Chapter 1

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.[1] 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."[2]

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.[3] 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.[4] In other words, as the danger becomes greater, a person

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1. *Gantes v. Kason Corp.*, 145 N.J. 478, 489 (1996); *People Exp. Airlines, Inc. v. Consolidated Rail*, 100 N.J. 246, 254-55 (1985).
2. *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142, 148 (1907).
3. *Rappaport v. Nichols*, 31 N.J. 188, 201 (1959).
4. *Ambrose v. Cyphers*, 29 N.J. 138, 144 (1959).

is required to exercise the degree of caution commensurate with the level of danger.[5]

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 defendant's conduct is compared with that which the hypothetical person of reasonable vigilance, caution and prudence would have exercised in the same or similar circumstances or conditions. *Overby v. Union Laundry Co.*, 28 *N.J. Super.* 100, 104 (App. Div. 1953), *aff'd* 14 *N.J.* 526 (1954); *McKinley v. Slenderella Systems of Camden, N.J., Inc.*, 63 *N.J. Super.* 571 (App. Div. 1960).

[5] *Harpell v. Pub. Serv. Coord. Transport*, 20 N.J. 309, 316 (1956).

"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 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

In order for a plaintiff to recover on a negligence claim, a threshold requirement is that the defendant owes a duty to the plaintiff.[6] 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.[7] 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.[8]

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.[9] 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.[10] In short, duty is largely grounded on the natural responsibilities of societal living and human relations.

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6. *Kernan v. One Washington Park Urban*, 154 N.J. 437, 445 (1998).

7. *Clohesy v. Food Circus Supermarkets*, 149 N.J. 496, 502 (1997).

8. *Carvalho v. Toll Bros. & Developers*, 143 N.J. 565, 572 (1996); *Kuehn v. Pub Zone*, 364 N.J. Super. 301, 310 (App. Div. 2003); *Badalamenti v. Simpkiss*, 422 N.J. Super. 86 (App. Div. 2011).

9. *Dunphy v. Gregor*, 136 N.J. 99, 108 (1994); *Kelly v. Gwinnell*, 96 N.J. 538, 544 (1984); *Shehaiber v. UMDNJ*, 360 N.J. Super. 330, 335 (App. Div. 2003).

10. *J.S. v. R.T.H.*, 155 N.J. 330, 339 (1998); *Olivo v. Owens-Illinois Inc.*, 186 N.J. 394 (2006) (Wife washing husband's asbestos filled clothes can bring claim where husband picked up the asbestos in his workplace.); *Schwartz v. Accuratus Corp.*, 225 N.J. 517 (2016) (Exposure of a non-spouse to a worker's toxic exposed clothes can be claimable, as it is fact sensitive.). *La Russa v. Four Points at Sheraton*, 360 N.J. Super. 156, 165 (App. Div. 2003) (Delivery person tracking snow into a hotel has a duty to hotel employee.); *Gallara v. Koskovich*, 364 N.J. Super. 418 (Law Div. 2003) (A gun dealer has a duty of care to protect and safeguard its firearms from theft and subsequent criminal misuse.); *Wagner v. Schlue*, 255 N.J. Super. 391 (Law Div. 1992) (Husband who lets his wife drive knowing she was drunk can be held liable on negligence.); *Doe v. XYC Corp.*, 382 N.J. Super. 122 (App. Div. 2005) (An employer on notice of an employee's use of a workplace computer to access pornography has a duty to investigate the employee's actions and take action to avoid harm to third parties, i.e., children in the pornographic images.); *Podias v. Mairs*, 394 N.J. Super. 338 (App. Div. 2007) (A passenger in a car has a duty to report an accident even when driver refuses to do so.); *Potomac Aviation, LLC. v. Port Authority of N.Y. and N.J.* 413 N.J. Super. 212 (App. Div. 2010) (An airport owner does not have a duty to install a highway type guard rail along the border of the airport runway and the adjacent highway to protect the planes from cars crashing through the

The far reaches of duty were probed in *Hill v. Yaskin*.[11] This case discusses the term "foreseeability" as a factor in the assessment of whether a legal 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.[12] 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.[13]

