true even though duty is a fluid concept without bright-line rules.

Imposition of a duty requires an analysis that considers the relationship of the parties, the nature of the risk, including foreseeability of harm, and the impact the imposition of the duty would have on public policy. It boils down to a question of fairness. The scope of the duty is determined under the totality of the circumstances and must be reasonable under those circumstances. Factors to be taken into consideration include the risk of harm involved, and the practicality of preventing it. In short, duty is largely grounded on the natural responsibilities of societal living and human relations.

The far reaches of duty were probed in Hill v. Yaskin. This case discusses the term “foreseeability” as a factor in the assessment of whether a legal account; negligence is a failure to do what the reasonable man would do ‘under the same or similar circumstances.’” Prosser, p. 125. The above may be modified to cover cases involving property damage.

1-2 EXISTENCE OF A DUTY-A MATTER OF LAW

duty exists. In *Hill v. Yaskin*, the defendant apparently left her car keys in
the ignition in a parking lot. Her car was then stolen, and a police officer was
injured when his police car, in pursuit of the stolen car, collided with it. The
Court held that, since leaving keys in the ignition of a parked car created an
enhanced hazard of theft and injury to innocent people lawfully using the
roadways, a legal duty could be imposed. Parenthetically, the defendant,
Yaskin, later ascended to the bench as an able Superior Court judge.

On the other hand, the Appellate Division refused to establish a duty for
a spouse to warn a potential victim of her husband’s violent propensities
even where there was a possibility of physical violence to that victim.

The Supreme Court reviewed the duty scope in weighing whether a
ballpark owner can be held responsible for a foul ball hitting a fan while
visiting a food concession stand. The Court held there could be such a duty
in some circumstances. The Legislature promptly passed an immunity
law for baseball facility owners.

A workers’ compensation carrier does not have a duty to the workers
of its insured employer even where the compensation carrier has done safety
inspections for the employer.

A commercial office building owner has no duty to take proactive
measures to monitor the water supply and plumbing for detection of
Legionnaires’ bacteria when there is no notice of a potential problem and
no industry standards suggest such proactive measures.

In the vast majority of negligence claims, duty will not be an issue. In
motor vehicle cases, it is recognized that a driver has duties with respect to
other drivers, other occupants of vehicles, pedestrians, and other people
around a roadway. A commercial store has a duty to keep its place of
business reasonably safe for customers and other visitors. Doctors,
lawyers, and other professionals have a duty to their patients, clients, and
customers to act in accord with the reasonable standards of care of their
profession. It will be the unusual case where the question of whether or
not the defendant owed a duty to the plaintiff must be determined.

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1-3  FORESEEABILITY AS A FACTOR FOR THE JURY
TO CONSIDER

The term “foreseeability” has been historically slippery because it is relevant in considering first, whether there is a duty on the part of the defendant to be decided as a matter of law by the court; second, as part of the jury’s fact finding on negligence; and third, as a concept in the jury’s evaluation of proximate cause issues. As discussed above, foreseeability is a factor assessed by the court in determining whether there was a legal duty by the defendant in the circumstances before the court. As will be discussed in Chapter 2, foreseeability is not really an appropriate part of the jury’s determination of proximate cause.

However, in the appropriate case, a jury can be instructed regarding foreseeability in their specific determination of whether reasonable care was exercised by the defendant. Since reasonable care requires levels of care commensurate with the various risks of harm that are present, it is sometimes appropriate for a jury to consider, as part of its determination of negligence, the foreseeability of harm.

The jury needs to be told that it is not necessary for the defendant to have been able to anticipate the precise occurrence that resulted from the defendant’s conduct. It is sufficient that it was within the realm of foreseeability that some harm might occur as a result of the conduct. If the ordinary person, under similar circumstances, using ordinary care, could have foreseen that some injury or damage could result, then the defendant’s failure to act with reasonable care would constitute negligence.18

Since foreseeability is simply one factor in the jury’s overall consideration of negligence, a separate jury question should never be used that specifically asks the jury whether or not harm was foreseeable. Model Civil Jury Charge 5.10B can be of assistance to juries in some cases. This charge is simply additional language to assist the jury in its evaluation of the defendant’s conduct. In many if not most instances, this additional foreseeability language is unnecessary in the routine negligence case. For example, if plaintiff is claiming that defendant ran a red light, causing an intersection collision, the added foreseeability charge is superfluous. It is obvious that, if a person drives through a red light, it is foreseeable that another driver passing through that intersection with a green light can foreseeably be harmed.

