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WHAT JUDGES TELL JURIES ABOUT NEGLIGENCE: A REVIEW OF PATTERN JURY INSTRUCTIONS

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INTRODUCTION

If you attempt to describe accurately the substantive law of negligence in the United States, you will be forced, sooner or later, to move beyond a bare statement of the prima facie case for the negligence cause of action—usually formulated as duty, breach of duty, cause in fact, proximate cause, and damages[1]—and toward a description of the institutional practices employed in determining negligence liability. That is so because the meaning of three out of the five elements of the prima facie case is murky, at best,[2] and formally the jury is charged with the task of applying to the facts of the individual case two of those three murky meanings: breach of duty and proximate cause.

Although the practical primacy of the jury in applying the proximate cause standard has been questioned,[3] there is no doubt that the jury plays the central role in applying the negligence standard, which is usually described in the scholarly literature as the conduct of the ordinary reasonable person.

State constitutions guarantee the centrality of the jury in applying the negligence standard: negligence is considered a fact to be determined by the jury under state constitutional provisions

* Professor of Law, Southern Illinois University School of Law. We appreciate the helpful comments of the other contributors to this symposium and the good work of Richard Wright in organizing it all. We appreciate the work of Mark Stewart, interlibrary loan specialist at S.I.U. law library, and the work of William Borders, Alison Dieterichs, Kelly Neff, William Beckman, and Linnea Stack of the *Chicago-Kent Law Review*.

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1. DAN B. DOBBS, THE LAW OF TORTS 269 (2000).

2. For a brief discussion of the indeterminacy of duty, breach of duty, and proximate cause, see Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAND. L. REV. 1039, 1041–43 (2001).

3. *See id.* at 1042, 1043; Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 88–90 (1991).

protecting the right to a jury trial in civil cases.[4] The role of judges in applying the negligence standard is, therefore, limited. When the case is tried before a jury, the judge's role is only to define the negligence standard for the jury in jury instructions and to ensure that the jury's determination is within the range of reasonable applications of the negligence standard as defined.

The range of reasonable applications of the negligence standard, in most cases, encompasses both the judgment that the defendant acted negligently and the judgment that the defendant did not act negligently. Such a range results because the negligence standard requires the jury to determine two things: what the defendant did, and whether an ordinary reasonable person would have done what the defendant did under the circumstances. The standard itself, then, does not give the jury rule-like guidance, in that it does not tell the jury what conduct is negligent under the circumstances. The history of the development of the negligence standard in the early nineteenth century suggests that the *ordinary reasonable person* standard of conduct was adopted in order to preserve the jury's historic role in judging the wrongfulness of the defendant's conduct in tort actions.

S.F.C. Milsom, in his brilliant work, *Historical Foundations of the Common Law*,[5] argues that the jury had the ultimate say in deter-

4. The following list of the constitutional provisions governing the right to trial by jury shows that the constitutions of forty-eight states provide the right to a jury trial in civil actions. (Louisiana and Maine do not provide for jury trials in civil actions.) The first list contains all those state constitutions where a civil cause is explicitly mentioned. The second list contains all those state constitutions where a civil cause is implicitly mentioned. For the purpose of these lists, "explicit" means that a civil cause is mentioned in the provision cited and "implicit" means that there is a general blanket right with no specific mention of civil causes.

Explicit: ALASKA CONST. art. I, § 16; ARK. CONST. art. II, § 7; CAL. CONST. art. I, § 16; COLO. CONST. art. II, § 23; CONN. CONST. art. I, § 19; GA. CONST. art. I, § 1, ¶ 11; HAW. CONST. art. I, § 13; IDAHO CONST. art. I, § 7; IND. CONST. art. I, § 20; MD. CONST. art. XXIII; MASS. CONST. pt. I, art. XV; MICH. CONST. art. I, § 14; MINN. CONST. art. I, § 4; MISS. CONST. art. 3, § 31; MO. CONST. art. I, § 22(a); MONT. CONST. art. II, § 26; NEB. CONST. art. I, § 6; NEV. CONST. art. I, § 3; N.H. CONST. pt. I, art. XX; N.J. CONST. art. I, ¶ 9; N.M. CONST. art. II, § 12; N.Y. CONST. art I, § 2; N.C. CONST. art. I, § 25; N.D. CONST. art. I, § 13; OHIO CONST. art. I, § 5; OKLA. CONST. art. II, § 19; OR. CONST. art. I, § 17; PA. CONST. art. I, § 6; S.D. CONST. art. VI, § 6; UTAH CONST. art. I, § 10; VA. CONST. art. I, § 11; WASH. CONST. art. I, § 21; W. VA. CONST. art. III, §§ 8, 9, 13; WIS. CONST. art. I, § 5; WYO. CONST. art. I, § 9.

Implicit: ALA. CONST. art. I, § 1; ARIZ. CONST. art. II, § 23; DEL. CONST. art. I, § 4; FLA. CONST. art. I, § 22; ILL. CONST. art. I, § 13; IOWA CONST. art. I, § 9; KAN. CONST. BILL OF RIGHTS § 5; KY. CONST. § 7; R.I. CONST. art. I, § 15; S.C. CONST. art. I, § 14; TENN. CONST. art. I, § 6; TEX. CONST. art. I, § 15; VT. CONST. chap. I, art. 12.

5. S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 283–313, 392–400 (2d ed. 1981).

mining whether the defendant's conduct was wrongful for centuries. A defendant could deny a plaintiff's claim of wrongfulness—a claim implicit in trespass and explicit in trespass on the case—by simply pleading the general issue: "Not guilty."[6] The case would then be sent from Westminster out to the county for the jury to decide. The jury's decision was effectively insulated from review by the court at Westminster. In the eighteenth century, procedures developed through which the litigants could bring the facts developed at the jury trial back to the court at Westminster.[7] This threatened the primacy of the jury in deciding whether a defendant's conduct was wrongful or not. Further, it threatened to reduce the law of torts to a multitude of very specific legal rules of conduct because the courts at Westminster ruled as a matter of law on individual cases brought back from the jury. The "ordinary reasonable man standard of conduct" in negligence cases responded to both these threats. The formal legal statement of the standard as the conduct of the ordinary reasonable man was pitched at a high level of generality. Adherence of the law to this level of generality could effectively keep the judges from reviewing jury verdicts on the facts developed at trial, for the judges did not need to decide, as a matter of law, whether certain conduct was negligent. All the judges needed to decide was whether the jury could reasonably find that the conduct was not that of the ordinary reasonable man. Thus, the development of the ordinary reasonable man standard blunted the threat that the eighteenth-century development of procedures for reviewing jury verdicts would ultimately reduce the law of torts to a multitude of specific legal rules of conduct. At the same time, of course, that standard helped maintain the primacy of the jury in determining whether the defendant's conduct was wrongful.[8]

The continued primacy of the jury in applying the seemingly open-ended negligence standard poses a challenge for anyone attempting to describe accurately the institutional practices employed in determining negligence liability. For a thorough understanding of those practices, we need to know: (1) how judges convey the meaning of the negligence standard to juries in jury instructions, (2) how juries

6. *Id.* at 296–313.

7. *Id.* at 397.

8. *See generally* Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315, 351–64 (1990) [hereinafter Kelley, *Who Decides?*].

understand those instructions, and (3) how juries apply those instructions to the facts of individual cases.

The purpose of this Article is to provide part of the answer to the question of how courts convey the meaning of the negligence standard to juries. This partial answer comes from collecting, categorizing, and reporting on the uniform or pattern jury instructions on negligence. This report, in turn, suggests some plausible but tentative answers to the second and third questions—how do juries understand the negligence instructions and how do they apply those instructions to the facts of individual cases. Part I of the Article reviews the debate over the meaning of the negligence standard. Part II discusses the history of the movement toward pattern jury instructions. Part III analyzes the common themes and categorizations of negligence instructions. Part IV considers the role of social science in the jury's understanding of the negligence standard. Finally, Part V discusses the relevance of answering how juries understand and apply jury instructions and the recurring problems in formulating an accurate descriptive theory of negligence liability.

The Article suggests that the states' pattern jury instructions are fruitful subjects for further scholarly analysis. In order to encourage others to use this resource, we have attached an appendix with a current bibliography of the states' pattern or uniform jury instructions.

I. THE DEBATE OVER THE MEANING OF THE NEGLIGENCE STANDARD

The meaning of the basic ordinary reasonable person standard is not immediately evident. Nor is it clear why we still ask the jury to apply that standard. We ordinarily ask juries to decide questions of fact, but in negligence cases we ask the jury to determine what the defendant did, and then make a qualitative judgment about that action. Moreover, the fact that a jury is a one-shot decision maker, disbanded after its verdict, means that another jury could reach a different qualitative judgment about another defendant's virtually identical conduct. What is it that justifies us, then, in leaving the negligence decision to the jury?

The meaning of the negligence standard and the justification for the jury's predominant role in applying that standard are closely connected: we have to be able to say *what* we ask the jury to decide before we can say *why* we ask the jury to decide that question.

Historically, five different meanings have been assigned to the negligence standard.

