CHAPTER 5

Negligence: Breach of Duty

OVERVIEW QUESTIONS

1. What does the question of reasonable care boil down to?
   a. At what moment in time is the reasonableness of a defendant’s conduct evaluated?
2. What question was Judge Learned Hand attempting to answer through the use of his formula?
3. What is the Learned Hand formula?
   a. Summarize the meaning of his formula.
   b. What do the courts look at in considering the burden of precautions?
   c. Use this formula to argue that a reasonable car manufacturer should include an air bag in the design of its cars.
4. How does the *Restatement* position compare with the Learned Hand formula?
5. What is the difference between an objective and a subjective standard?
   a. Why is the objective standard usually used in tort law?
   b. What kinds of things is the reasonable person expected to know?
   c. Is ignorance of the law an excuse under the reasonable-person standard?
6. Does the law take into account a person’s mental stability in determining the reasonableness of her or his conduct?
   a. What about a person’s IQ?
7. To what standard is an intoxicated person held?
8. To what standard is an insane person held?
   a. What are three reasons for adhering to such a standard?
     (1)  
     (2)  
     (3) 
9. Does the law take into account the physical attributes of an individual?
   a. Give an example.
   b. How are unknown physical conditions treated?
10. To what standard of care are children held?
    a. When are they held to an adult standard of care?
11. To what standard of care is one held in an emergency?
    a. In what, if any, circumstances might a person be expected to anticipate the actions of others?
12. How is custom used in determining the reasonable standard of care?
    a. Does adherence to custom necessarily preclude a defendant from being found negligent?
13. To what standard of care is a professional held?
    a. What is the difference in standard of care for a general practitioner and a neurosurgeon?
    b. Is a novice in a profession held to a lower standard of care than a more experienced individual?
14. What is negligence per se?
    a. What are the elements of negligence per se?
15. In what way is negligence per se problematic when it comes to cases involving the stealing of cars?
16. Does the violation of a criminal statute necessarily result in civil liability?
    a. What is the majority rule?
17. Are there ever circumstances in which the violation of a statute will be considered negligence per se even though the defendant acted reasonably?
   a. Give an example.
18. How do different jurisdictions treat the violation of a statute (if the statutes do not impose an absolute duty of compliance)?
19. Are contributory negligence and assumption of risk viable defenses in cases of negligence per se?
20. If a defendant acts in compliance with a statute, is she or he presumed not to be negligent?
21. What is an automobile-guest statute?
   a. What was the rationale behind this statute?
22. What is the doctrine of res ipsa loquitur?
   a. What four things must a plaintiff prove?
      (1)
      (2)
      (3)
      (4)
23. If it is just as likely that someone other than the defendant caused the plaintiff’s injuries, does the doctrine of res ipsa loquitur apply?
24. Why does the plaintiff often have a difficult time proving negligence when there are multiple defendants?
   a. Why do some courts allow plaintiffs to rely on res ipsa loquitur in such cases?
25. Is a plaintiff required to prove that only negligence could have been the cause of the injuries she or he sustained?
26. Is the doctrine applicable if the plaintiff was contributorily negligent?
27. Is the doctrine applicable if the evidence of negligence is just as available to the plaintiff as it is to the defendant?
28. What are the procedural consequences of relying on the doctrine of res ipsa loquitur?

**REVIEW QUESTIONS**

1. What general rules have been established to determine the reasonableness of a defendant’s conduct?
2. In what way has the law attempted to objectively assess the reasonableness of conduct (e.g., using formulas or guidelines)?
3. Explain how a plaintiff can use the doctrines of negligence per se and res ipsa loquitur to help prove the case.
   a. What might a defendant argue in response to the use of these doctrines?

**PUTTING IT INTO PRACTICE**

A client asks your firm to represent her in a medical malpractice claim against a gynecologist who uses both traditional (allopathic) and holistic approaches to treating her patients. The client says she had emergency surgery that saved her life but resulted (she claims) in a recurring pain in her left leg. She never experienced such pain before and nothing she or any physician does alleviates this constant pain. She also says that after the surgery, the gynecologist used some nontraditional techniques, which were designed to expedite the healing process. How will you go about determining whether the doctor breached her duty of care?

**KEY TERMS**

Define the following:

- learned hand formula
- negligence per se
- res ipsa loquitur

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