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Court of Appeals No. 63299-0-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ELSA ROBB, personal representative of the
ESTATE OF MICHAEL ROBB,

Respondent

vs.

CITY OF SEATTLE, a municipal corporation;
OFFICER KEVIN MCDANIEL; OFFICER PONHA LIM,

Petitioner

PETITIONER'S STATEMENT OF ADDITIONAL AUTHORITIES

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ORIGINAL

Pursuant to RAP 10.8, Petitioner City of Seattle submits the following additional authorities.

Restatement (Second) of Torts § 281 (attached)

Restatement (Second) of Torts § 282 (attached)

Restatement (Second) of Torts § 283 (attached)

RESPECTFULLY SUBMITTED this 17th day of January, 2012.

PETER S. HOLMES
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By: /s _____
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§ 281. Statement Of The Elements Of A Cause Of Action For Negligence

The actor is liable for an invasion of an interest of another, if:
(a) the interest invaded is protected against unintentional invasion, and
(b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and
(c) the actor's conduct is a legal cause of the invasion, and
(d) the other has not so conducted himself as to disable himself from bringing an action for such invasion.

See Reporter's Notes.

Comment:

a. Clauses (a) and (b) state the conditions necessary to make the actor's conduct negligent. Clauses (c) and (d) state the conditions which are necessary to make negligent conduct actionable.

Comment on Clause (a):

b. This Clause states the requirement that the interest which is invaded must be one which is protected, not only against acts intended to invade it, but also against unintentional invasions. The extent to which particular interests are protected is considered in those Chapters which deal with the various interests, and no catalogue is here given of the interests which are protected against unintentional invasions and those which are not so protected.

Comment on Clause (b):

c. *Risk to class of which plaintiff is member.* In order for the actor to be negligent with respect to the other, his conduct must create a recognizable risk of harm to the other individually, or to a class of persons—as, for example, all persons within a given area of danger—of which the other is a member. If the actor's conduct creates such a recognizable risk of harm only to a particular class of persons, the fact that it in fact causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not make the actor liable to the persons so injured.

Illustrations:

1. A, a passenger of the X Railway Company, is attempting to board a train while encumbered with a bulky and apparently fragile package. B, a trainman of the Company, in assisting A, does so in such a manner as to make it probable that A will drop the package. A drops the package, which contains fireworks, although there is nothing in its appearance to indicate it. The fireworks explode. The force of the explosion knocks over a platform scale thirty feet away, which falls upon C, another passenger waiting for a train, and injures her. X Railway Company is not liable to C.

2. A is driving a car down the street. He drives so carelessly that he collides with another car. The second car contains dynamite. A is ignorant of this and there is nothing in its appearance or in the circumstances to give him reason to suspect it. The collision causes an explosion which shatters a window of a building on an intersecting street, half a block away, inflicting serious cuts upon B, who is working at a nearby desk. The explosion also harms C, who is walking on the sidewalk near the point where the collision occurs. It also shatters the windows in the building opposite, injuring D at work therein. A is not negligent toward B, since he had no reason to believe that his conduct involved any risk of harming anyone at the point where B is injured. A is negligent toward C since he should have realized that careless driving might result in an accident which would affect the safety of those traveling upon the sidewalk, and the fact that the harm occurred in a different manner from that which might have been expected does not prevent his negligence from being in law the cause of the injury. Whether or not A is negligent toward D depends upon whether A as a reasonable man should have expected that the manner in which he drove the car might cause harm to persons in D's situation.

Comment:

d. There are situations in which the obvious probability of harm to one class of persons may be considered in determining whether an act is negligent to a person of a different class, although the risk of harm to persons of the latter class is so slight that the actor's conduct might otherwise not be negligent as to them. (See § 294.)

e. The hazard problem. Conduct is negligent because it tends to subject the interests of another to an unreasonable risk of harm. Such a risk may be made up of a number of different hazards, which frequently are of a more or less definite character. The actor's negligence lies in subjecting the other to the aggregate of such hazards. In other words, the duty established by law to refrain from the negligent conduct is established in order to protect the other from the risk of having his interest invaded by harm resulting from one or more of this limited number of hazards.

In some cases the duty to refrain from certain conduct may be established solely to protect the other from the risk of harm arising from one particular hazard. As to harm resulting from that hazard, the conduct is negligent. Thus in some situations the locking of a securely closed door may be required only for the purpose of protecting goods within the room or building from the risk of theft. When the thief appears on the scene, opens the unlocked door, and steals the goods within, the harm which results is the precise harm which the duty to lock the door was designed to prevent. (See § 449.)