First, Oliver Wendell Holmes, Jr. suggested that the ordinary reasonable man standard asks the jury whether an ordinary, reasonable man in the defendant's position would have foreseen danger to others from the defendant's conduct under the known circumstances.[9] The reason we ask the jury this, he said, is to consult the experience of mankind as to the danger of certain conduct under certain known circumstances.[10] Once the judge knows what the experience of mankind reveals about the danger of certain conduct under certain known circumstances, then the judge should dispense with the jury and reduce the negligence standard to a specific rule for that conduct under those circumstances.[11]

Second, advocates of the *Carroll Towing Co.* test[12] have suggested that the ordinary reasonable person standard asks a cost-benefit question: whether the burden of taking precautions against a foreseeable risk is less than the foreseeable probability times the foreseeable gravity of threatened harm to others if the precautions are not taken.[13] If this is the meaning of the negligence standard, it is not clear why we leave the question to the jury. Although, it might be argued that the resulting cost-benefit judgment is an essentially legislative judgment about how people ought to act under those circumstances. Then, the jury, an ad hoc body representative of the community, can appropriately make those judgments in our democratic society.

Third, some theorists suggest that the ordinary reasonable person standard asks the jury to decide whether the defendant's conduct under the circumstances was morally wrong according to the prevail-

9. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 87–88 (Mark DeWolfe Howe ed., Little, Brown 1963) (1881).

10. *Id.* at 98.

11. *Id.* at 98–99.

12. The *Carroll Towing Co.* test, also known as the Hand Formula, is a test for determining negligence set out by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). The test focuses on the burden of taking precautions against the risks threatened by the defendants' conduct, the probability of harm, and the gravity of the threatened harm. Judge Hand stated: "Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P; i.e., whether $B < PL$." *Id.* at 173. For the prior history of the *Carroll Towing Co.* test, see Patrick J. Kelley, *The* Carroll Towing Company Case *and the Teaching of Tort Law*, 45 ST. LOUIS U. L.J. 731, 742–50 (2001).

13. *See generally* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 85–107 (1987).

ing community moral values.[14] The jury appropriately decides these questions because the jury, a rough cross section of the community, reflects in its composite judgment the prevailing community moral values.

Fourth, Professor Heidi Li Feldman has recently published a thoughtful article in this law review arguing that virtue ethics theory explains the negligence liability standard and its application by the jury.[15] We ask the jury to reach a normative judgment about the defendant's conduct by performing a thought experiment: place an hypothesized person in the defendant's position, endow that person with the virtues of reasonableness, prudence and carefulness, and determine how that person would have acted.

Fifth, others have argued that the ordinary reasonable person standard asks the jury whether the defendant breached a community safety convention adopted to protect people in the plaintiff's position from the risk of harm that eventuated in harm to the plaintiff.[16] The reason we ask the jury to answer that question is that the jury, as a cross section of the community, can better determine as a matter of fact whether there was a safety convention applicable under the circumstances and whether the defendant breached that convention.

The different meanings assigned to the negligence standard, and their related justifications for the jury's role in applying that standard, represent different descriptive theories about the working of our negligence liability system. There are two sets of facts relevant to determining which of the five theories most accurately describes the prevailing negligence liability systems in our fifty different states.

First, of course, are judicial opinions. What judges say about the negligence standard in appellate or trial court opinions may tell us precisely what the formal negligence standard is in that state and, possibly, the meaning of that standard as understood by the judges. Second are the instructions on the negligence standard that judges give to juries in the different states.

14. Catharine Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2402–13 (1990) (elaborating a particularly sophisticated version of this theory).

15. Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431 (2000).

16. *See* JULES L. COLEMAN, RISKS AND WRONGS 358–59 (1992); Kelley, *Who Decides?*, *supra* note 8, at 343–90; Steven D. Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 781 (1987).

The pattern or uniform jury instructions for each state provide an opportunity to collapse these two factual inquiries into one. The drafters of pattern jury instructions do not consider that their job is to reform the law. Instead, they attempt to embody in the pattern instructions an accurate and understandable statement of the law as it has been set out by the state's highest appellate court. Because the committees appointed to draft pattern jury instructions are comprised of highly respected legal practitioners, such as trial lawyers, judges, and the occasional practical-minded law professor, their collective judgment about what the highest court in the state has determined to be the basic standard of negligence is entitled to significant weight. Moreover, insofar as trial judges use pattern jury instructions over and over as a matter of course in defining for the jury fundamental legal terms such as negligence, analysis of those instructions may provide the best possible insight into the meaning of the negligence standard that is conveyed to juries.

II. THE MOVEMENT TOWARD PATTERN JURY INSTRUCTIONS

In 1979, the American Judicature Society published a helpful monograph by Robert Nieland that traced the history of the pattern jury instruction movement.[17] Nieland identified two rounds of pattern instruction adoption. The first round began with the influential California pattern instruction published by the Judges of the Superior Court of Los Angeles in 1938, entitled *The Book of Approved Jury Instructions* ("B.A.J.I.").[18] The early success of this work "encouraged the development of pattern jury instruction by associations of the bench and bar in Washington, D.C., Florida, Chicago, Nebraska, Colorado, and Utah over the next two decades."[19]

The next significant round of pattern instruction development began in Illinois. Nieland explains the development as follows:

> Shortly after its formation in 1954, the Illinois Judicial Conference realized that pattern jury instructions might be used to correct an instructional system described as 'nonfunctional.' Section 67 of the Illinois Civil Practice Act had made trial judges little more than speaking agents of slanted, argumentative instructions. All were drafted by counsel, the court having little more discretion than to

17. ROBERT G. NIELAND, PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM (1979).

18. *Id.* at 6–7.

19. *Id.* at 8.

> pick and choose between tendered instructions. . . . This system encouraged counsel to turn the instructions of the impartial judge into partisan weapons. By slanting proposed instructions as strongly as possible to one's case or by tendering an excessive number of instructions to confuse the jury, attorneys were able to turn many a weak case to their favor.
>
> While the more logical and direct way to correct this nonfunctional system of instruction would have been through amendment of the Civil Practice Act, the Judicial Conference was doubtless aware of the failure of such attempts in the past. It therefore recommended the preparation of accurate and impartial pattern jury instructions in an attempt to correct the graver abuses of the system. Cognizant of the fact that a set of standardized instructions prepared by the Chicago Bar Association in 1948 had received little use, the Judicial Conference took the unusual step of requesting the Supreme Court to carry out the project. This suggestion was accepted and a committee was appointed in 1956 to draft a set of pattern jury instructions for civil cases. Upon the completion of the committee's work the court adopted Rule 25-1, making use of the pattern jury instructions mandatory when applicable to the facts of a particular case. . . . The publicity surrounding the Illinois project kindled interest in their development throughout the country. The highest courts of fifteen states followed the Illinois example in ordering the preparation of pattern jury instructions. In six of these states, the court further ordered that the instructions must be used when applicable. In other states, responsibility for developing sets of standardized instructions has been assumed by state bar associations, judicial conferences, judges associations, administrative offices, trial and defense lawyers associations, law schools, judicial colleges, and private individuals.[20]

The movement toward pattern jury instructions has continued since Nieland wrote in 1979. Our research indicates that forty-eight of the fifty states now have pattern or recommended jury instructions, leaving only Texas[21] and West Virginia[22] without pattern instructions.

20. *Id.* at 8–10.

21. Although Texas has no pattern civil jury instructions, it does have a vigorously updated civil jury instruction reporter entitled "Court's Charge Reporter, a New Trial-Level Resource Service for Judges and Lawyers Preparing Charges in Civil Jury Cases," published monthly in Austin, Texas by Court's Charge Reporter.

22. Jury instruction forms for Virginia cover both Virginia and West Virginia. The combination of these two states is based on their shared history from colonial times to the civil war. Though West Virginia ultimately split off from Virginia, their earliest case law was all based in Virginia. Current jury instructions seem to be a carry-over from turn-of-the-century books reporting on jury instructions that have been ruled on by appellate courts. *See, e.g.*, DEWITT C. BLASHFIELD, FORMS OF INSTRUCTIONS TO JURIES IN CIVIL AND CRIMINAL CASES, INCLUDING APPROVED PRECEDENTS (1903); HENRY E. RANDALL, A TREATISE ON THE LAW OF INSTRUCTIONS TO JURIES IN CIVIL AND CRIMINAL CASES WITH FORMS OF INSTRUCTIONS APPROVED BY THE COURTS (1922). A treatise of this sort by Edward R. Branson went through three editions from 1914 to 1936, culminating in a "Replacement" edition in 1962. A.H. REID, THE LAW OF INSTRUCTIONS TO JURIES IN CIVIL AND CRIMINAL CASES (2000) (1962

A current bibliography of pattern instructions referenced in this Article is set out in the Appendix. These pattern instructions constitute a rich resource for studying what judges ordinarily tell juries about the basic negligence standard. In the next Section, we will review the pattern jury instructions for the forty-eight states on the basic negligence standard.

III. PATTERN NEGLIGENCE INSTRUCTIONS CATEGORIZED AND ANALYZED

A. Instructions Defining Negligence

1. Ordinary Care and the Reasonably Careful Person

In most pattern jury instructions on negligence, negligence is defined by using both the concept of ordinary care and the concept of the conduct of a reasonably careful person or one of her close relatives. The instructions combine these two concepts in a limited number of ways. Some, such as the following Illinois instruction, tell the jury that the defendant had a duty to exercise ordinary care for the safety of the plaintiff: "It was the duty of the defendant, before and at the time of the occurrence, to use ordinary care for the safety of [the plaintiff] [and] [the plaintiff's property]. That means it was the duty of the defendant to be free from negligence."[23]

Others, such as the following instruction from New York, define negligence as the failure to use ordinary care or the lack of ordinary care: "Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances. . . ."[24]

replacement edition by William Samore).