Sometimes it will be the plaintiff and sometimes it will be the defendant requesting this additional foreseeability language as a part of the jury’s

consideration of negligence. The defendant may be arguing that he or she could never have anticipated the exact injury the plaintiff suffered. On the other hand, the plaintiff may want the judge to instruct the jury using the foreseeability language so the jury understands that it is not necessary to show that the specific injury plaintiff suffered was predictable, but only that some harm was foreseeable from defendant’s unreasonable conduct.

The Model Civil Jury Charge on foreseeability as it pertains to negligence is as follows:

**Model Civil Jury Charge 5.10B**

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<tr>
<th>5.10B FORESEEABILITY (AS AFFECTING NEGLIGENCE)</th>
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<td>(Approved before 1984)</td>
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<td>In determining whether reasonable care has been exercised, you will consider whether the defendant ought to have foreseen, under the attending circumstances, that the natural and probable consequence of his/her act or omission to act would have been some injury. It is not necessary that the defendant have anticipated the very occurrence which resulted from his/her wrongdoing but it is sufficient that it was within the realm of foreseeability that some harm might occur thereby. The test is the probable and foreseeable consequences that may reasonably be anticipated from the performance, or the failure to perform, a particular act. If an ordinary person, under similar circumstances and by the use of ordinary care, could have foreseen the result, [i.e., that some injury or damage would probably result] and either would not have acted or, if he/she did act, would have taken precaution to avoid the result, then the performance of the act or the failure to take such precautions would constitute negligence.</td>
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**Cases:**


1-4 ASSUMPTION OF RISK CONCEPT DISCARDED

In the past, the defense in some personal injury cases could argue that a threshold jury question, even before deciding defendant's negligence, was whether the plaintiff by his or her conduct assumed a risk. It was argued that this assumption of risk was a first determination to be made by a jury that would serve as a bar to the jury's even considering a defendant's conduct. The New Jersey Supreme Court, going back several decades,
has held that the defense of assumption of risk is not a valid defense in normal negligence actions.\textsuperscript{19} That is not to say a plaintiff’s conduct is never evaluated. A plaintiff’s conduct is evaluated under the concepts of comparative negligence, which is discussed later in Chapter 3.

Concepts of assumption of risk have been re-injected into our negligence laws by statutes covering particular recreational activities, such as skiing, roller-skating, and equestrian activities. The assumption of risk notion also appears in the evolving area of sports injuries. These are discussed in Chapter 20.

1-5 PLAINTIFF’S BURDEN OF PROOF—PREPONDERANCE OF EVIDENCE

The plaintiff has the burden of proving negligence. There is a starting presumption against negligence when a claim is made. It is plaintiff’s obligation to bring forth evidence of negligence.\textsuperscript{20}

A plaintiff is not required to prove a case with certainty. The obligation is to produce evidence which will justify an inference of the probability of negligence. However, the mere possibility of negligence is insufficient.\textsuperscript{21}

In weighing whether or not there was negligence, the test is one of probability.\textsuperscript{22} All that is needed for a jury to determine negligence is the production of evidence from which reasonable persons can say that, on the whole, it is more likely that there was negligence than there was not negligence.\textsuperscript{23}

This standard of proof is known in our lexicon as a “preponderance of the evidence.” Unfortunately, the word “preponderance” has fallen so far out of general use that nine out of ten jurors would not be able to provide a definition. Preponderance means superiority in weight. Since the word preponderance has fallen far out of general usage, we should probably eliminate it from our jury instructions, substituting in the phrase “greater weight of the evidence.” Rather than saying, “In this action, the plaintiff has the burden of establishing by a preponderance of the evidence all the facts necessary to prove the following issues … ,”\textsuperscript{24} the instruction would


\textsuperscript{20} Buckelew v. Grossbard, 87 N.J. 512, 525 (1981); Gonzalez v. Safe and Sound Security Corp., 185 N.J. 100 (2005) (Plaintiff elected not to testify on his own case, but the defendant called the plaintiff. Supreme Court held plaintiff must testify if called.).