In other cases the number of hazards, although limited, may be large. Thus the duty to exercise reasonable care in driving an automobile down the highway is established for the protection of the persons or property of

others against all of the unreasonable possibilities of harm which may be expected to result from collisions with other vehicles, or with pedestrians, or from the driver's own automobile leaving the highway, or from narrowly averted collisions or other accidents. When harm of a kind normally to be expected as a consequence of the negligent driving results from the realization of any one of these hazards, it is within the scope of the defendant's duty of protection.

f. Harm beyond the risk. Where the harm which in fact results is caused by the intervention of factors or forces which form no part of the recognizable risk involved in the actor's conduct, the actor is ordinarily not liable. This is subject, however, to the qualification that where the harm which has resulted was itself within the risk created, the fact that it has been brought about in a manner which was not to be expected, or by the intervention of forces which were not within the risk, does not necessarily prevent the actor's liability. (See § 442B.)

Illustration:

3. A gives a loaded pistol to B, a boy of eight, to carry to C. In handing the pistol to C the boy drops it, injuring the bare foot of D, his comrade. The fall discharges the pistol, wounding C. A is subject to liability to C, but not to D.

g. Flexibility of risk. In determining whether a particular harm or hazard is within the scope of the risk created by the actor's conduct, "risk" must be understood in the broader sense of including all of those hazards and consequences which are to be regarded as normal and ordinary. "Risk" is not limited to those hazards which a reasonable man would have in contemplation and take into account in planning his conduct. Thus one who drives an automobile through city streets at excessive speed may not, as a reasonable man, have in mind the possibility that he may endanger a child in the street and that one who attempts to rescue the child may suffer harm; that he may injure some one who will suffer further injury from negligent medical treatment, or from a fall while attempting to walk on crutches; or that the injured man may be left lying in the highway, where a second car will run over him. None of these possibilities is in itself sufficient to make the driver negligent, and none of them is sufficiently probable to influence the conduct of a reasonable man in his position, which will be determined without regard to them. Nevertheless, each of them is a normal, not unusual consequence of the hazardous situation risked by the driver's conduct, and each is justly attachable to the risk created, and so within its scope.

In determining whether such events are within the risk, the courts have been compelled of necessity to resort to hindsight rather than foresight. If an event appears to have been normal, not unusual, and closely related to the danger created by the actor's original conduct, it is regarded as within the scope of the risk even though, strictly speaking, it would not have been expected by a reasonable man in the actor's place.

h. Relation to legal cause. The problem which is involved in determining whether a particular intervening force is or is not a superseding cause of the harm is in reality a problem of determining whether the intervention of the force was within the scope of the reasons imposing the duty upon the actor to refrain from negligent conduct. If the duty is designed, in part at least, to protect the other from the hazard of being harmed by the intervening force, or by the effect of the intervening force operating on the condition created by the negligent conduct, then that hazard is within the duty, and the intervening force is not a superseding cause. (See §§ 443-452.) A completely accurate analysis of the hazard element in negligence would require the material on superseding cause in Chapter 16 to be placed in this chapter. However, in the past the courts generally have discussed the effect of intervening forces in terms of causation. The solution of the problem of determining whether the presence of an intervening force should relieve the actor from liability for harm which his conduct was a substantial factor in bringing about (see § 440) is facilitated by an appreciation of the fact that the problem is a "hazard problem" rather than a problem of causation.

i. Application to violation of statutes. The statement in Comment e is most easily recognized in cases of violation of legislative enactments. The language of many statutes makes it clear that they are intended to prevent a very definite type of accident or class of accidents, the prevalence of which has led to the enactment of the statute. (See § 286, Clause (c), and Illustrations.) Many acts are prohibited or required by the common law for substantially the same reason, although the fact that this is so is less easy to recognize.

j. Risk to particular interest. Conduct may be negligent because it involves an unreasonable risk of invading only a particular interest of the plaintiff, or one of a particular species of interests, such as an interest of personality, but may involve no recognizable risk of invading another interest of the same species, or an interest of another species, such as an interest in land or chattels. If so, the fact that the interest to which harm results is a different interest, or a different kind of interest, from that which was threatened with harm, will not prevent the actor from being liable, so long as the interest in fact harmed is one entitled to legal protection against negligence. Thus where harm is threatened only to the plaintiff's land, and harm results instead to his person, or vice versa, the defendant is not relieved from liability by the unexpected nature of the result, or by the fact that an interest of a different kind has been invaded. The plaintiff is not subjected to fragmentation in terms of risk or harm to his foot, his hand, his eye, his chattels, or his land.

Illustration:

4. A, negligently shooting in the street, wounds B's dog. The dog, yelping with pain, runs into B's house and collides with B in the hallway, knocking

B down and injuring him. A is subject to liability to B, not only for the harm to his dog but also for the harm to his person.