23. Ill. P.J.I. Civ. 10.04 (2000). For similar instructions that the defendant had the duty to exercise ordinary care, see Ark. A.M.I. Civ. 305 (1999); Idaho I.D.J.I. Civ. 200 (1988); Mich. S.J.I. Civ. 10.05 (2d ed. 1981 & Supp. 2001); N.C. P.I. Civ. 102.11 (1994 & Supp. 1999); N.M. U.J.I. Civ. 13-604 (2001). *See also* Ala. A.P.J.I. Civ. 28.02 (2d ed. 1993 & Supp. 2000) (defining duty to use reasonable care); Conn. C.J.I. Civ. 2-4 (1998) (defining duty to use reasonable care); Or. U.C.J.I. Civ. 20.04 (1993) (defining duty to use reasonable care); R.I. M.J.I. Civ. 1001, 1003 (1998). *Cf.* Vt. P.J.I. Civ. 7.17 (1993); Wash. W.P.I. Civ. 10.04 (1989) (rejecting any instruction in terms of duty).

24. N.Y. P.J.I. Civ. 2:10 (3d ed. 2000). For similar instructions defining negligence as the failure to exercise ordinary care or as the lack of ordinary care, see Ariz. R.A.J.I. Civ. Fault 1 (3d ed. 1997); Cal B.A.J.I. Civ. 3.10 (defining reasonable or ordinary care); Del. P.J.I. Civ. 5.1 (2000) (equating a reasonably prudent and careful person with an ordinarily prudent and careful person); Ind. P.J.I. Civ. 5.01 (2d ed. 1989 & Supp. 2001) (defining reasonable or ordinary care);

Similar to this New York instruction, most states go on to define ordinary care in terms of the conduct of the reasonably prudent person[25] or one of her close cousins: the reasonably careful person;[26] the reasonably careful and prudent person;[27] the ordinary, prudent person;[28] or the ordinary, careful person.[29]

States that deviate from this ordinary pattern do so in the following ways. Some states define negligence as the failure to use reasonable care[30] and then go on to define reasonable care in terms of the conduct of the reasonably prudent person or her relatives.[31] One state, Kansas, defines ordinary care as the conduct of the ordinary

Kan. P.I.K. Civ. 103.01 (3d ed. 1997 & Supp. 2001); Me. M.J.I. Civ. 7-61 (4th ed. 2001); Md. M.P.J.I. Civ. 19:1 (3d ed. 1993 & Supp. 2001); Mich. 10.02 (2d ed. 1981 & Supp. 2001); Mo. A.J.I. 11.07 (5th ed. 1996 & Supp. 2001); Nev. P.J.I. Civ. 4.03 (1986); Ohio J.I. Civ. 7.10 (2001); Okla. U.J.I. Civ. 9.2 (2d ed. & Supp. 2002); Pa. S.J.I Civ. 3.01 (1981 & 3d Supp. 1997 & Supp. 1999); S.D. P.J.I Civ. 10-01 (1995 & rev. 1997) (defining ordinary care or skill); Tenn. T.P.I. 3.05 (3d ed. 1997 & Supp. 2000); Va. M.J.I. Civ. 4.000 (1998 repl. ed. & Supp. 2001); Wash. 10.01 (1989); Wis. J.I. Civ. 1005 (2002); Wyo. P.J.I. Civ. 3.02 (1993). *See also* Alaska P.J.I. Civ. 3.03A (1999) (defining negligence as the failure to use reasonable care); Georgia 3(a) (defining negligence as failure to exercise ordinary diligence); Minn. J.I.G. Civ. 25.10 (4th ed. 1999); Miss. M.J.I. Civ. 15:1 (2001) (defining negligence as the failure to use reasonable care); Mont. P.J.I. Civ. 2.00 (1987 & Supp. 2001) (defining negligence as failure to exercise reasonable care); N.H. J.I. Civ. 6.1 (1994 & Supp. 2001) (defining reasonable care).

25. Ala. 28.01 (2d ed. 1993 & Supp. 2000); Alaska 3.03A (1999) (defining reasonable care); Cal. 3.10 (8th ed. 1994 & Supp. 2002); Conn. 2-4 (1998) (defining reasonable care); N.Y. 2:10 (3d ed. 2000); Ohio 7.10 (2001) (stating reasonably cautious, careful or prudent as alternatives); Pa. 3.01 (1981 & 3d Supp. 1997 & Supp. 1999); S.D. 10-01 (1995 & rev. 1997).

26. Ariz. Fault 1 (3d ed. 1997) (defining reasonable care); Ark. 303 (1999); Colo. J.I. Civ. 9.6 (4th ed. 1999 & Supp. 2000) (defining reasonable care); Idaho 210 (1988); Ill. 10.01 (2000); Iowa C.J.I. Civ. 700.2 (1987 & Supp. 2001); Mich. 10.02 (2d ed. 1981 & Supp. 2001); Miss. 15:1 (2001) (defining reasonable care); N.H. 6.1 (1994 & Supp. 2001) (defining reasonable care); Okla. 9.2 (2d ed. 1991 & Supp. 2002); Ohio 7.10 (2001) (defining ordinary care alternatively as that of a reasonably cautious, careful, or prudent person); Or. 20.04 (1993) (equating a person of ordinary prudence with a reasonably careful person); Tenn. 3.05 (3d ed. 1997 & Supp. 2000); Wash. 10.01 (1989).

27. Del. 5.1 (2000) (equating a reasonably prudent and careful person with an ordinarily prudent and careful person); Ind. 5.01 (2d ed. 1989 & Supp. 2001) (defining reasonable or ordinary care).

28. Ga. 23(C)(1) (1991 & Supp. 1997) (defining ordinary diligence); Or. 20.04 (1993) (defining reasonable care); R.I. 1003 (1998) (defining due care); Utah M.U.J.I. Civ. 3.2 (1993) (defining reasonable care).

29. Me. 7-61 (4th ed. 2001); Wyo. 3.02 (1993) (stating ordinary care as the degree of care which should be reasonably expected of the ordinary careful person under the same or similar circumstances).

30. *See* Alaska 3.03A (1999); Conn. 2-4 (1998) (duty to use reasonable care); Minn. 25.10 (4th ed. 1999); Miss. 15:1 (2001); Mont. 2.00 (1987 & Supp. 2001); N.H. 6.1 (1994 & Supp. 2001); Or. 20.04 (1993) (defining duty to use reasonable care).

31. Alaska 3.03A (1999) (reasonably prudent person); Ariz. Fault 1 (3d ed. 1997) (defining reasonably careful person); Colo. 9.6 (4th ed. 1999 & Supp. 2000); Conn. 2-4 (1998) (reasonably prudent person); Miss. 15:1 (2001) (reasonably careful person); N.H. 6.1 (1994 & Supp. 2001) (reasonably careful person); Or. 20.04 (1993) (defining ordinary prudent person).

person.[32] Several define ordinary care as the conduct of the reasonable person.[33] A few dispense with the notions of ordinary or reasonable care altogether, defining negligence in terms of the conduct of the reasonably careful person[34] or the reasonable person.[35]

A few jurisdictions follow the ordinary pattern in all respects except in substituting the adverb *ordinarily* for the adjective *ordinary*. Thus, we see ordinary care defined as the conduct of an ordinarily careful person[36] or an ordinarily prudent person.[37] This change from the usual pattern instruction language seems unfortunate. An ordinary, careful person is an ordinary person who is careful. An ordinarily careful person, on the other hand, is not necessarily an ordinary person, but is a person who is only ordinarily careful; sometimes, then, this person may not be careful at all. The formulation of the standard in terms of the *ordinarily* prudent or *ordinarily* careful person, then, invites the jury to commit what courts have consistently condemned as error[38] —what one might call the "there but for the grace of God go I" fallacy: the conclusion that since we all at one time or another fail to follow known safety rules, a defendant here should be excused for his momentary lapse.

2. Foreseeability in Negligence Instructions

Foreseeable harm to others plays a central role in two descriptive theories of negligence liability. Under Holmes's theory, if the experience of mankind has established that harm to others is a foreseeable consequence of the defendant's act under the known circumstances, then the defendant's conduct was negligent. Under the modern risk-benefit theory of negligence liability, the defendant is liable for conduct that poses an unreasonable, foreseeable risk of harm to others, where a risk is unreasonable if the burden of taking precautions to avoid a risk of harm to others is less than the foreseeable probability multiplied by the foreseeable gravity of the threat-

32. Kan. 103.01 (3d ed. 1997 & Supp. 2001).

33. Md. 19:1 (3d ed. 1993 & Supp. 2001); Minn. 25.10 (4th ed. 1999) (reasonable care); S.C. P.J.I. Civ. 23-8 (1994 & Supp. 1995); Va. 4.000 (1998 repl. ed. & Supp. 2001).

34. Fla. S.J.I. Civ. 4.1 (2001); Neb. N.J.I. Civ. 3.02 (2d ed. 2001).

35. Haw. C.J.I. Civ. 6.1 (1999).

36. Mo. 11.02 (5th ed. 1996 & Supp. 2001); Mont. 2.00 (1987 & Supp. 2001).

37. Ky. I.J. Civ. 14.01 (1989 & Supp. 2001); La. J.I. Civ. 3.01 (1994 & Supp. 2001); Mass. J.I. Civ. 3.1 (1997 & Supp. 1999) (defining ordinarily reasonable, cautious, prudent individual).

38. For the leading article on this principle, see Mark F. Grady, *Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U. L. REV. 292, 303 n.44 (1988).

ened harm. In order to test the plausibility of these two theories, we must examine the use of foreseeability in the pattern negligence instructions.