\textsuperscript{22} DeRienzo v. Morristown Airport Corp., 28 N.J. 231, 239 (1958).


\textsuperscript{24} Model Civil Jury Charge 1.12(G).
be more easily understood if it said, “In this action, the plaintiff has the burden of establishing by a greater weight of the evidence all the facts necessary to prove the following issues … ” Unfortunately, we are not so good at discarding old words.

The Model Civil Jury Charge explaining preponderance of the evidence does say, “To prove an allegation by the preponderance of the evidence, a party must convince you that the allegation is more likely true than not.” Since very few people know the meaning of the word “preponderance,” that word could simply be eliminated and the charge could read, “To prove an allegation, a party must convince you that the allegation is more likely true than not.”

The longer version of the Model Civil Jury Charge does provide a good explanation of the weighing of evidence necessary to support a charge of negligence. The charge is at its best when it says, “As long as the evidence supporting the claim weighs heavier in your minds, then the burden of proof has been satisfied and the party who has the burden is entitled to your favorable decision on that claim.”

Of course, if the jury finds that the evidence is equal in weight, then the plaintiff’s burden has not been carried. The lawyers and the court, in discussing the burden of proof with the jury, frequently and appropriately use the visual or mental picture of the scales of justice in describing this concept.

In a majority of negligence cases, the defense argues that the plaintiff was negligent, setting up for the jury’s consideration a weighing of negligence under the concept of comparative negligence. When the defense argues that the plaintiff was negligent and that the plaintiff’s negligence contributed to the incident, the fact that it is defendant’s burden to prove that the plaintiff was negligent by a greater weight of the evidence is sometimes overlooked.

The Model Civil Jury Charge on the burden of proof is as follows:

25. Model Civil Jury Charge 1.12(H).
26. Model Civil Jury Charge 1.12(I).
Model Civil Jury Charge 1.12(G), (H), (I)

1.12 GENERAL PROVISIONS FOR STANDARD CHARGE  
(Approved 11/98)

G. Burden of Proof¹

The burden of proof is on the plaintiff/each party to establish his/her/their claim by a preponderance of the evidence. In other words, if a person makes an allegation then that person must prove the allegation.

In this action, the plaintiff (name) has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues:

[Explain issues raised by plaintiff.]

The defendant (name) has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues:

[Explain issues raised by defendant.]

H. Preponderance of the Evidence (short version)²

The term “preponderance of the evidence” means that amount of evidence that causes you to conclude that the allegation is probably true. To prove an allegation by the preponderance of the evidence, a party must convince you that the allegation is more likely true than not true.

If the evidence on a particular issue is equally balanced, that issue has not been proven by a preponderance of the evidence. Therefore, the party having the burden of proving that issue has failed with respect to that particular issue.

I. Preponderance of Evidence (long version) (2/98)

The party with the burden of proof has the burden of providing his/her/its claim by a preponderance of the evidence. If the party fails to carry that burden, the party is not entitled to your favorable decision on that claim.

To sustain the burden, the evidence supporting the claim must weigh heavier and be more persuasive in your minds than the contrary evidence. It makes no difference if the heavier weight is small in amount. As long as the evidence supporting the claim weighs heavier in your minds, then the burden of proof has been satisfied and the party who has the burden is entitled to your favorable decision on that claim.

However, if you find that the evidence is equal in weight, or if the evidence weighs heavier in your minds against the party who has the burden, then the burden of proof has not been carried and the party with the burden is not entitled to your decision on that claim.

Note to Judge

The following bracketed statements are different descriptions of the concept of burden of proof. Use the statement(s) that are applicable.

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[When I talk about weighing the evidence, I refer to its capacity to persuade you. I do not mean that you are to count the number of witnesses presented by each side or measure the length of their testimony. The concept of weighing the evidence refers to its quality and not its quantity.]

[In order to decide whether the burden of proof has been carried, you are to sift through the believable evidence and determine the persuasive weight which you feel should be assigned to it.]

[The right of each party to have the other party bear the required burden of proof is a substantial one and is not a mere matter of form.]