Comment on Clause (c):

k. The rules which determine whether the actor's conduct is in law a cause of the invasion of another's interest are stated in §§ 430-462.

Comment on Clause (d):

l. The rules which determine whether the other's conduct is such as to disable him from bringing an action for an invasion of which the actor's negligence is in law the cause, are stated in §§ 463-496.

Division 2. Negligence
Chapter 12. General Principles
Topic 2. The Standard By Which Negligence Is Determined

§ 282. Negligence Defined

In the Restatement of this Subject, negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregarding of an interest of others.

Comment:

a. Negligent conduct may consist either of an act (see § 2), or an omission to act when there is a duty to do so (see § 284).

b. As stated in § 281, negligent conduct subjects the actor to liability only if the conditions stated in Clauses (a), (b), (c), and (d) of that Section exist.

c. The concept of unreasonable risk includes the existence of a risk and also its unreasonable character. The conditions which determine whether the actor should recognize the existence and extent of the risk involved in his conduct are stated in §§ 289 and 290. The conditions which determine whether the risk is unreasonable are stated in §§ 291-296.

The phrase "conduct involving unreasonable risk" is substantially synonymous with the phrases "unduly dangerous conduct" and "unreasonably dangerous conduct." However, the phrase used in this Section is preferable in that it makes it easier to define the nature and character of the risk.

d. Negligence contrasted with intended harm. The definition of negligence given in this Section includes only such conduct as creates liability for the reason that it involves a risk and not a certainty of invading the interest of another. It therefore excludes conduct which creates liability because of the actor's intention to invade a legally protected interest of the person injured or of a third person (see § 8 A, Comment *b*, which defines "intent" as including knowledge that the conduct will invade the interest, as well as a purpose to invade it). The conditions which create liability for intentional invasions of interests of personality are stated in Chapter 2.

e. Negligence contrasted with recklessness. As defined in this Section, the word "negligence" excludes conduct which the actor does or should realize as involving a risk to others which is not merely in excess of its utility, but which is out of all proportion thereto and is therefore "recklessly disregarding of the interests of others." As the disproportion between risk and utility increases, there enters into the actor's conduct a degree of culpability which approaches and finally becomes indistinguishable from

that which is shown by conduct intended to invade similar interests. Therefore, where this disproportion is great, there is a marked tendency to give the conduct a legal effect closely analogous to that given conduct which is intended to cause the resulting harm. The rules which create liability for harm caused by conduct which is recklessly disregarding of the interests of others are stated in §§ 500-503.

Special Note: The word "negligent" is often used to include all conduct which, although not intended to invade any legally protected interest, has the element of social fault. Conduct which is in reckless disregard of a legally protected interest of others is thus constantly spoken of as a form of negligence, the phrases used being "reckless," "wanton," and "wilful negligence," as distinguished from "negligence" or "mere negligence." But as stated in §§ 500-503, conduct recklessly disregarding of an interest of another differs from negligence in several important respects:

1. The rule that contributory negligence is no defense to an act intended to invade the plaintiff's interest is applied where the conduct is in reckless disregard of the plaintiff's interest.
2. Greater culpability is recognized by the imposition of punitive damages in many jurisdictions.
3. There is a pronounced tendency to regard reckless conduct as the legal cause of a particular harm, although the actor's conduct if merely negligent would not have been so considered.
4. In some jurisdictions the liability of a landowner to a trespasser or a gratuitous licensee is imposed only when the presence of the trespasser or licensee is known and the risk created by the actor's conduct is out of all proportion to its social utility.
5. In the construction of statutes which specifically refer to gross negligence, that phrase is sometimes construed as equivalent to reckless disregard.
6. In those jurisdictions where the distinction between trespass and trespass on the case is still of importance, reckless disregard is assimilated to intended harm to the extent that an action for trespass will lie.

Notwithstanding the difficulty of drawing the line between negligence and reckless conduct, these differences make it advisable to treat the two subjects separately.

f. Negligence contrasted with liability without fault. The fact that negligence as here defined is conduct which falls below the standard of behavior established by law for the protection of others carries with it the idea of social fault. Therefore it does not include acts which, although done with every precaution which it is practicable to demand, involve an

irreducible minimum of danger to others, but which are so far justified by their utility or by traditional usage that even the most perfect system of preventive law would not forbid them. These may for convenience be termed "acts which create a strict liability" and are considered in Volume 3 of the Restatement of this Subject.

g. The word "risk" standing by itself denotes a chance of harm. In so far as risk is of importance in determining the existence of negligence, it is a chance of harm to others which the actor should recognize at the time of his action or inaction.

h. In determining whether the actor should recognize the risks which are involved in his conduct, either of act or omission, only those circumstances which the actor perceives or should perceive at the time of his action or inaction are to be considered. Circumstances which occur after the conduct which is alleged to be negligent are as immaterial as are those circumstances which exist at the time of his action or inaction, but of which the actor neither knows nor should know, although known to third persons. Thus the rule here stated has reference to the reasonable probability that harm will ensue, but not to its extent, so long as the harm itself is unreasonable.