A number of pattern negligence instructions use foreseeable danger, foreseeable harm, or cognate notions of apparent danger to explain a longstanding negligence principle: that the degree of care required of a defendant under the ordinary or reasonable care standard depends on the magnitude of threatened danger under the known circumstances.[39] This is such a simple notion, necessarily entailed in the standard of ordinary care itself, that the Idaho pattern instructions recommend not giving such an instruction separately at all.[40]

Pattern instructions in a few states tell the jury that a foreseeable risk of harm to others from the defendant's conduct is a precondition for any negligence liability. A New Hampshire instruction states: "Thus, a person may not be found negligent if he or she could not reasonably foresee that his/her conduct would result in an injury to another. . . ."[41] A New York instruction states in part: "A person is only responsible for the results of his or her conduct if the risk of injury is reasonably foreseeable."[42] The New York instruction goes on to define negligence in light of a reasonably foreseeable risk: "There is negligence if a reasonably prudent person could foresee injury as a result of his or her conduct, and acted unreasonably in the light of what could be foreseen."[43] Both California[44] and Hawaii[45] follow this New York pattern, setting out a reasonably foreseeable risk as a precondition to negligence liability and then defining negligence as unreasonable conduct in the face of a foreseeable risk of harm to others. Four states (Arkansas, New Mexico, Louisiana, and Wisconsin) have pattern instructions that explain the negligence standard itself in terms of unreasonable conduct in the face of

39. *See* Cal. 3.12, 3.41 (8th ed. 1994 & Supp. 2002); Colo. 9.5 (4th ed. 1999 & Supp. 2000); La. 3.01 (2001); Md. 19:3 (3d ed. 1993 & Supp. 2001); N.M. 13-1603 (2001); Ohio 7.15 (2001); Or. 20.04 (1993); Vt. 7.19 (1993) (stating that the duty of due care increases proportionately with the foreseeable risks); Wis. 1020 (1989 & Supp. 2002).

40. Idaho 218 (1988).

41. N.H. 6.3 (1994 & Supp. 2001).

42. N.Y. 2:12 (3d ed. 2000) (first part of two-part test); *see also* Cal. 3.11 (8th ed. 1994 & Supp. 2002) (first part of two-part test).

43. N.Y. 2:12 (3d ed. 2000).

44. Cal. 3.11 (8th ed. 1994 & Supp. 2002).

45. Haw. 6.2 (1999).

foreseeable risk of harm.[46] Unlike New York, Hawaii, and California, however, these states do not set out a reasonably foreseeable risk of harm as a precondition to negligence.

The Arkansas foreseeability instruction expands on the reasonably careful person standard and is to be given when foreseeability is an issue.[47] It provides: "To constitute negligence an act must be one from which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause him not to do the act, or to do it in a more careful manner."[48] The New Mexico pattern negligence instruction uses both ordinary care and the reasonably prudent person terminology, but joins them with the test of unreasonable foreseeable risk of injury:

> Negligence (of all persons) definition: The term 'negligence' may relate either to an act or a failure to act.
>
> An act, to be 'negligence,' must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to [himself] [herself] or to another and which such a person, in the exercise of ordinary care, would not do.
>
> A failure to act, to be 'negligence,' must be a failure to do an act which one is under a duty to do and which a reasonably prudent person, in the exercise of ordinary care, would do in order to prevent injury to [himself] [herself] or to another. . . .[49]
>
> Ordinary care: Ordinary care is that care which a reasonably prudent person would use in the conduct of that person's own affairs. What constitutes 'ordinary care' varies with the nature of what is being done.
>
> As the risk of danger that should reasonably be foreseen increases, the amount of care required also increases. In deciding whether ordinary care has been used, the conduct in question must be considered in the light of all the surrounding circumstances.[50]

Like New Mexico, the two alternative Wisconsin negligence instructions use both ordinary care and the conduct of a reasonable person or a person of ordinary intelligence and prudence, together with the notion of unreasonable foreseeable risk, to define negligence:

> "Negligence" means a failure to exercise ordinary care. "Ordinary care" is that degree of care which the great mass of mankind, or the ordinarily prudent man, exercises under like or similar cir-

46. Ark. 302 (1999); N.M. 13-1601 (2001); La. 3.01 (2001); Wis. 1001 (2002).
47. Ark. 302 (1999), note on use.
48. Ark. 302 (1999).
49. N.M. 13-1601 (2001).
50. N.M. 13-1603 (2001).

> cumstances. A person fails to exercise ordinary care—or in other words, is negligent—when, without intending to do harm, the person does an act or omits to take a precaution under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such act or omission will subject the person or property of another to an unreasonable risk of harm. . . .[51]
>
> Negligence—Defined: A person is negligent when (he) (she) fails to exercise ordinary care. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.[52]

Of the states that mention unreasonable foreseeable risk in their pattern negligence instructions, only Louisiana sets out a cost-benefit test for determining whether the defendant's conduct is negligent in light of that foreseeable risk, and this test is presented as optional:

> The ordinarily prudent person will avoid creating an unreasonable risk of harm. In determining whether the defendant breached this standard, and created an unreasonable risk of harm, you may weigh the likelihood that someone might have been injured and the seriousness of that injury against the importance to society of what the defendant was doing and the advisability of the way in which he was doing it, under the circumstances.[53]

The earlier part of the Louisiana negligence instruction, which is not optional, defines negligence in terms of the care which we might reasonably expect from an ordinarily prudent person under the same or similar circumstances.[54]

B. Related Instructions: The Context for the Basic Negligence Instructions

The substantive instructions defining the standard of care in a negligence action are not the only instructions given to the jury. The judge gives the negligence definition to the jury as well. Ordinarily, the judge will give three other instructions closely related to the instructions defining negligence: (1) an instruction setting out the elements of the prima facie case for recovery in a negligence action;[55]

51. Wis. 1001 (2002).
52. Wis. 1005 (2002).
53. La. 3.01 (2001).
54. *Id.*
55. *See, e.g.*, Colorado Pattern Jury Instructions:
    ELEMENTS OF LIABILITY—NO NEGLIGENCE OF PLAINTIFF
    For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his)(her)

(2) an instruction identifying that part of the defendant's conduct that the plaintiff claims was negligent;[56] and (3) an instruction explaining the verdict forms that the judge submits to the jury.[57] In addition, the

claim of negligence, you must find that all of the following have been proved. . . : [1] The plaintiff had (injuries) (damages) (losses); [2] The defendant was negligent; and [3] The defendant's negligence was a cause of the plaintiff's (injuries) (damages) (losses). If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [insert any affirmative defense that would be a complete defense to the plaintiff's claim]).

If you find that (this affirmative defense) . . . has been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense) . . . has not been proved, then your verdict must be for the plaintiff.

Colo. 9.1 (4th ed. 1999 & Supp. 2000).

56. *See, e.g.*, Illinois Pattern Jury Instructions:

ISSUES MADE BY THE PLEADINGS—NEGLIGENCE—ONE OR MORE DEFENDANTS

[1] The plaintiff claims that he was injured and sustained damage, and that the defendant[s] [was] [were] negligent in one or more of the following respects; [Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to the negligence of the defendants which have not been withdrawn or ruled out by the court and are supported by the evidence. If there is more than one defendant and the allegations of negligence are different as between them, use a form such as:

'Defendant C, in _____.' e.g., failing to keep a proper lookout.

'Defendant D, in _____.']

[2] The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

[3] The defendant [Defendant C] [denies that he did any of the things claimed by the plaintiff,] denies that he was negligent [in doing any of the things claimed by the plaintiff] [and denies that any claimed act or omission on the part of the defendant was a proximate cause of the plaintiff's claimed injuries].

[4] The defendant[s] claim[s] that the plaintiff was contributorily negligent [in one or more of the following respects:]

[Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's contributory negligence which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[5] The defendant[s] further claim[s] that one or more of the foregoing was [a] [the sole] proximate cause of the plaintiff's injuries.

[6] The plaintiff [denies that he did any of the things claimed by defendant(s),] denies that he was negligent [in doing any of the things claimed by defendant(s),] [to the extent claimed by defendant(s),] [and denies that any claimed act or omission on his part was a proximate cause of his claimed injuries].

[7] The defendant [Defendant C] also sets up the following affirmative defenses:

Defendant [Defendant C] claims [here set forth in simple form without undue emphasis or repetition those affirmative defenses (except contributory negligence) in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence].

[8] The plaintiff denies that [summarize affirmative defense].

[9] The defendant[s] further den[ies][y] that the plaintiff was injured or sustained damages [to the extent claimed].

Ill. 20.01 (2000).

57. See, for example, the interrelated set of potential verdict forms in Ill. 45.01 (2000).

ordinary boilerplate instructions explaining to the jurors their role in the case and directing them to use common sense in their deliberations[58] may become important in deciding whether the defendant acted negligently.

In addition to these common boilerplate instructions, the court may decide to give other instructions directly related to the negligence standard, either qualifying or explaining the negligence standard or cautioning the jury against misunderstanding that standard. Looking at the pattern jury instructions from a number of states identifies the tension between adding additional qualifying, explanatory or cautionary instructions, or instead, instructing the jury with only a bare-bones definition of negligence. We can see this tension in the fact that the pattern instructions for some states have certain additional instructions and others do not. More significantly, perhaps, for many of the additional instructions (*sudden emergency*, *unavoidable accident*, and the *assumption that others will act properly*) some states have a pattern instruction and in other states the pattern instruction drafters specifically recommend that no such instruction be given.

For the sake of analysis we have sorted these additional negligence instructions into three categories: (1) additional instructions reaffirming the basic negligence standard as applied in certain recurring situations; (2) additional clarifying instructions intended to prevent common potential jury misunderstandings; and (3) additional instructions relating the negligence standard to basic principles of coordination when two or more parties are acting.

