Determining Breach of Duty

1) Would reasonable person have foreseen a risk of harm?
   – If no, then not negligent
   – [If yes, move on to #2]

2) Would reasonable person have taken steps to avoid or minimize the risk/acted with more care than D?
   – If no, then not negligent
   – If yes, then negligent
Learned Hand Formula

Negligent if $B < P \times L$

$B =$ burdens to actor of taking steps to avoid or minimize risk

$P =$ probability harm

$L =$ magnitude of harm
If no bargee, each year 50% chance barge will be hit, causing average damages of $40,000. Annual salary for full-time bargee is $30,000.

***

Negligent if B < P*L

B = burden taking steps to avoid or minimize risk
P = probability harm
L = magnitude of harm
Learned Hand Formula – Reduced Risk

Negligent if $B < (P_{\text{do nothing}} \times L) - (P_{\text{take precautions}} \times L)$

$B$ = burdens to actor of taking steps to avoid or minimize risk

$P$ = probability harm

$L$ = magnitude of harm
If no bargee, anticipate barge hit once/yr, with average damages of $50,000. Full-time bargee reduced risk by 50%. Annual salary for full-time bargee is $30,000.

* * *

Negligent if \( B < (P_{\text{do nothing}} \times L) - (P_{\text{take precautions}} \times L) \)

\( B = \) burdens to actor of taking steps to avoid or minimize risk
\( P = \) probability harm
\( L = \) magnitude of harm
Mathews Revisted

P alleged that D should have pushed flaming mower out of garage in an effort to save the garage.

***

Negligent if B < P*L

B = burdens to actor of taking steps to avoid or minimize risk
P = probability harm
L = magnitude of harm
Learned Hand Formula -- Refined

Negligent if $B < (P_{\text{do nothing}} \times L) - (P_{\text{take precautions}} \times L)$

$B = \text{burdens to actor of taking steps to avoid or minimize risk}$

- Includes direct costs + potential risk
- Potential risk = $(P_{\text{new risk}} \times L_{\text{new risk}})$
  
  New risk = risk associated with precaution that avoids or minimizes original risk

$P = \text{probability harm}$

$L = \text{magnitude of harm}$
Allocation Responsibility

Scenario: Both Defendant (D) and Plaintiff (P) were negligent

• **Comparative Fault**: Damages reduced in proportion to P’s fault
  
  *Example
  
  – P’s damages = $100,000
  – D 70% at-fault, P 30% at-fault
  – D liable for 70% of damages, or $70,000

• **Traditional rule**: P recovers nothing
Scenarios: Two or more Ds were negligent

• **Several Liability**: P collects separately from each D in proportion to fault

  *Example:*
  - P’s damages = $100,000
  - D1 70% at-fault; D2 30% at-fault
  - P collects $70,000 from D1 and $30,000 from D2

• **Joint and Several Liability**: P can collect in full from any D; paying D seeks contribution from other D(s)

  *Example:*
  - P’s damages = $100,000
  - D1 70% at-fault; D2 30% at-fault
  - P collects $100,000 from D1; D1 seeks $30,000 from D2
Types of Evidence

1) *Direct Evidence*: Evidence that if believed clearly establishes a fact

2) *Circumstantial Evidence*: Evidence of one fact that permits an inference of another fact

3) *Eye witnesses*: Testimony from those with first hand knowledge

4) *Expert witness*: Testimony from those with expertise in a field
Slip and Fall Timeline

D’s negligent conduct contributes to creation of hazard?

D fails to address hazard

P slips and falls
Slip and Fall

1) Did D create dangerous condition, have actual or constructive knowledge of dangerous condition, or operate in manner with foreseeable risk others create dangerous condition?

and

2) Did D fail to take reasonable actions to minimize/eliminate condition?

Ordinary Care

1) Would reasonable person have foreseen a risk of harm?

and

2) Would reasonable person have taken steps to avoid or minimize the risk?
Effect of Statutory Requirements

- Ordinary Care

What RPP would do

- Negligence

Statutory requirement

- Negligence Per Se
Determining Breach of Duty

1) **Would reasonable person have foreseen a risk of harm?**
   - Question is not whether technically foreseeable, but whether remote
   - Evidence of foreseeability
     - Custom
     - Internal Policies
     - D took precautions

2) **Would reasonable person have taken steps to avoid or minimize the risk?**

   **Conceptualizations of Reasonable Person**
   - Risk-utility balancing/Learned Hand formula
   - Community norms
     - E.g., value life above property
   - What people generally do
   - Policy justifications
     - E.g., impose burden of minimizing risk on party with superior knowledge

   **Evidence of what reasonable person would do:**
   - Internal policies
   - Custom
   - Statutes/ordinances/regulations
   - Professional/industry guidelines
Summary - *Res Ipsa Loquitur*

**Context:** Do not know what defendant specifically did

**Key Issues:**
- Whether accident ordinarily would not occur in the absence of negligence
- Whether defendant’s negligence is the most probable cause

**Factors:**
- Evidence eliminating non-negligent causes
- Failure by plaintiff/defendant to present available evidence
- Control condition
- Evidence eliminating other actors as tortfeasors

**2+ Potential Defendants:** If cannot determine which D was negligent
- *Majority rule:* No RIL unless shared responsibility
- *Collins:* RIL if serial control (and complaint stage of litigation?)
**Res Ipsa Loquitur – Procedural Effect**

When applicable –

**Majority approach:**

- P gets to jury.
- Jury may infer that D was negligent
  - *Not required to do so

**Minority approach:** Presumption of negligence

- D has burden of proving not negligent, or
- D presumed negligent, but if D presents evidence of non-negligence revert to majority rule
Paul, an experienced pilot, always inspects his private airplane prior to each flight. After finding nothing wrong with the plane, Paul took-off from Houston to San Antonio. Mid-route the plane crashes. Paul survives but is badly injured. Most of the plane’s engine components were destroyed by the post-crash fire, while the remaining components were never located. The day before the accident Dobbs, a mechanic, had performed some repairs on the plane’s engine. Paul believes Dobbs may have been negligent in doing the repairs.

Paul approaches you about suing Dobbs for negligence. You conclude that because there is no physical evidence suggesting that Dobbs’s repair job was negligent, Paul’s only chance of winning his case is if the court invokes the doctrine of *res ipsa loquitur* against Dobbs. Should you take Paul’s case?