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.[14] The Legislature promptly passed an immunity law for baseball facility owners.[15]

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.[16]

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.[17]

A public school principal has no duty to a non-school-related pedestrian walking on school grounds who is bit by a dog not owned by a school employee, but by a neighbor of the school property.[18]

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airport fence.); *Anderson v. A.J. Friedman Supply*, 416 N.J. Super. 46, 64 (App. Div. 2010); *In re Estate of Desir v. Vertus*, 418 N.J. Super. 310 (App. Div. 2011); *McGlynn v. State of N.J.*, 434 N.J. Super. 23 (App. Div. 2014); *Peguero v. Tau Kappa Epsilon*, 439 N.J. Super. 77 (App. Div. 2015) (fraternity cannot be held liable for an unanticipated shooting at a fraternity gathering).

11. *Hill v. Yaskin*, 75 N.J. 139 (1977); *see also Jerkins ex rel. Jerkins v. Anderson*, 191 N.J. 285 (2007).

12. *Hill v. Yaskin*, 75 N.J. 139, 144-45 (1977).

13. *Sacci v. Metaxas*, 355 N.J. Super. 499, 507 (App. Div. 2002).

14. *Maisonave v. Newark Bears Prof'l Baseball Club, Inc.*, 185 N.J. 70 (2005).

15. N.J.S.A. 2A:53A-43; *Sciarrotta v. Global Spectrum*, 194 N.J. 345 (2008).

16. *Fackelman v. Lac d'Amiante du Quebec*, 398 N.J. Super. 474 (App. Div. 2008).

17. *Vellucci v. Allstate Ins. Co.*, 431 N.J. Super. 39 (App. Div. 2013); *see also Estate of Desir v. Vertus*, 214 N.J. 303 (2013).

18. *Robinson v. Vivirito*, 217 N.J. 199 (2014).

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.

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.[19]

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

[19] *Menth v. Breeze Corp., Inc.*, 4 N.J. 428 (1950).

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

5.10B FORESEEABILITY (AS AFFECTING NEGLIGENCE)
(Approved before 1984)

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.

Cases:

Lutz v. Westwood Transportation Co., 31 *N.J. Super.* 285 (App. Div. 1954), *certif. denied,* 16 *N.J.* 205 (1954); *Glaser v. Hackensack Water Co*., 49 *N.J. Super.* 591 (App. Div. 1958); *Martin v. Bengue, Inc*., 25 *N.J.* 359 (1957); *Menth v. Breeze Corporation, Inc.*, 4 *N.J.* 428 (1950); *Andreoli v. Natural Gas Co.*, 57 *N.J. Super.* 356 (App. Div. 1959); *Avedisian v. Admiral Realty Corp.*, 63 *N.J. Super.* 129 (App. Div. 1960); 2 *Ohio Jury Instructions, Civil*, 7.12; *see also* instructions in Chapter 7, below as to Proximate Cause.

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.[20] 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.[21]

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.[22]

In weighing whether or not there was negligence, the test is one of probability.[23] 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.[24]

This standard of proof is known in our lexicon as a "preponderance of the evidence." Unfortunately, the word "preponderance" has fallen so far

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20. *McGrath v. American Cyanamid Co.*, 41 N.J. 272 (1963); *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44 (1959); *Cordy v. Sherwin Williams Co.*, 975 F. Supp. 639 (D.N.J. 1997).

21. *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.).

22. *Bohn v. Hudson & Manhattan R.R. Co.*, 16 N.J. 180, 188 (1954).

23. *DeRienzo v. Morristown Airport Corp.*, 28 N.J. 231, 239 (1958).

24. *Roper v. Blumenfeld*, 309 N.J. Super. 219, 231 (App. Div. 1998).

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 … ,"[25] the instruction would 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."[26] 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."[27]

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:

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25. Model Civil Jury Charge 1.12(G).
26. Model Civil Jury Charge 1.12(H).
27. 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 Proof[1]

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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1. T.P.1. - Civil 2.40 "Burden of Proof and Preponderance of Evidence," Tennessee Pattern Jury Instructions of the Committee of the Tennessee Judicial Conference (3rd Ed. 11/95).