1. Additional Instructions Reaffirming the Basic Negligence Standard

A number of states have pattern jury instructions that reaffirm the basic negligence definition and explain its application in certain recurring situations.

58. *See, e.g.*, Illinois Preliminary Cautionary Instructions:

> You will decide what facts have been proven. Facts may be proven by evidence or reasonable inferences drawn from the evidence. Evidence consists of the testimony of witnesses and of exhibits admitted by the court. You should consider all the evidence without regard to which party produced it. You may use common sense gained from your experiences in life in evaluating what you see and hear during the trial.

Ill. 1.01 [3] (2000).

(a) Sudden Emergency

At least twenty-three states have pattern jury instructions telling the jury how the basic negligence standard applies in a sudden emergency.[59] These instructions vary greatly in the detail with which they explain the application of the negligence standard to an emergency situation. One of the more detailed instructions is that of New York:

> Common Law Standard of Care—Emergency Situation:
>
> A person faced with an emergency and who acts without opportunity to consider the alternatives is not negligent if (he, she) acts as a reasonably prudent person would act in the same emergency, even if it later appears that (he, she) did not make the safest choice or exercise the best judgment. A mistake in judgment or wrong choice of action is not negligence if the person is required to act quickly because of danger. This rule applies where a person is faced with a sudden condition, which could not have been reasonably anticipated, provided that the person did not cause or contribute to the emergency by (his, her) own negligence.
>
> If you find that (defendant, plaintiff) was faced with an emergency and that (his, her) response to the emergency was that of a reasonably prudent person, then you will conclude that (defendant, plaintiff) was not negligent. If, however, you find that the situation facing (defendant, plaintiff) was not sudden, or should reasonably have been foreseen, or was created or contributed to by (defendant's, plaintiff's) own negligence, or that the (defendant's, plaintiff's) conduct in response to the emergency was not that of a reasonably prudent person, then you may find that (defendant, plaintiff) was negligent.[60]

59. Ala. 28.15 (2d ed. 1993 & Supp. 2000); Cal. 4.40 (8th ed. 1994 & Supp. 2002); Colo. 9.10 (4th ed. 1999 & Supp. 2000); Minn. 26.35 (4th ed. 1999); Nev. 4.14 (1986); N.H. 6.9 (1994 & Supp. 2001); *see also* Ariz. Neg. 6 (3d ed. 1997); Conn. 2-28 (2000) (limiting instruction to auto accidents); Ind. 5.33 (2d ed. 1989 & Supp. 2001); Me. 7-67 (4th ed. 2001); N.H. 6.10 (defining instinctive action) (1994 & Supp. 2001); N.Y. 2:14 (3d ed. 2000); Ohio 7.17–7.18 (2001); Or. 20.08 (1993); Pa. 3.18 (1991); R.I. 1305 (1998); S.D. 12.03 (1995 & rev. 2000); Tenn. 3.08 (3d ed. 1997 & Supp. 2000); Vt. 7.33 (1993); Va. 7.000 (1998 repl. ed. & Supp. 2001); Wash. 12.02 (1989).

60. N.Y. 2:14 (3d ed. 2000); *see also* California Jury Instruction:

> Duty of One in Imminent Peril:
>
> A person who, without negligence on [his] [her] part, is suddenly and unexpectedly confronted with peril arising from either the actual presence of, or the appearance of, imminent danger to [himself] [herself] or to others, is not expected nor required to use the same judgment and prudence that is required in the exercise of ordinary care in calmer and more deliberate moments. [His] [her] duty is to exercise the care that an ordinarily prudent person would exercise in the same situation. If at that moment [he] [she] does what appears to [him] [her] to be the best thing to do, and if [his] [her] choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, [he] [she] does all the law requires of [him] [her]. This is true even though in the light of after-events, it should appear that a different course would have been better and safer.

Cal. 4.40 (8th ed. 1994 & Supp. 2002).

The Colorado instruction is much more concise:

> Sudden Emergency: A person who, through no fault of his or her own, is placed in a sudden emergency, is not chargeable with negligence if the person exercises that degree of care which a reasonably careful person would have exercised under the same or similar circumstances.[61]

Other pattern instructions on emergency run the gamut between the simplicity of the Colorado instruction and the detail of the New York instruction. Tennessee and Alabama have particularly thorough and precise instructions on sudden emergency:

> Sudden Emergency [Tennessee]: A person who is faced with a sudden or unexpected emergency that calls for immediate action is not expected to use the same accuracy of judgment as a person acting under normal circumstances who has time to think and reflect before acting. A person faced with a sudden emergency is required to act as a reasonably careful person placed in a similar position. A sudden emergency will not excuse the actions of a person whose own negligence created the emergency.
>
> If you find there was a sudden emergency that was not caused by any fault of the person whose actions you are judging, you must consider this factor in determining and comparing fault.[62]

> Sudden Emergency [Alabama]: If a person, without fault of his own, is faced with a sudden emergency, he is not to be held to the same correctness of judgment and action as if he had time and opportunity to fully consider the situation, and the fact, if it be a fact, that he does not choose the best or safest way of escaping peril or preventing injury is not necessarily negligence, but the standard of care required in an emergency situation is that care which a reasonably prudent person would have exercised under the same or similar circumstances.[63]

The pattern instructions for a number of states treat sudden emergency as if it were an affirmative defense that the defendant has the burden of establishing, although the standard of conduct applied

61. Colo. 9.10 (4th ed. 1999 & Supp. 2000); *see also* Or. 20.08 (1993):

> EMERGENCY.
>
> People who are suddenly placed in a position of peril through no negligence of their own, and who are compelled to act without opportunity for reflection, are not negligent if they make such a choice as a reasonably careful person placed in such a position might make, even though they do not make the wisest choice.

Or. 20.08 (1993).

62. Tenn. 3.08 (3d ed. 1997 & Supp. 2000).

63. Ala. 28.15 (2d ed. 1993 & Supp. 2000).

to the defendant's conduct in a sudden emergency remains the same as the basic negligence standard.[64] In at least three states[65] the pattern jury instructions recommend against giving a sudden emergency instruction on the grounds that it is redundant with the basic negligence instructions.

(b) Intoxication

The pattern instructions for a number of states include an instruction on the application of the negligence standard to an intoxicated party. These instructions tell the jury that an intoxicated person is held to the standard of ordinary care exercised by a reasonably prudent sober person and that intoxication is not an excuse.[66] The Illinois pattern instruction is typical:

> Intoxication as Negligence: Whether or not a person involved in the occurrence was intoxicated at the time is a proper question for the jury to consider together with other facts and circumstances in evidence in determining whether or not he was [negligent] [or] [contributorily negligent]. Intoxication is no excuse for failure to act as a reasonably careful person would act. An intoxicated person is held to the same standard of care as a sober person.[67]

(c) Volunteers

The pattern instructions for a number of states include an instruction that a party who volunteers to help in a situation is nevertheless held to the regular negligence liability standard.[68] A typical instruction of this kind is that of Oklahoma:

Volunteer—Duty of Care: One who voluntarily assumes the care of another who is not capable of caring for [himself/herself] is under a

64. *See, e.g.*, Ohio 7.17 (2001); Pa. 3.18; S.D. 12-03 (1995 & rev. 2000); Vt. 7.33 (1993); *see also* R.I. 1305(a) (1998) ("In this case [plaintiff/defendant] alleges he/she was faced with a 'sudden emergency' to explain why he/she acted the way he/she did just before the accident."); Va. 7.000 (1998 repl. ed. & Supp. 2001) ("The defendant [plaintiff] contends he was confronted with a sudden emergency. . . . If you believe from the evidence that the defendant [plaintiff,] without negligence on his part, was confronted with a sudden emergency. . . .").

65. *See* Fla. 4.1, drafter's cmt. (2001); Idaho 218 (1988); Ill. 12.02 (2000).

66. *See* Ala. 28.14 (2d ed. 1993 & Supp. 2000); Ill. 12.01 (2000); Ind. 5.31 (2d ed. 1989 & Supp. 2001); Iowa 700.2 (1987 & Supp. 2001); Ky. 14.02 (1989 & Supp. 2001); Minn. 26.25 (4th ed. 1999); N.H. 6.7 (1994 & Supp. 2001); N.Y. 2:20 (3d ed. 2000); Ohio 7.19 (2001); Or. 22.01 (1993); Tenn. 4.11 (3d ed. 1997 & Supp. 2000); Wash. 12.01 (1989).

67. Ill. 12.01 (2000).

68. *See* Ala. 28.17 (2d ed. 1993 & Supp. 2000); Colo. 9.8 (4th ed. 1999 & Supp. 2000); Miss. 15:16 (2001); N.H. 6.6 (1994 & Supp. 2001); N.Y. 2:24 (3d ed. 2000); Okla. 9.5 (2d ed. 1991 & Supp. 2002). *Contra* Tenn. 4.30 (3d ed. 1997 & Supp. 2000) (originating from Tennessee's Good Samaritan Law finding liability for volunteers only if there is gross negligence).

duty to act as a reasonably careful person would under similar circumstances.[69]

(d) Act of God

The pattern instructions in a few states include an instruction that defines an act of God and relates it to the application of the basic negligence standard.[70] A succinct instruction of this kind is that of Mississippi:

> Factors Relieving Liability—Acts of God: If you find from a preponderance of the evidence in this case that Plaintiff's injury was due directly and exclusively to natural causes, without human intervention, which could not have been prevented by the exercise of reasonable care and foresight, the occurrence is an act of God for which the defendant is not liable.[71]

Alabama seems to treat act of God as an affirmative defense, although the standard of conduct applied is the regular negligence standard.[72]

(e) Custom

The pattern jury instructions for a number of states include an instruction on the relevance of custom to the application of the negligence standard.[73] A typical instruction is that of California:

> Evidence of Custom in Relation to Ordinary Care: Evidence as to whether a person conformed or did not conform to a custom that had grown up in a given locality or business is relevant and ought to be considered, but is not necessarily controlling on the issue whether such person was negligent. That issue must be determined by the standard of care that I have stated to you.[74]

(f) Ordinary Care Varies with the Degree of Apparent Danger

The pattern instructions from a number of states include a provision telling the jury that the care required by the negligence standard varies according to the degree of apparent or foreseeable

69. Okla. 9.5 (2d ed. 1991 & Supp. 2002).

70. *See* Ala. 28.18 (2d ed. 1993 & Supp. 2000); Miss. 15:7 (2001); N.C. 102.22 (1994 & Supp. 1999) (relating to proximate cause); Ohio 7.27 (2001) (relating to proximate cause).