Division 2. Negligence
Chapter 12. General Principles
Topic 2. The Standard By Which Negligence Is Determined

§ 283. Conduct Of A Reasonable Man: The Standard

Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.

Comment:

a. This Section is concerned only with the standard of conduct required of the actor to avoid being negligent. It is not concerned with the question of when he owes to another a duty to conform to that standard.

b. Qualities of the "reasonable man." The words "reasonable man" denote a person exercising those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others. It enables those who are to determine whether the actor's conduct is such as to subject him to liability for harm caused thereby, to express their judgment in terms of the conduct of a human being. The fact that this judgment is personified in a "man" calls attention to the necessity of taking into account the fallibility of human beings.

c. Standard of the "reasonable man." Negligence is a departure from a standard of conduct demanded by the community for the protection of others against unreasonable risk. The standard which the community demands must be an objective and external one, rather than that of the individual judgment, good or bad, of the particular individual. It must be the same for all persons, since the law can have no favorites; and yet allowance must be made for some of the differences between individuals, the risk apparent to the actor, his capacity to meet it, and the circumstances under which he must act.

In dealing with this problem the law has made use of the standard of a hypothetical "reasonable man." Sometimes this person is called a reasonable man of ordinary prudence, or an ordinarily prudent man, or a man of average prudence, or a man of reasonable sense exercising ordinary care. It is evident that all such phrases are intended to mean very much the same thing. The actor is required to do what this ideal individual would do in his place. The reasonable man is a fictitious person, who is never negligent, and whose conduct is always up to standard. He is not to be identified with any real person; and in particular he is not to be identified with the members of the jury, individually or collectively. It is

therefore error to instruct the jury that the conduct of a reasonable man is to be determined by what they would themselves have done.

The chief advantage of this standard of the reasonable man is that it enables the triers of fact who are to decide whether the actor's conduct is such as to subject him to liability for negligence, to look to a community standard rather than an individual one, and at the same time to express their judgment of what that standard is in terms of the conduct of a human being. The standard provides sufficient flexibility, and leeway, to permit due allowance to be made for such differences between individuals as the law permits to be taken into account, and for all of the particular circumstances of the case which may reasonably affect the conduct required, and at the same time affords a formula by which, so far as possible, a uniform standard may be maintained.

d. The qualities of a reasonable man which are of importance differ with the various situations in which the phrase is used. In determining whether the actor should realize the risk which his conduct involves, the qualities which are of importance are those which are necessary for the perception of the circumstances existing at the time of his act or omission and such intelligence, knowledge, and experience as are necessary to enable him to recognize the chance of harm to others involved therein. (See §§ 289 and 290.)

e. Weighing interests. The judgment which is necessary to decide whether the risk so realized is unreasonable, is that which is necessary to determine whether the magnitude of the risk outweighs the value which the law attaches to the conduct which involves it. This requires not only that the actor give to the respective interests concerned the value which the law attaches to them, but also that he give an impartial consideration to the harm likely to be done the interests of the other as compared with the advantages likely to accrue to his own interests, free from the natural tendency of the actor, as a party concerned, to prefer his own interests to those of others.

f. Reasonable consideration for others and reasonable prudence. In so far as the conduct of the reasonable man furnishes a standard by which negligence is to be determined, the standard is one which is fixed for the protection of persons other than the defendant. In so far as the contributory negligence of the actor is concerned, the standard is one to which the actor is required to conform for his own protection (see § 463). When a plaintiff's contributory negligence is in question, the "reasonable man" is a man of reasonable "prudence." Where a defendant's negligence is to be determined, the "reasonable man" is a man who is reasonably "considerate" of the safety of others and does not look primarily to his own advantage.

CERTIFICATE OF SERVICE

Susan E. Williams certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am employed as a Legal Assistant with the Seattle City Attorney's office.

On January 17, 2012, I emailed, per agreement, a copy of this document to the following counsel:

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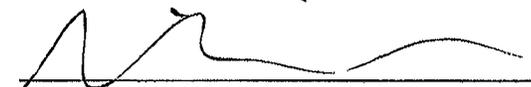
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I further state that I caused this document to be filed electronically with the Washington State Supreme Court.

DATED this 17th day of January, 2012.



SUSAN E. WILLIAMS