2. T.P.1. - Civil 2.40 "Burden of Proof and Preponderance of Evidence," Tennessee Pattern Jury Instructions of the Committee of the Tennessee Judicial Conference (3rd Ed. 11/95).

[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 NET OPINIONS AND *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.[28] There is a starting presumption that there is no negligence, and that is a burden the plaintiff bears.[29] 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.[30]

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.[31] Negligence may indeed be proven by circumstantial evidence, and one type of that circumstantial evidence has the mantle "*res ipsa loquitur*."[32]

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.[33]

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28. *Myrlak v. Port Auth. of N.Y. and N.J.*, 157 N.J. 84 (1999).

29. *Buckelew v. Grossbard*, 87 N.J. 512 (1981).

30. *Rivera v. Columbus Cadet Corps of Am.*, 59 N.J. Super. 445 (App. Div.), *certif. denied*, 32 N.J. 349 (1960); *Wyatt v. Curry*, 77 N.J. Super. 1 (App. Div. 1962).

31. *Myrlak v. Port Auth. of N.Y. and N.J.*, 157 N.J. 84 (1999); *Lorenc v. Chemirad Corp.*, 37 N.J. 56 (1962).

32. *Shaw v. Calgon, Inc.*, 35 N.J. Super. 319 (App. Div. 1955).

33. *Rocco v. N.J. Transit Rail Operations, Inc.*, 330 N.J. Super. 320 (App. Div. 2000); *Mangual v. Berezinsky*, 428 N.J. Super. 299, 312-13 (App. Div. 2012).

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.[34]

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.[35] An improper "net opinion" is one that is comprised of bare conclusions unsupported by factual evidence.[36] It cannot be simply the expert's personal opinion about what should have been done.[37] 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.[38]

Judge Sabatino of the Appellate Division 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.[39] Judge Sabatino again discussed these same issues in a case involving a claim that plaintiff slipped on a phone card that had found itself on a walkway outside the store. Presumably, that phone card came from a display inside the store near the cashier. The Appellate Division there said that the store had no notice of the danger and that the views of the plaintiff's expert were indeed a "net opinion."[40]

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34. *Jerista v. Murray*, 185 N.J. 175 (2005); *see also Rosenberg v. Otis Elevator Co.*, 366 N.J. Super. 292 (App. Div. 2000); *Jimenez v. GNOC Corp.*, 286 N.J. Super. 533 (App. Div. 1996); *Huszar v. Great Bay Hotel & Casino, Inc.*, 375 N.J. Super. 463 (App. Div. 2005); *Apuzzio v. Jayfed Trucking*, Inc., 355 N.J. Super. 562, 578 (App. Div. 2005); *Davis v. Brickman Landscaping*, 219 N.J. 395, 407 (2014).

35. *Scully v. Fitzgerald*, 179 N.J. 114, 129 (2004); N.J. Evid. R. 703; *Akhtar v. JDN Props. at Florham Park, L.L.C.*, 439 N.J. Super. 391, 402 (App. Div. 2015).

36. *Scully v. Fitzgerald*, 179 N.J. 114, 129 (2004); *Buckelew v. Grossbard*, 87 N.J. 512, 524 (1981).

37. *Satec, Inc. v. Hanover Ins. Grp.*, 450 N.J. Super. 319 (App. Div. 2017): *Sessleman v. Muhlenberg Hosp.*, 124 N.J. Super. 285 (App. Div. 1973).

38. *Scully v. Fitzgerald*, 179 N.J. 114, 128 (2004).

39. *Mayer v. Once Upon a Rose, Inc.*, 429 N.J. Super. 365 (App. Div. 2013).

40. *Arroyo v. Durling Realty, LLC*, 433 N.J. Super. 238 (App. Div. 2013).