[Proof need not come wholly from the witnesses produced by the party having the burden of proof, but may be derived from any believable evidence in the case.]

[Proof of “possibility” as distinguished from “probability” is not enough.]

1-6 RES IPSA LOQUITUR—THE THING SPEAKS FOR ITSELF

Whether or not there was negligence is a factual issue that must be proven and is never presumed. The burden of proving a defendant’s negligence is always on the plaintiff. There is a starting presumption that there is no negligence, and that is a burden the plaintiff bears. The mere showing that there was an incident that caused injury to a plaintiff is not by itself sufficient to justify an inference of negligence.

The doctrine of res ipsa loquitur, meaning the thing speaks for itself, is an evidentiary rule which allows for inferences to be drawn from a set of facts that overcome any presumption against negligence. Negligence may indeed be proven by circumstantial evidence, and one type of that circumstantial evidence has the mantle “res ipsa loquitur.”

Res ipsa loquitur permits an inference that a defendant has used less than due care, and this inference of negligence is sufficient to establish a prima facie case at the end of the plaintiff’s evidence. The doctrine does not shift the burden of persuasion. However, since it allows for an inference of negligence necessary to establish a prima facie case, the defense then needs to come forward and explain the causative circumstances because of the defendant’s superior knowledge.

In a *res ipsa* case, a plaintiff need not exclude all possible causes. The plaintiff must only show that the circumstances establish more probably than not that the defendant’s conduct is a proximate cause of the accident. The issue in a *res ipsa* case is not whether the instrument is complex or simple. An expert is required only when common knowledge cannot provide the inferences necessary to meet the *res ipsa* test.33

A close cousin of the evidentiary rule *res ipsa loquitur* is the rule that an expert opinion can be barred if it is deemed to be merely a “net opinion.” Many times a “net opinion” objection is a red herring. An expert opinion must be supported by facts or data that are in the record or of the type usually relied upon by experts in the field.34 An improper “net opinion” is one that is comprised of bare conclusions unsupported by factual evidence.35 The question to be determined is whether the expert has particular knowledge or experience that is not common to the world, which can assist the trier of fact in determining a question.36

Judge Sabatino of the Appellate Division has recently dealt incisively with the analytical difficulties that exist among (1) the need for expert testimony, (2) the “net opinion” argument, and (3) *res ipsa loquitur*. Expert testimony is not always needed to establish liability in an injury case. *Res ipsa* can be invoked to allow a blameless plaintiff to obtain an inference of negligence. Instructing a jury on *res ipsa* still allows the jury to make the ultimate liability decision.37

### 1-6:1 Requirements Necessary to Invoke Doctrine

The *res ipsa loquitur* concept is appropriate for an inference that defendant was lacking in due care when three conditions have been demonstrated. First, the occurrence itself ordinarily bespeaks negligence. Second, the instrumentality was within the defendant’s exclusive control. Third, there was no indication that the injury was the result of plaintiff’s own negligence.38

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Chapter 1 Negligence and Duty—General Concept

A res ipsa loquitur application is available if it is more probable than not under the circumstances that the defendant has been negligent. A trial judge must instruct the jury on the doctrine of res ipsa loquitur when the facts call for it. The failure to charge res ipsa loquitur in the appropriate circumstances is reversible error.

The old res ipsa loquitur cases from around the country seemed to frequently involve somebody opening up a soda bottle or soup can and belatedly finding that something inappropriate, such as a mouse, came from the contents of the container. Apparently, improved quality controls have minimized such surprises. Perhaps this is another example of the salutary result of our tort laws. The word has gone forth; improve quality control in order to avoid paying damage claims.

The plaintiff’s bar needs to be aware that “mouse in the soup” cases seem to be a source of fraudulent claims made by some immoral individuals looking to make a buck. Defense counsel for food manufacturers and sellers have learned to carefully scrutinize such claims because there have been plenty of instances of fraud in this area. Such fraud needs to be exposed, for these fake claims despoil the civil justice system.