71. Miss. 15:7 (2001).

72. Ala. 28.18 (2d ed. 1993 & Supp. 2000).

73. Cal. 3.16 (8th ed. 1994 & Supp. 2002); Minn. 26.15 (4th ed. 1999); N.Y. 2:16 (3d ed. 2000); Ohio 7.11 (2001); Wis. 1019 (2002); Utah 3.10 (1993); Wyo. 3.08 (1993).

74. Cal. 3.16 (8th ed. 1994 & Supp. 2002).

danger under the circumstances.[75] Some of these provisions, like that for Pennsylvania, are built into the basic definition of negligence:

> Ordinary Care—Definition: Ordinary Care is the care a reasonably careful person would use under the circumstances presented in this case. It is the duty of every person to use ordinary care not only for his own safety and the protection of his property, but also to avoid injury to others. What constitutes ordinary care varies according to the particular circumstances and conditions existing then and there. The amount of care required by the law must be in keeping with the degree of danger involved.[76]

Others, like that for Utah, convey this to the jury in a separate, additional instruction:

> Amount of Care Required Varies with Conditions: The amount of care that is considered "reasonable" depends on the situation. Some situations require more caution because a person of ordinary prudence would understand that more danger is involved. In other situations, less care is expected, such as when the risk of danger is lower or when the situation happens so suddenly that a person of ordinary prudence would not appreciate the danger.[77]

The drafters of the Idaho pattern instructions recommend against an instruction of this kind.[78] Pattern instructions from a number of states include a closely related instruction telling the jury that a great deal of care is required when the defendant is engaged in inherently dangerous or extremely dangerous conduct.[79]

2. Additional Instructions Intended to Prevent Common Potential Misunderstandings

A number of pattern instructions seem intended to prevent common misunderstandings about the negligence standard.

(a) Negligence Not a Pre-Determined Legal Rule

Jurors might believe, mistakenly, that negligence must be judged based on a predetermined judicial rule. The pattern instructions from a number of states include a provision that seems to attempt to block

75. *See* Cal. 3.12 (8th ed. 1994 & Supp. 2002); Conn. 2-4 (1998); Md. 19:3 (3d ed. 1993 & Supp. 2001); N.M. 13-1603 (2001); Ohio 7.10 (2001); Or. 20.04 (1993); Pa. 3.02 (1981 & 3d Supp. 1997 & Supp. 1999); Utah 3.6 (1993); Wis. 1020 (1989 & Supp. 2002).

76. Pa. 3.02 (1981 & 3d Supp. 1997 & Supp. 1999).

77. Utah 3.6 (1993).

78. Idaho 218 (1988).

79. Cal. 3.41 (8th ed. 1994 & Supp. 2002); Colo. 9.5 (4th ed. 1999 & Supp. 2000); Ohio 7.15 (2001); Pa. 3.16 (1981 & 3d Supp. 1997 & Supp. 1999); Tenn. 4.21 (3d ed. 1997 & Supp. 2000); Utah 3.8 (1993).

that misunderstanding.[80] Commonly, the provision tells the jury that the law does not say how the negligence standard applies, rather that it is for the jury to decide, based upon the facts in the case. A typical provision is included in Michigan's basic definition of negligence:

> Negligence is the failure to use ordinary care. Ordinary care means the care a reasonably careful person would use. Therefore by "negligence," I mean the failure to do something that a reasonably careful person would do, or the doing of something that a reasonably careful person would not do, under the circumstances that you find existed in this case.
>
> The law does not say what a reasonably careful person using ordinary care would or would not do under such circumstances. That is for you to decide.[81]

(b) Fact of Accident Does Not Establish Negligence

A juror might conclude that just because there was an accident caused in part by the defendant's conduct, the defendant must have been negligent. In cases where res ipsa loquitur is not an issue, of course, that is not true. The pattern instructions in some states include an instruction, to be given when res ipsa loquitur is not applicable, telling the jury that they should not presume from the fact of the accident that the defendant was "negligent."[82] A typical instruction of this kind is that of Iowa's "Accident Does Not Constitute or Raise Presumption of Negligence," which states that "[t]he mere fact an accident occurred or a party was injured does not mean a party was [negligent] [at fault]."[83]

The drafters of the Idaho pattern instruction recommend against giving an instruction like this.[84]

(c) Standard Not That of a Supercautious or Extraordinarily Careful Person

A juror might believe that the legal standard of conduct in negligence is higher than what we ordinarily expect of others in the

80. Ark. 302, 303 (1999); Idaho 210 (1988); Ill. 10.01 (2000); Mich. 10.02 (2d ed. 1981 & Supp. 2001); Okla. 9.2 (2d ed. 1991 & Supp. 2002); Pa. 3.01 (1984).

81 Mich. 10.02 (2d ed. 1981 & Supp. 2001).

82. *See* Colo. 9:12 (4th ed. 1999 & Supp. 2000); Conn. 2-45 (1998); Del. 5.1, 5.4 (2000); Iowa 700.8 (1987 & Supp. 2001); Minn. 25.55 (4th ed. 1999); Miss. 15:14 (2001); N.M. 13-1616 (2001); N.C. 102.35 (1994 & Supp. 1999); Or. 20.01 (1993); S.C. 23-19 (1994 & Supp. 1995); Utah 3.3 (1993); Va. 4.015 (1998 repl. ed. & Supp. 2001).

83. Iowa 700.8 (1987 & Supp. 2001).

84. Idaho 217 (1982).

community. This mistake could be invited by the use of terms like *prudent*, *careful*, *cautious*, and *reasonable* in the instructions that describe the hypothesized person whose conduct sets the standard. This mistake presumably is guarded against in the basic negligence instructions themselves, which almost always qualify these virtue-terms by the word *reasonably*, *ordinary*, or *ordinarily*, and usually use the hypothesized person standard in conjunction with the term *ordinary care*. Nevertheless, some states include in their pattern instructions another provision specifically pointing out that the hypothetical person is not an extraordinarily cautious or exceptionally careful person.[85] An example of this kind of provision is that of Massachusetts, which includes the following sentence in its basic instruction defining negligence:

> You will notice that the standard is not the conduct of the most careful person or of the least careful person, but rather the conduct of an ordinarily reasonable, cautious, prudent person, faced with the same situation and under the same circumstances as the person whose conduct is being considered.[86]

(d) Unavoidable Accident

To a legal historian, the term unavoidable accident raises antiquarian visions of the common law in the days when the forms of action were the significant legal categories. Back then, inevitable accident could be specially pleaded as a defense to a trespass action, and the standard for determining inevitable accident was the forerunner of our modern negligence standard.[87] One might think that the term unavoidable accident, reminiscent of the antiquated inevitable accident, and substantially equivalent to the conclusion that the defendant was not negligent, should have no place in modern negligence instructions. In fact, the drafters of pattern instructions in six states recommend that an unavoidable accident instruction *not* be given.[88] Nevertheless, the pattern instructions in at least five other states include an instruction on unavoidable accident or on accident

85. Ala. 28.15 (2d ed. 1993 & Supp. 2000); Cal. 3.10 (8th ed. 1994 & Supp. 2002); Mass. 3.1 (1997 & Supp. 1999); Utah 3.2 (1993).

86. Mass. 3.1 (1997 & Supp. 1999).

87. For the origin and development of the inevitable accident defense in trespass, see *Weaver v. Ward*, Hobart 135, 80 Eng. Rep. 284 (1616). *See also* Gibbons v. Pepper, 91 Eng. Rep. 922 (1695); Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850) (equating inevitable accident case with lack of negligence); Harvey v. Dunlop, Hill & Den, 193 (N.Y. 1843) (equating inevitable accident with lack of negligence).

88. Colo. 9.11 (4th ed. 1999 & Supp. 2000); Idaho 233 (1988); Ind. 5.37 (2d ed. 1989 & Supp. 2001); S.D. 12-01 (1995 & rev. 2000); Wash. 12.03 (1989); Wis. 1000 (1989 & Supp. 2002).

simpliciter.[89] Why? A look at these instructions suggests that their purpose is to warn the jurors against a mistake invited by our two different, but closely related, meanings for the word accident.

Under one meaning, an accident is a harm-producing occurrence caused by human behavior in which none of the actors intended harm. In this sense, harm caused by negligent conduct, which by definition is not done with intent to cause harm, would always be the result of an accident. Under the other meaning of accident, however, something is not an accident if it could have been avoided by appropriate conduct on the part of human actors. An accident or unavoidable accident instruction, then, could tell the jurors that the defendant is not freed from liability for negligence just because the harm to the plaintiff was not *intended* by the defendant and was therefore the result of an accident in the first sense. For the defendant to escape liability, the accident must have been an unavoidable accident that happened even though the defendant exercised ordinary care under the circumstances.