The Pandora's box on net opinions has now been opened wide by two recent New Jersey Supreme Court cases. In each of these two cases, the trial court had dismissed the plaintiffs' claim based upon a net opinion finding. Yet, the Appellate Division by three-judge panels, reversed the trial courts' decisions to dismiss. Then, the Supreme Court unanimously reversed the Appellate Division decisions, reinstating the trial court dismissals.[41]

In a mass tort case involving more than 2000 plaintiffs' claims that the use of Accutane contributes to the development of Crohn's disease, our Supreme Court states that it is within the trial court's discretion after a careful analysis of the scientific methodology utilized by the plaintiff's expert, to dismiss claims without getting to a jury. The Supreme Court stated, "We intend by this case to clarify and reinforce the proper role for the trial court as the gatekeeper of expert witness testimony." The Supreme Court acknowledged that the gatekeeping role requires care and that determinations regarding the exclusion of expert testimony are "complicated" and "difficult." The trial court analysis must be "rigorous." The focus should be on whether the expert is relying upon sound, scientific methodology, not whether the expert's theory has general acceptance in the scientific community.[42]

While the Supreme Court said it was not declaring New Jersey a "Daubert jurisdiction," the court said that the Daubert factors are useful and should be utilized in the evaluation of scientific expert testimony.[43]

In the other recent Supreme Court case, the court said that, "the net opinion rule is not a standard of perfection." However, the offered expert must be able to identify the factual basis for the conclusions, explain the methodology, and demonstrate that the factual basis and methodology are reliable. The basic facts in the case were that a driver pulled up to a T intersection intending to make a left-hand turn. To her left, on a commercial property, there were large overgrown bushes that blocked her view to the left. The driver claimed she was able to move her car forward enough so that the bushes no longer blocked her view. She then pulled into the intersection, made a left-hand turn, and killed a motorcyclist who was coming from her left. An expert for the motorcyclist opined that the bushes were a contributing cause to the collision. The Supreme Court held that this was a net opinion because it contradicted the factual record of

41. *In re Accutane Litigation*, ___ N.J. ___ (Aug. 1, 2018); *Townsend v. Pierre*, 221 N.J. 36 (2017).
42. *In re Accutane Litigation*, ___ N.J. ___ (Aug. 1, 2018).
43. *In re Accutane Litigation*, ___ N.J. ___ (Aug. 1, 2018).

the driver who claimed that the bushes ultimately did not block her view. It is worth noting that the motorcyclist could not give his version of the accident because he was dead.[44]

The battle over what constitutes a net opinion will continue.

1-6:1 Requirements Necessary to Invoke Res Ipsa

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.[45]

A *res ipsa loquitur* application is available if it is more probable than not under the circumstances that the defendant has been negligent.[46] A trial judge must instruct the jury on the doctrine of *res ipsa loquitur* when the facts call for it.[47] The failure to charge *res ipsa loquitur* in the appropriate circumstances is reversible error.[48]

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

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44. *Townsend v. Pierre*, 221 N.J. 36 (2017); See also *Davis v. Brickman Landscaping*, 219 N.J. 395, 409-414 (2014).

45. *Myrlak v. Port Auth. of N.Y. and N.J.*, 157 N.J. 84 (1999); *Eaton v. Eaton*, 119 N.J. 628 (1990); *Jerista v. Murray*, 185 N.J. 175 (2005); *Cockerline v. Menendez*, 411 N.J. Super. 596, 614 (App. Div. 2010) (The doctrine of *res ipsa loquitur* is not linked to proximate cause.).

46. *Myrlak v. Port Auth. of N.Y. and N.J.*, 157 N.J. 84 (1999); *Kahn v. Singh*, 397 N.J. Super. 184, 197-200 (App. Div. 2007), *affirmed,* 200 N.J. 82 (2009).

47. *Vespe v. DiMarco*, 43 N.J. 430 (1964).

48. *Terrell v. Lincoln Motel, Inc.*, 183 N.J. Super. 55 (App. Div. 1982).

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 loquitor can apply in medical negligence cases. However, the doctrine will only be used where the outcome "ordinarily bespeaks negligence."[49]

Our Supreme Court 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.[50]

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.[1] Generally, the mere fact that an accident happened, with nothing more, does not provide proof that the accident was a result of negligence.[2]

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

1. *Brown v. Racquet Club of Bricktown*, 95 *N.J.* 280, 288 (1984).
2. *Buckelew v. Grossbard*, 87 *N.J.* 512, 525 (1981).

