

## The Prima-Facie Case for Negligence

(NB!: This is the basic framework; you will need to populate it with more rules)

Plaintiff bears the burden of proof on the following elements of the prima-facie case.

### I. Duty (DUTY + STD):

The issues of whether a [1] duty exists and, if so, what the [2] applicable standard or duty of care is, are generally legal determinations for the judge only:<sup>1</sup>

[1]. Does  $\partial$  owe a legal **duty** to  $\pi$ ; this is a binary issue, “yes or no.”

[a]. Assume yes, unless a special no-duty rule says otherwise.

[2]. If “yes,” then determine what **standard** of care the law prescribes:

[a]. The default standard at common law is to act as a reasonable and prudent person would under the same or similar circumstances;

[i]. Sometimes this standard is directly modified by the common law or by statute—*e.g.* physical infirmity, children, trespassers, medical malpractice.

[b]. Sometimes a statute or regulation indirectly prescribes the standard, *i.e.*, negligence per se.

### II. Breach:

Breach issues are for the fact finder (the jury, in a jury trial), unless there is no triable issue of fact [*e.g.*, MSJ or JMOL]. Once the judge decides on the proper “standard of care” for the case, *see supra* § I.[2], the fact finder must determine whether the  $\partial$  has failed to conform to the applicable standard. Stated another way, the fact finder must decide whether the  $\partial$  has breached his or her “duty of care” or was “negligent.” For example:

[1].  $\partial$  has breached the applicable common-law standard; or

[a]. We often use  $B < P \times L$  to assess breach. We look at the  $\partial$ ’s actual underlying conduct and assign values to the severity of potential harm (L) and the probability (P) of the L occurring. We then propose what a reasonable person would have done and assess the burden (B) of that untaken precaution (a.k.a. the “shoulda done”).

[2]. In a negligence per se case,  $\partial$  has violated the applicable statute or regulation [without a legally recognized excuse].<sup>2</sup>

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<sup>1</sup> There are a few exceptions where the jury will participate, *e.g.*, medical malpractice.

<sup>2</sup>  $\partial$  bears the burden to prove that any violation was excused.

### III. Legally Cognizable Harm (LCH):

Harm is a mixed question of fact and law. Whether the  $\pi$  has actually suffered any “harm” is an issue for the fact finder, unless there is no triable issue of fact. But whether the “harm” suffered is legally cognizable—that is to say, one the law will recognize—is an issue for the judge only.

- [1]. Traditionally, the  $\pi$  must suffer actual injury to her person or property.
- [2]. Under certain circumstances, other harms are cognizable, *e.g.*, loss of consortium, stand-alone emotional distress, loss of chance for a better outcome.

### IV. Cause in Fact (CIF):

Actual-cause issues are for the fact finder, unless there is no triable issue of fact.

- [1]. In the vast majority of cases, the  $\pi$  must show that “but for”  $\partial$ ’s breach [*i.e.*, negligence]  $\pi$  would not have suffered the LCH identified and relied upon in § III *supra*.
  - [a]. More specifically, if the  $\partial$  had done what a reasonable person would have done under the circumstances, [*i.e.*, if the  $\partial$  had done the “shoulda done,”] the  $\pi$  would not have suffered the LCH identified and relied upon in § III *supra*.
- [2]. In some limited circumstances or jurisdictions, the  $\pi$  may instead show that  $\partial$ ’s breach [*i.e.*, negligence] was a “substantial factor” in causing  $\pi$ ’s LCH.

### V. Proximate Cause / Scope of Risk (SOR):

Scope-of-risk issues are for the fact finder, unless there is no triable issue of fact.

- [1]. The LCH suffered must fall within the scope of  $\partial$ ’s negligence—*i.e.*, a reasonable person would have foreseen harm of the same general type as the LCH.
- [2]. The  $\pi$  must fall within the scope of  $\partial$ ’s negligence—*i.e.*, a reasonable person would have foreseen harm to a class of persons to which  $\pi$  belongs.
- [3]. Manner of Occurrence:
  - [a]. The precise manner in which the LCH occurs need not be foreseeable, but probably some aspects of the manner in which it occurred must be foreseeable.
  - [b]. An intervening act or force (even an intentionally tortious or criminal one) can fall within the scope of the risk the  $\partial$  negligently imposed so long as the intervening act or force, or one of the same general type, is foreseeable.
- [4]. Thin-skull rule: the extent of the  $\pi$ ’s LCH or damages need not be foreseeable.