Typically, however, the instructions are given in terms of an unavoidable accident, defined as an accident that could not have been avoided by the use of due care. A typical example of this is the unavoidable accident pattern instruction from Virginia: "An unavoidable accident is one which ordinary care and diligence could not have prevented or one which occurred in the absence of negligence by any party to this action."[90]

3. Additional Instructions Relating the Negligence Standard to Recurring Coordination Questions

We coordinate our conduct with that of others based on certain assumptions about how they will act and what their capacities are. The pattern jury instructions of a number of states include references to a number of these coordinating assumptions.

89. Ohio 7.29 (2001); S.C. 23-19 (1994 & Supp. 1995); Utah 3.4 (1993); Va. 4.018 (1998 repl. ed. & Supp. 2001).

90. Va. 4.018 (1998 repl. ed. & Supp. 2001). The comment to this instruction includes this caveat:

> The Court has observed: 'It is only where there is a reasonable theory of the evidence under which the parties involved may be held to have exercised due care, notwithstanding that the accident occurred, that an unavoidable accident instruction is proper.' Bickly v. Farmer, 215 Va. 484, 488, 211 S.E.2d 66, 70 (1975). The Court has also stated: 'It is rarely permissible to give an unavoidable accident instruction in automobile accident cases.' Chodorov v. Eley, 239 Va. 528, 531, 391 S.E.2d 68 (1990).

Id.

(a) The Assumption That Others Will Act Properly

A number of state pattern jury instructions include an instruction that a party may act based on the assumption that others will act with reasonable care and/or follow the rules of law.[91] Only the Alabama, Arizona, and Oregon instructions[92] are limited to the assumption that others will obey the law. Most other states provide that one may *assume* that others will obey the law and act with reasonable care.[93] A typical example of these instructions is that of Nevada:

> Right to Assume Others Will Exercise Due Care: A person who, himself, is exercising ordinary care has a right to assume that every other person will perform his duty under the law; and in the absence of reasonable cause for thinking otherwise, it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another.[94]

A number of other state pattern instructions include an instruction that a party may assume that others will act appropriately or with reasonable care,[95] until they have notice to the contrary. The drafters of pattern instructions for Florida[96] and Idaho[97] recommend that no such instructions be given.

(b) Assumption That Others Are Reasonably Intelligent and Have Normal Sight and Hearing

A few states have a pattern jury instruction that tells the jury that a party may assume that others are reasonably intelligent and have normal sight and hearing.[98] The instruction from California is typical:

91. *See* Ala. 28.16 (2d ed. 1993 & Supp. 2000); Ariz. Neg. 4 (3d ed. 1997) (limiting instruction to auto accidents); Cal. 3.13 (8th ed. 1994 & Supp. 2002); Conn. 2-25 (1998) (limiting instruction to auto accidents); Del 5.3 (2000); Minn. 26.10 (4th ed. 1999); Miss. 15:15 (2001); Mont. 2.04 (1987 & Supp. 2001); Nev. 4.03 (1986); N.H. 6.16 (1994 & Supp. 2001); Ohio 7.30(3) (2001); Or. 20.06 (1993); S.D. 12-06, 12-06A (1995); Tenn. 3.05 (3d ed. 1997 & Supp. 2000); Utah 3.12 (1993); Wash. 12.07 (1989).

92. Ala. 28.16 (2d ed. 1993 & Supp. 2000); Ariz. Neg. 4 (3d ed. 1997); Or. 20.06 (1993) ("Every person has a right to assume that others will obey the law, unless and until that person knows or in the exercise of reasonable care should know otherwise.")

93. *See* Cal. 3.13 (8th ed. 1994 & Supp. 2002); Conn. 2-25 (1998); Minn. 26.10 (4th ed. 1999); Mont. 2.04 (1987 & Supp. 2001); Nev. 4.03 (1986); Ohio 7.30(3) (2001); S.D. 12-06, 12-06A (1995); Utah 3.12 (1993); Wash. 12.07 (1989).

94. Nev. 4.09 (1986).

95. Conn. 2-25 (1998) (limiting instruction to auto accidents); Del. 5.3 (2000); Miss. 36.15; N.H. 6.16 (1994 & Supp. 2001); Tenn. 3.05 (3d ed. 1997 & Supp. 2000).

96. Fla. 4.1 cmt. 3 (2001).

97. Idaho 219 (1988).

98. Cal. 3.14 (8th ed. 1994 & Supp. 2002); N.Y. 2:11 (3d ed. 2000); Tenn. 3.06 (3d ed. 1997 & Supp. 2000); Utah 3.12 (1993).

> Right to Assume Others' Normal Faculties: A person who is exercising ordinary care has a right to assume that other persons are ordinarily intelligent and possessed of normal sight and hearing, in the absence of reasonable cause for thinking otherwise.[99]

(c) Anticipate Conduct of Children

A number of state pattern jury instructions tell the jury that one cannot assume that children will act with the care expected of an adult.[100] The California instruction sets out the idea clearly:

> Care Required for Safety of Minor: Ordinarily it is necessary to exercise greater caution for the protection and safety of a young child than for an adult person who possesses normal physical and mental faculties. One dealing with children must anticipate their ordinary behavior. The fact that children usually do not exercise the same degree of prudence for their own safety as adults, or that they often are thoughtless and impulsive, imposes a duty to exercise a proportional vigilance and caution on those dealing with children, and from whose conduct injury to a child might result.[101]

The drafters of the Illinois pattern instructions recommend that no such instruction be given.[102]

IV. SOCIAL SCIENCE AND THE JURY'S UNDERSTANDING OF THE NEGLIGENCE STANDARD

The actual working of the negligence liability system depends on the meaning of the negligence standard conveyed to the jury and their willingness and capacity to apply that standard to the facts of the case. Those who have studied the American jury system are virtually unanimous in their answer to the question of the jury's willingness to follow the substantive legal instructions given to them by the judge.[103] Generally, jurors take their duties very seriously, and the judges and lawyers in the trial process continually emphasize to the jurors the significance and responsibilities of the jury. The question of the meaning of the negligence standard conveyed by negligence instruc-

99. Cal. 3.14 (8th ed. 1994 & Supp. 2002).

100. *See* Ariz. Neg. 5 (3d ed. 1997); Cal. 3.38 (8th ed. 1994 & Supp. 2002); Conn. 2-6 (1998); Mich. 10.07 (2d ed. 1981 & Supp. 2001); S.C. 23-18 (1994 & Supp. 1995); Utah 3.7 (1993).

101. Cal. 3.38 (8th ed. 1994 & Supp. 2002).

102. Ill. 10.07 (2000).

103. *See, e.g.*, VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 245–51 (1986); REID HASTIE ET AL., INSIDE THE JURY 227–40 (1983); *cf.* NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW 319–37 (1995).

tions and the capacity of the jury to apply that standard to the facts is more problematic.

There are a number of recent, thoughtful, scholarly works on the question of the jury's ability to understand and apply jury instructions.[104] Two other major works report on experiments testing the understandability of jury instructions—a path-breaking article by Robert Charrow and Veda Charrow published in the *Columbia Law Review* in 1979,[105] and a how-to book by Amiran Elwork, Bruce D. Sales and James J. Alfini published in 1982, giving a step-by-step guide to drafting more understandable jury instructions.[106] Both the Charrow article and the Elwork book propose simplified, more comprehensible versions of a basic negligence instruction. The Charrows rewrote the alternative foreseeability instruction in the California pattern instructions B.A.J.I. 3.11.[107] Elwork and his co-authors rewrote a basic negligence instruction, presumably originally written in terms of the conduct of the ordinary careful person.[108] The

104. The literature is reviewed in Note, *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1489–1513 (1997).

105. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979).

106. AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982).

107. The Charrows set out the then-current B.A.J.I. 3.11:

> One test that is helpful in determining whether or not a person was negligent is to ask and answer whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, he would have foreseen or anticipated that someone might have been injured by or as a result of his action or inaction. If such a result from certain conduct would be foreseeable by a person of ordinary prudence with like knowledge and in like situation, and if the conduct reasonably could be avoided, then not to avoid it would be negligence.

Charrow & Charrow, *supra* note 105, at 1349. They then set out their rewritten form:

> 3.11 Modified
>
> In order to decide whether or not the defendant was negligent, there is a test you can use. Consider how a reasonably careful person would have acted in the same situation. Specifically, in order to find the defendant negligent you would have to answer "yes" to the following two questions:
>
> 1. Would a reasonably careful person have realized in advance that someone might be injured as a result of a defendant's conduct?
>
> And,
>
> 2. Could the reasonably careful person have avoided behaving as defendant did? If your answer to both of these questions is yes, then the defendant is negligent. You can use the same test in deciding whether the plaintiff was negligent.

Id.

Their research in the two different forms given to participants in comprehensibility tests showed a marked increase in comprehensibility from the original to the modified form. *Id.* at 1349–50.

108. Their reformulated instruction reads as follows:

> STEP 2: UNDERSTAND WHAT NEGLIGENCE IS
>
> Negligence is the failure to be as careful as we would expect an ordinary person to be. For a person to be negligent, he/she must have done at least one of the following two things:

problem with these studies, as applied to the negligence standard, is that they both just simplify the sentences containing the basic defining language, while leaving the basic defining language unelaborated. If those basic defining terms—foreseeability in the one case and the conduct of the ordinary careful person in the other—are subject to different interpretations and consequently different applications, these simplifying rewrites may not make the ultimate standard clear to the jury.[109] The ultimate questions, not resolvable by simple clarification studies, may be: what is the intended meaning of the negligence standard; what is the meaning actually conveyed to juries by the unreduced but simplified negligence instruction, and how can the intended meaning be better conveyed?