49. *Saks v. Ng*, 383 N.J. Super. 76, 91 (App. Div. 2006); *Roper v. Blumenfeld*, 309 N.J. Super. 219 (App. Div.), *certif. denied*, 156 N.J. (1998).
50. *Szalontai v. Yazbo Sports Café*, 183 N.J. 386 (2005).

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[3] 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.[4]

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.[5]

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 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.[6]

[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.[7]

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.

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3. *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); *Kahalili v. Rosecliff Realty, Inc.*, 26 *N.J.* 596, 606 (1958).

4. *See* footnote 6, below.

5. *See* footnote 3, above.

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.

[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.[8] 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:

3 Modern Tort Law (1977), by James A. Dooley, § 48.21, p. 349. *4 F. Harper and F. James, The Law of Torts*, (2nd Ed.) § 19.12, p. 78.

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.

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[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 lightening 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.[51]

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.[52] 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.[53]

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" comprehends all misfortune and accidents arising from inevitable necessity which human prudence could not foresee or prevent. *Meyer Bros. Hay & Grain Co. v. National Malting Co*., 124 *N.J.L*. 321 (Sup. Ct. 1940).

An "act of God" is an unusual, extraordinary, sudden and unexpected manifestation of the forces of nature which cannot be prevented by human care,

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51. *Mockler v. Russman*, 102 N.J. Super. 582 (App. Div. 1968), *certif. denied*, 53 N.J. 270 (1969).

52. *Meyer Bros. Hay & Grain Co. v. Nat'l Malting Co.*, 124 N.J.L. 321 (N.J. 1940).

53. *Cora v. Trowbridge Outdoor Adv. Corp.*, 18 N.J. Super. 1 (App. Div. 1952); *Andreoli v. Natural Gas Co.*, 57 N.J. Super. 356 (App. Div. 1959); *Hopler v. Morris Hills Reg'l Dist.*, 45 N.J. Super. 409 (App. Div. 1957).

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.[54] A specific instruction with respect to sudden emergency should only be given in the rarest of circumstances.[55] 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

54. *Finley v. Wiley*, 103 N.J. Super. 95, 101 (App. Div. 1968).
55. *Leighton v. Sim*, 248 N.J. Super. 577, 580 (App. Div. 1991).

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.

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:

Harpell v. Public Service Coord. Transport, 20 *N.J.* 309 (1956); *Dobrow v. Hertz*, 125 *N.J.L.* 347 (E. & A. 1940); *Dickinson v. Erie R.R.*, 81 *N.J.L.* 464 (E. & A. 1911); *Massotto v. Public Service Coord. Transport*, 71 *N.J. Super.* 30 (App. Div. 1961); *Ferry v. Settle*, 6 *N.J. Super.* 107 (App. Div. 1950); *Spalt v. Eaton*, 118 *N.J.L.* 327 (Sup. Ct. 1937).

NOTE TO JUDGE

There may be cases in which the burden of proof shifts. *See Roberts v. Hooper*, 181 *N.J. Super.* 474 (App. Div. 1981).

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:

Tuttle v. Atlantic City R.R., 66 *N.J.L.* 327 (E. & A. 1901); *Marshall v. Suburban Dairy*, 96 *N.J.L.* 81 (Sup. Ct. 1921); *Buchanan v. West Jersey R.R.*, 52 *N.J.L.* 265 (Sup. Ct. 1890).

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.[56] 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.[57]

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

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[56] *Foldi v. Jeffries, Inc.*, 93 N.J. 533, 548 (1983); *Buono v. Scalia*, 358 N.J. Super. 210 (App. Div. 2003), *aff'd*, 179 N.J. 131 (2004); *Marcinkiewicz v. Marrerro*, 376 N.J. Super. 488 (App. Div.), *certif. denied*, 185 N.J. 39 (2005).