An examination of the cases and the Model Civil Jury Charge on res ipsa loquitur should suggest to a plaintiff’s attorney that he or she use extreme caution in reliance upon res ipsa loquitur. Given the requirements to invoke the doctrine, it is a risky proposition in many cases to rely upon the judge to decide to give the charge and rely upon the jury to understand the charge. In a case involving an injury of any significance, it would be wise to support meeting the necessary res ipsa loquitur criteria with expert testimony. It should be the rare case with modest injuries where a plaintiff’s attorney elects to go forward based upon the res ipsa loquitur doctrine without an expert.

Res ipsa loquitur can apply in medical negligence cases. However, the doctrine will only be used where the outcome “ordinarily bespeaks negligence.”

Our Supreme Court recently weighed in on a res ipsa case where a plaintiff fell into a sink hole at a sports bar parking lot. The Court said the

incident did not meet the first prong of the three part *res ipsa* test, *i.e.*, the presence of a sink hole does not automatically bespeak negligence.\footnote{Szalontai v. Yazbo Sports Café, 183 N.J. 386 (2005).}

The Model Civil Jury Charge on *res ipsa loquitur* is as follows:

**Model Civil Jury Charge 5.10D**

**5.10D  *RES IPSA LOQUITUR***  
(Approved 10/90)

In any case in which there is a claim that the defendant was negligent, it must be proven to you that the defendant breached a duty of reasonable care which was a proximate cause of the plaintiff’s injuries.\footnote{Brown v. Racquet Club of Bricktown, 95 N.J. 280, 288 (1984).} Generally, the mere fact that an accident happened, with nothing more, does not provide proof that the accident was a result of negligence.\footnote{Buckelew v. Grossbard, 87 N.J. 512, 525 (1981).}

In a negligence case, the plaintiff must prove that there was some specific negligent act or omission by the defendant which proximately caused the accident. However, in certain circumstances, the very happening of an accident may be an indication of negligence.

Thus, the plaintiff may, by providing facts and circumstances, establish negligence by circumstantial evidence. If the instrumentality causing the injury was in the exclusive control of the defendant, and if the circumstances surrounding the happening were of such a nature that in the ordinary course of events the incident would not have occurred if the person (entity) having control of the instrumentality had used reasonable care under the circumstances, the law permits, but does not require, the jury to infer negligence from the happening of the incident.

Plaintiff’s voluntary act\footnote{Stec. v. Richardson, 75 N.J. 304, 308 (1978); Rose v. Port of N.Y.Auth., 61 N.J. 129, 136 (1972); Vespe v. Chemirad Corp., 37 N.J. 56, 70-71 (1962); Kahaliili v. Rosecliff Realty, Inc., 26 N.J. 596, 606 (1958).} or neglect contributing to the occurrence prevents the inference from being drawn. However, the mere fact that plaintiff was present does not defeat the inference. Rather, you must find that plaintiff’s action or negligence was a proximate cause of the occurrence to prevent the inference.\footnote{See footnote 6, below.}

For instance, assume someone was walking on a sidewalk under a piano, which was being lifted by a crane to go into the upper floor, and assume further that the piano fell onto the pedestrian. The falling piano would be an indication of negligence, since pianos do not usually fall from the sky without someone being negligent. The mere fact that the pedestrian was present is not a voluntary act or neglect.\footnote{See footnote 3, above.}

In summary, if you find by the greater weight of the evidence that at the time of the incident (1) the defendant had exclusive control of the instrumentality causing the occurrence, (2) that the circumstances were such that in the ordinary course of events the incident would not have occurred if the defendant had exercised

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\footnote{Szalontai v. Yazbo Sports Café, 183 N.J. 386 (2005).}
reasonable care and (3) plaintiff’s voluntary act or negligence did not contribute to the occurrence, then you may infer that the defendant was negligent.  

[Where “exclusive control” is in issue]  
As to the requirement of “defendant having exclusive control,” this implies that the control was of such type that the probabilities that the negligent act was caused by someone else is so remote that it is fair to permit an inference of negligence by defendant.  

If you infer that the defendant was negligent, then the plaintiff need not point out any specific conduct or inaction by the defendant that was a breach of his/her duty of reasonable care. This inference was drawn, even if plaintiff has introduced some evidence of defendant’s specific negligence.  