[57] *Mancinelli v. Crosby*, 247 N.J. Super. 456, 463 (App. Div. 1991); *Verni v. Harry M. Stevens, Inc.*, 387 N.J. Super. 160 (App. Div. 2006) (How a child is belted in the rear seat is a child-care decision protected by parental immunity.).

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.[58] 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 … ."[59] 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.[60]

1-10 DUTIES VOLUNTARILY ASSUMED

A volunteer who willingly undertakes a duty must act with due care.[61] A volunteer who assumes to act must satisfy the duty of reasonable care under the circumstances.[62] An example of this circumstance would be if a 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.[63] This act provides many immunities to specific types of personnel in volunteer situations and is discussed in Chapter 20.

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58. *Buono v. Scalia*, 179 N.J. 131, 143 (2004).
59. *Buono v. Scalia*, 179 N.J. 131, 142 (2004).
60. *Buono v. Scalia*, 179 N.J. 131, 150 (2004) (Justice Long dissenting).
61. *Barbarisi v. Caruso*, 47 N.J. Super. 125 (App. Div. 1957).
62. *Freddie-Gail, Inc. v. Royal Holding Corp.*, 45 N.J. Super. 471 (App. Div.), *certif. denied*, 25 N.J. 56 (1957).
63. N.J.S.A. 2A:62A-1, *et seq*.

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:

Gudnestad v. Seaboard Coal Dock Co., 27 *N.J. Super*. 227 (App. Div. 1953); *Wolcott v. N.Y. and L.B.R.R. Co*., 68 *N.J.L*. 421 (Sup. Ct. 1902).

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:

Johnson v. Souza, 71 *N.J. Super*. 240 (App. Div. 1961); *Restatement of Torts*, *Sec*. 325, p. 831 (1934): *Miller v. Muscarelle*, 67 *N.J. Super*. 305 (App. Div. 1961).

1-11 PER SE NEGLIGENCE

Often in negligence trials there is an allegation that a statute or administrative code or other form of regulation of some type has been violated. The question then becomes how the jury is to consider such a violation. Is a violation simply evidence of negligence? Is it negligence per se? Is it a violation to be considered at all by the jury?

The Model Civil Jury Charge Committee has put forward new alternative charges depending upon the trial court's analysis of what a violation of a code, statute, or regulation can mean. This is for purposes in general negligence cases similar to how a motor vehicle statute violation can be considered in an automobile case. The Model Civil Jury Charge Committee in its comments to these new proposed charges has provided all the necessary case analysis for which the charge should be used or whether one should be used at all.

5.10J EVIDENCE OF AND *PER SE* NEGLIGENCE (04/2016)

1. Violation of Administrative Regulation/Statute as Evidence of Negligence
In this case, the plaintiff, in support of the claim of negligence made, asserts that defendant violated a provision of the New Jersey Administrative Code/New Jersey Statutes *[whichever is applicable]*. The provision referred to as N.J.A.C./N.J.S.A. *[insert citation]* reads as follows:

. . .

The administrative regulation/statute has set up a standard of conduct. If you find that defendant has violated that standard of conduct, such violation is evidence to be considered by you in determining whether negligence, as I have defined that to you, has been established. You may find that such violation constituted negligence on the part of the defendant, or you may find that it did not constitute such negligence. Your findings on this issue may be based on such violation alone, but in the event that there is other or additional evidence bearing upon the issue, you will consider such violation together with all such additional evidence in arriving at your ultimate decision as to the defendant's negligence.

2. Violation of Administrative Regulation/Statute as Negligence *Per Se*
In this case, the plaintiff asserts that the defendant violated a provision of the New Jersey Administrative Code/New Jersey Statutes *[whichever is applicable]*. The provision referred to as N.J.A.C./N.J.S.A. *[insert citation]* reads as follows:

. . .

The administrative regulation/statute has set up a standard of conduct. If defendant has violated this provision, such conduct is negligence on the defendant's part.