[If defendant provides explanation, add:]  
If you do infer that the defendant was negligent, then you should consider the defendant’s explanation of the accident. If the explanation causes you to believe that it is no longer reasonable to infer that the defendant was negligent, then the defendant is entitled to your verdict. But if giving fair weight to all of the worthwhile evidence, you decide that it is more likely than not that the defendant was negligent, then your verdict should be for the plaintiff.  

Treatise References:  
The inference arising from a res ipsa loquitur case may, however, be destroyed by sufficiently conclusive evidence that it is not in reality a res ipsa loquitur case. If the defendant produces evidence which is so conclusive as to leave no doubt that the event was caused by some outside agency for which he/she was not responsible, or that it was of a kind which commonly occurs without negligence on the part of anyone and could not be avoided by the exercise of all reasonable care, he/she may be entitled to a directed verdict. 2 Restatement (Second) of Torts § 328 E, comment o, p. 166.  

6 In the event of evidence the plaintiff did contribute to the occurrence but no evidence of contribution to the instrumentality, state at (3), “… that there is no indication in the circumstances that the object causing the injury was the result of plaintiff’s neglect.”  
7 Note that in Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958), the New Jersey Supreme Court held the doctrine of res ipsa loquitur applied to a defendant bottler who had delivered filled soda bottles to a luncheonette and where one of those bottles exploded and injured the plaintiff who was an employee of the luncheonette. The Court found that even though possession and control of the bottles had been transferred to the luncheonette, there was no rational ground for imputing presumed negligence to the luncheonette where there was no suggestion of careless handling of the bottle by the luncheonette. Id. at 274. See J. Francis’ pointed observation in concurrence at p. 275. Note also that the plaintiff has the burden of excluding the negligence of an intervening person in possession or control.  
8 In Bornstein, supra, at 273, the Court noted that res ipsa loquitur “is not ordinarily applicable ‘if it is equally probable that the negligence was that of someone other than the defendant,’ but the plaintiff need not exclude all other persons who might possibly have been responsible where the defendant’s negligence appears to be the more probable explanation of the accident.” Quoting from Zentz v. Coca-Cola Bottling Co. of Fresno, 247 P. 2d 344 (Sup. Ct. Cal. 1952). See also Lynch v. Galler Seven-Up Pre-Mix Corp., 74 N.J. 146, 154 (1977).
1-7 ACTS OF GOD

There are certainly occasions when an injury to a plaintiff is not at all caused by the negligence of a defendant, but by a force of the natural world known historically as an “act of God.” This notion often comes into play in motor vehicle accidents where there is the sudden appearance of ice in the roadway which can lead to multi-car chain collisions, or a motorist will come around a curve and suddenly the sun completely blocks his or her vision. An act of God could also involve a lightning bolt, or a flash flood. In analyzing the “act of God” concept, the first premise to recall is that the plaintiff always has the burden of proving defendant’s negligence. Thus, the plaintiff must always show that the defendant’s conduct breached the requirement of ordinary care under the circumstances that existed.

To illustrate, in a case where a car was hit in the rear by a bus, and the bus driver claimed he could not stop because of a patch of ice on the road, the bus driver was not found negligent. The Appellate Division upheld the verdict.44

In order to defend using the argument that an accident was caused by an act of God, the defendant must demonstrate that he or she was free from any negligence in responding to the claimed force of nature or act of God.

It is only where the “act of God” is the sole cause of injury that a defendant will be exempt from liability.45 Where a defendant is guilty of negligence which was a contributing cause to the injury, a defendant is not exonerated by proof that an act of God was a concurring cause.46

The Model Civil Jury Charge with respect to acts of God is as follows:

Model Civil Jury Charge 5.10E

5.10E ACT OF GOD
(Approved before 1984)

The defendant contends that the accident was caused by an act of God without any negligence on his/her part and that he/she is thereby exonerated from responsibility for the plaintiff’s injuries (or damage).

An act of God is an unusual, extraordinary and unexpected manifestation of the forces of nature, or a misfortune or accident arising from inevitable necessity

which cannot be prevented by reasonable human foresight and care. If plaintiff’s injuries were caused by such an event without any negligence on the part of the defendant, the defendant is not liable therefor.

However, if the defendant has been guilty of negligence which was an efficient and cooperative cause of the mishap, so that the accident was caused by both the forces of nature and the defendant’s negligence, the defendant is not excused from responsibility.

In other words, if the defendant was negligent and his/her negligence contributed as an efficient and cooperating cause to the happening of the mishap and the injuries which proximately resulted therefrom, it is immaterial that an act of God was also a concurring cause.

**Cases:**


An “act of God” is an unusual, extraordinary, sudden and unexpected manifestation of the forces of nature which cannot be prevented by human care, skill or foresight. 38 Am. Jur., Negligence, Sec. 7, 649; *Carlson v. A. & P. Corrugated Box Corp.*, 72 A.2d. 290, 364 Penna. 216 (1950).

The significance of an “act of God” as a defense is that when it is the sole cause of damage, it exempts defendant from liability for negligence. *Meyer Bros. Hay & Grain Co. v. National Malting Co.*, 124 N.J.L. 321 (Sup. Ct. 1940).

It is the well established principle that where a defendant has been guilty of negligence which is an efficient and cooperating cause of the mishap, the defendant is not exonerated from liability by proof that an “act of God” was a concurring cause. *Cora v. Trowbridge Outdoor Adv. Corp.*, 18 N.J. Super. 1 (App. Div. 1952).

When there has been a finding of wrongdoing which is an efficient and cooperative cause of the mishap, the wrongdoer is not relieved from liability by proof that an “act of God” was a concurring cause. *Hopler v. Morris Hills Regional District*, 45 N.J. Super. 409 (App. Div. 1957). Reducing this principle to the terseness of a maxim, “he whose negligence joins with an ‘act of God’ in producing injury is liable therefor.” 38 Am. Jur. Negligence. Sec. 65, 719; *Cora v. Trowbridge Outdoor Adv. Corp.*, supra, p. 4.

**1-8 SUDDEN EMERGENCY CLAIMS**

Closely related to the act of God argument is the claimed defense that the defendant’s actions were simply a response to a sudden emergency. This assertion does not really require any additional theory beyond what is included in the basic law of negligence. Did defendant act with ordinary and reasonable care under the circumstances? Our appellate courts and the Model Civil Jury Charge Committee have specifically warned against injecting unnecessary verbiage with respect to sudden emergencies, when the general charges on negligence essentially encompass appropriate responses to unusual circumstances.
There is grave doubt whether a sudden emergency charge should ever be given in an ordinary automobile case. A sudden emergency charge by the court can be seen as argumentative and confusing, adding what may seem to be yet another hurdle for the plaintiff to overcome. A specific instruction with respect to sudden emergency should only be given in the rarest of circumstances. If the basic standard for negligence, as stated in Model Civil Jury Charge 5.10A, can be efficiently stated as, “negligence is the failure to use that degree of care, precaution, and vigilance which a reasonably prudent person would use under the same or similar circumstances,” when would it ever be necessary to inject further language? Counsel for the plaintiffs and defendants are able to argue about defendant’s response to a particular set of circumstances. The court should strive to make the jury charge straightforward, without belaboring or emphasizing a particular part of the facts in a case.

The sudden emergency Model Civil Jury Charge is as follows:

Model Civil Jury Charge 5.10G

| 5.10G SUDDEN EMERGENCY |
| (Approved pre-1983) |
| **Note to Judge (Approved 2/95)** |
| This doctrine is in disfavor. “(W)e entertain grave doubt whether a sudden emergency charge should ever be given in an ordinary automobile case. There is a modern view that it is argumentative and confusing, and should be eliminated.” Finley v. Wiley, 103 N.J. Super. 95, 101 (App. Div. 1968). “We again caution that this instruction should be given in only the most unusual circumstances.” Leighton v. Sim, 248 N.J. Super. 577, 580 (App. Div. 1991). No reported case can be found where use of the charge has been upheld since the advent of comparative negligence. Query: isn’t this “reasonable care under the circumstances?” |

**A. Sudden Emergency, Effect on Negligence**

In connection with the question of (contributory) negligence, it has been asserted that the defendant (plaintiff) was confronted with a sudden emergency. Where a person, without any fault on his/her part, is confronted with a sudden emergency, that is, is placed in a sudden position of imminent peril not reasonably to be anticipated, the law will not charge him/her with negligence if he/she does not select the very wisest course in choosing between alternative courses of action. An honest mistake of judgment in such a sudden emergency will not, of itself, constitute negligence, although another course might have been better and safer. All that is required of such a person is that he/she exercises the care of a reasonably prudent person under like circumstances.