Cases:
The question of whether a jury should be instructed a statute or administrative regulation constitutes evidence of negligence or negligence *per se* is one to be determined by the court as a matter of law on a case by case basis. For cases which have held a regulation or statute was evidence of negligence, *see*: *Constantino v. Ventriglia*, 324 *N.J. Super.* 437 (App. Div. 1999), *certif. denied*, 163 N.J. 10 (2000) (OSHA regulations were evidence of the standard of care for the construction industry); *Braitman v. Overlook Terrace Corp.*, 68 *N.J.* 368 (1975) (holding failure to supply tenant deadbolts in violation of statute was evidence of negligence); *Frugis v. Bracigliano*, 177 *N.J.* 250 (2003) (noting violation of an administrative regulation requiring school rooms to have unobstructed safety-vision panels was evidence of negligence); *Parks v. Rogers*, 176 *N.J.* 491, 496, n. 1 (2003) (Supreme Court of New Jersey referenced provisions in the Uniform Construction Code Act and its subcode regarding handrails as evidential on the standard of care); *Swank v. Halivopoulos*, 108 *N.J. Super.* 120 (App. Div. 1969), *certif. denied*, 55 *N.J.* 444 (1970) (Releases of the New Jersey Department of Health Concerning Administration of Oxygen held admissible in medical malpractice action); *Horbal v. McNeil*, 66 *N.J.* 99 (1974) (traffic regulations regarding speeding (*N.J.S.A.* 39:4-98)

and right of way at intersections (*N.J.S.A.* 39:4-90) were evidence a jury could consider on the issues of negligence and contributory negligence).

For cases in which a statute or regulation constituted negligence *per se*, *see*: *Eaton v. Eaton*, 119 N.J. 628 (1990) (*N.J.S.A.* 39:4-97 incorporated a common law standard of care, thus a jury finding of a statutory violation was a finding of negligence; *Brehm v. Pine Acres Nursing Home,* 190 *N.J. Super.* 103 (App. Div. 1983) (violation of Nursing Home Bill of Rights, *N.J.S.A.* 30:13-8, constituted a cause of action against the person committing the violation). *Cf*. *Ptaszynski v. Atlantic Health Systems, Inc.*, 440 N.J. Super. 24 (App. Div. 2015) (*N.J.S.A.* 30:13-4.2 does not permit plaintiff to assert cause of action against nursing home for failure to comply with state or federal statutes as set forth in *N.J.S.A.* 30:13-3 (h)); *DiGiovanini v. Pessel*, 104 *N.J. Super.* 550 (App. Div. 1969), *aff'd in part, rev'd in part on other grounds*, 55 *N.J.* 188 (1970) (*N.J.S.A.* 30:4-30 set forth standard of conduct for physician certifying as to a person's insanity requiring physical examination, but court dismissed malpractice action due to failure to provide evidence of proximate cause).

Courts have also found statutes or regulations may not be used as evidence of negligence. For those cases see: *Reyes v. Egner,* 404 *N.J. Super.* 433 (App. Div. 2009), *aff'd.*, 201 *N.J.* 417 (2010) (*N.J.A.C.* 11:5-6.9 did not apply to "short-term rentals" and, therefore, was not evidential); *Badalamenti v. Simpkiss*, 422 *N.J. Super.* 86 (App. Div. 2011) (while a violation of statute may be considered by a jury in determining negligence, it must be casually related); *Johnson v. Mountainside Hospital*, 239 *N.J. Super.* 312, 325 (App. Div. 1990) (*N.J.A.C.* 8:43B-6(a)(i) was a regulation stating an objective or aspiration, not a standard of care); *Zuidema v. Pedicano*, 373 *N.J. Super.* 135 (App. Div. 2004) (New Jersey Administrative Code provisions prohibiting physicians engaging in sexual relations with a patient not evidence of negligence because they did not constitute a legitimate professional service and were not deemed a negligent act by the regulations); *Castro v. NYT Television*, 370 *N.J. Super.* 282 (App. Div. 2004) *aff'd in part, rev'd in part on other grounds*, 384 *N.J.* (1970) (the Hospital Patient's Bill of Rights Act, unlike the Nursing Home Residents' Bill of Rights Act, does not expressly authorize private causes of action).