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Chapter 1  
Negligence and Duty—General Concept

It is for you the jury to determine from the evidence whether such an emergency existed, whether it arose without the fault of that person and whether that person acted with due care under the circumstances.

[The following two additional paragraphs may be utilized where necessary:]

The law recognizes that one acting in a sudden emergency may have no time for thought and so cannot weigh alternative courses of action but must make a speedy decision which will be based on impulse or instinct. What is required of a person in such an emergency is that he/she act reasonably and with ordinary care under such circumstances.

However, if the emergency arose in whole or in part by reason of the fault, that is, a lack of due care, of that person in the events preceding the emergency, then this rule of sudden emergency does not apply to excuse him/her even though his/her conduct during the emergency does meet the standard of reasonable care referred to.

Cases:


Note to Judge


B.  Defendant's Liability for Effects of Emergency

When one without negligence on his/her part is put by the negligence of another under a reasonable apprehension of emergent serious personal physical injury, and in a reasonable and bona fide and well-meant effort to escape, the former sustains physical injury, a right of action arises against the person creating such emergency to recover for the damages proximately resulting therefrom.

Cases:


1-9  PARENTAL IMMUNITY AND ITS EXCEPTIONS

A basic rule in New Jersey is that a parent cannot be charged with the negligent raising of a child. The theory behind this is that we acknowledge that parents will try to do their best, and their manner of raising their children
should not be second-guessed by the law of personal injury. However, what will be deemed to be protected by this immunity is not always so easily predictable. For example, a parent guiding a child across the street is not protected by parental immunity because crossing the street is not within the purview of the child rearing functions protected by the immunity.

Whether there is parental immunity in a particular case should be decided by the court as a matter of law.

By a four to three split, our Supreme Court has upheld the notion of parental immunity. The majority indicated that deciding whether to apply the doctrine requires a careful case-by-case analysis. Demonstrating that philosophical leanings are an inherent part of judicial decision making, the majority said, “If we were to force parents to defend against their negligent but otherwise honest errors of judgment in those settings, then we would risk opening the floodgates of intrusive litigation … .” The dissent, pointing out that the majority was extending parental immunity to third party claimants, asserted that,

The majority’s invocation of the old saw about the floodgates of intrusive litigation should be taken with a grain of salt. Our courts exist so that innocent victims may be made whole for the injuries they have sustained at the hands of others. By rejecting the expansion of parental immunity that the majority here approves, that salutary goal would be advanced. The fear of increased filings pales in comparison.

A volunteer who willingly undertakes a duty must act with due care. A volunteer who assumes to act must satisfy the duty of reasonable care under the circumstances. An example of this circumstance would be if a

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person were asked to provide a ride in a car to someone needing a lift. The driver does not have to give the ride, but if he or she agrees to do so, the driver is then obligated to drive with reasonable care.

New Jersey does have a specific statute known as the Good Samaritan Act. This act provides many immunities to specific types of personnel in volunteer situations and is discussed in Chapter 20.

The Model Civil Jury Charge on duties voluntarily assumed is as follows:

**Model Civil Jury Charge 5.10C**

5.10C UNDERTAKING VOLUNTARILY ASSUMED

(Approved before 1984)

(1) One who in the absence of a legal obligation to do so voluntarily undertakes to render a service for the protection of the safety of another may become liable to him/her for the failure to perform, or the failure to exercise reasonable care in the performance of that service. His/Her responsibility, however, is only commensurate with the extent of his/her voluntary undertaking and his/her liability does not arise unless it appears from the evidence that his/her negligence had a proximate causal relationship to the occurrence of the mishap, which brought about the injuries.

**Cases:**


THE FOLLOWING MAY BE ALTERNATIVELY CHARGED WHERE APPLICABLE:

(2) Where a defendant has gratuitously undertaken to do an act or to perform a service recognizably necessary to another’s bodily safety and there is reasonable reliance thereon, the defendant will be liable for the harm sustained by the other party resulting from defendant’s failure to exercise reasonable care to carry out the undertaking.

**Cases:**


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