Perhaps a recent, thoughtful book by Neal Feigenson[110] might be of help in tackling those questions. Feigenson's book reviews the social science research on jury decision making in civil cases and then attempts to enlarge our understanding by carefully analyzing selected closing arguments to the jury in a number of accident cases, reviewing what actual jurors have said about their deliberations in those and other cases.

Based on these materials, Professor Feigenson concludes that jurors consistently take their job very seriously and try to follow the substantive instructions that the judge gives them. Reflecting his social psychology perspective, Feigenson identifies three recurring features of jury decision making: (1) a tendency to view the case as melodrama, looking for a single locus of fault;[111] (2) application of norm theory, the use of counterfactual thinking—focusing on which actor failed to do what others within that culture usually do in that

> 1. He/she must have done something that an ordinary careful person would not have done in the same situation.
>
> 2. Or, he/she must have *not* done something that an ordinary careful person would have in the same situation.
>
> This means that if a person acted similarly to the way an ordinary, careful person would have acted, then he/she is not negligent.

ELWORK ET AL., *supra* note 106, at 166.

109. One proposal to encourage the use of clearer instructions is to make unclear instructions a ground for appealing a jury verdict. AMIRAM ELWORK, ET AL., *Toward Understandable Jury Instructions*, *in* IN THE JURY BOX: CONTROVERSIES IN THE COURTROOM 161, 176 (Lawrence S. Wrightsman et al. eds., 1987). This approach was adopted by the California Supreme Court in *Mitchell v. Gonzales*, 819 P.2d 872, 877–79 (Cal. 1991), which rejected B.A.J.I. 3.75 based on its use of the term proximate cause, partly because the Charrow study showed that the average juror could not understand it.

110. NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS (2000).

111. *Id.* at 88–95.

situation;[112] and (3) a search for total justice—the just resolution of the dispute in light of all the facts of the case, whether or not they are legally relevant.[113]

Feigenson's relentless focus on the social psychology of the jury, however, tends to draw the reader's attention away from the jury's legally defined role; implying, perhaps, that juries decide based on these psychological tendencies rather than the facts that they find to be true and the law given to them by the judge.

Emblematic of this shift in focus, perhaps, is Feigenson's curious inability to understand the jurors' explanation in the one case in his study in which jurors told interviewers after trial that the judge's instructions forced them to find for the plaintiff. That was *Faverty v. McDonald's Rests. of Or., Inc.*,[114] in which a teenage McDonald's employee fell asleep at the wheel while driving home from McDonald's after a late-night shift, his second shift in twenty-four hours. The plaintiff was seriously injured when the sleepy teenager's car slammed into his truck.

The instruction that the holdout jurors identified as crucial was this. The judge told the jury that they had to decide: "[W]as the defendant, McDonald's, negligent in working [the teenage employee] more hours than was reasonable under the circumstances existing when the defendant knew or in the exercise of reasonable care should have known that [he] would operate a motor vehicle and be a hazard to himself and others?"[115]

Feigenson says that this instruction did not force the jury to find for the plaintiff because they still had to determine whether McDonald's conduct was unreasonable,[116] which, he says, they must have done based on their melodramatic judgment—"simplifying, personalizing, and moralizing accidents by attributing responsibility to the party who deviates from accepted cultural norms."[117] This moralistic judgment can be seen in the statement of the jury's foreman: "McDonald's was working him . . . more hours than they should have, especially on a school night."[118] But it is not clear that the jury would have considered that judgment relevant to the decision of this case

112. *Id.* at 53–56.
113. *Id.* at 104–11.
114. 892 P.2d 703 (Or. App. 1995), *discussed in* FEIGENSON, *supra* note 110, at 152–69.
115. FEIGENSON, *supra* note 110, at 168.
116. *Id.*
117. *Id.* at 169.
118. *Id.* at 168–69.

without the judge's instruction, which invited the jury to determine whether McDonald's was negligent in working the teenage employee more hours than was reasonable under the circumstances.[119] That instruction took away from the jury the option of deciding that McDonald's had not wronged the plaintiff because it had no duty to third parties to make decisions about workers' shifts and hours so as to protect those third parties from a sleepy worker driving home after his shift. Once you accept that there is such a duty, it is difficult to say that it was reasonable, in light of the risk to others from sleepy employees driving home, to work a teenage employee on a late-night shift, his second shift in twenty-four hours. The judicial recognition of a duty here, and its embodiment in the jury instruction, therefore, told the jury to transform work-shift rules, adopted to maintain worker productivity and avoid overtime pay, into safety rules intended to protect third parties threatened with harm by sleepy employees driving home.

Understood in this way, of course, the *Faverty* case seems to illustrate not the penchant of juries for melodramatic reasoning, but the overwhelming significance of the judge's instructions and the jury's understanding of those instructions as they apply to the facts of the specific case. The *Faverty* case, relied on heavily by Feigenson, thus suggests the importance of focusing on the relationship between the basic negligence instructions given to the jury and the way the jury decides the negligence question. Feigenson himself does not do this systematically—*Faverty* is the only case in his sample for which he gives part of the jury instructions. Moreover, Feigenson's review of the literature suggests that there are no social science studies focused on the meaning of the negligence standard conveyed to juries by standard or variant negligence instructions. Clearly, this question is ripe for further empirical research.

V. DESCRIPTIVE THEORY OF NEGLIGENCE AND PATTERN JURY INSTRUCTIONS

In the absence of definitive social science studies on the meaning or meanings of negligence conveyed to jurors by standard negligence instructions, any theorizing about the jury's role in applying the negligence instructions must depend on straightforward traditional interpretive analysis to determine the probable meaning or meanings

119. *Id.* at 168.

the different pattern instructions on negligence would convey to a jury.

Here, we run into a serious obstacle in our search for a single descriptive theory of the negligence standard and the role of the jury in applying it. Our review of the basic negligence instructions and their immediate context in the pattern jury instructions of the different states has shown us a range of similar but variant instructions in a wide range of qualifying contexts. How can we settle on a single general descriptive theory that will accurately describe all these varying particulars? Can the same theory that adequately accounts for Virginia's definition of the negligence standard[120] by reference to the conduct of the *reasonable* person also adequately account for Kansas's definition of the negligence standard[121] by reference to the conduct of the *ordinary* person? Can the same theory that adequately accounts for Idaho's definition of the negligence standard[122] by reference to the conduct of the *reasonably careful person* also adequately account for Missouri's definition of the negligence standard in terms of the conduct of the *ordinarily careful person*?[123] For that matter, can the descriptive theory that adequately explains Idaho's basic definition of negligence, shorn of most qualifying or reaffirming instructions, also adequately explain Mississippi's same basic definition, qualified, elaborated, and reaffirmed heavily by surrounding instructions?

There are three possible responses to the descriptive theory problem posed by the multiple variations in pattern negligence instructions. One could say that a single descriptive theory of these variant instructions is impossible, and that the best we can do is to attempt fifty different descriptive theories of the negligence law, one for each state. An alternative response is to focus on what is common to all of the pattern negligence instructions and elaborate a theory of this commonality. But the only commonality among all these negligence instructions is the device of defining the negligence standard by reference to the conduct of a hypothesized person, whose attributes are then differently and variously defined. The third response is to recognize that the current different negligence instructions all derive ultimately from a common historical precedent,[124]

120. Va. 4.000 (1998 repl. ed. & Supp. 2001).
121. Kan. 103.01 (3d ed. 1997 & Supp. 2001).
122. Idaho 210 (1988).
123. Mo. 11.02 (5th ed. 1996 & Supp. 2001).
124. Vaughan v. Menlove, 132 Eng. Rep. 490 (1837).

which was itself explainable by a single descriptive theory.[125] In light of that common history, one could then search for the central or focal case[126] of these variant negligence instructions, develop a descriptive theory of that case, and then explain the variations from that central or focal case. Although this proposed methodology would not in every case focus on the most common current standards, the central or focal case, in this instance, would seem to be those negligence instructions that are most consistent with the historical development of the negligence standard. This would give us as the central case those pattern negligence instructions that define negligence as the failure to exercise ordinary care under the circumstances and that go on to define ordinary care in terms of the conduct of the reasonably careful or reasonably prudent person. The theoretical project would then focus first on that central case and move from there to explain, or account for, seemingly significant differences from that central case.

Such a methodology, applied in drastically shortened form, supports the following tentative conclusions about the relationship between the pattern jury instructions reviewed here and the five descriptive theories of the negligence standard identified above.

First, there seems to be no support in the pattern negligence instructions for Holmes's theory of the negligence standard. Foreseeability is not mentioned in most of the negligence instructions, and where it is, the foreseeability of danger from the defendant's conduct *simpliciter* is not presented as the negligence standard. Without Holmes's reductive positivist commitments, it is difficult to read the ordinary pattern negligence instructions, emphasizing ordinary care and the conduct of the reasonably careful or reasonably prudent person or its variants, as requests that the jury determine only whether foreseeable danger to others was threatened by the defendant's conduct under the known circumstances.

Second, the cost-benefit test of negligence does not seem to be the probable meaning of even those five pattern negligence instructions couched in terms of unreasonable foreseeable risk. To law professors, of course, unreasonable foreseeable risk conjures up Henry Taylor Terry's cost-benefit test for negligence,[127] embodied in

125. *See* Kelley, *Who Decides?*, *supra* note 8, at 351–64.

126. For an explanation of this focal or central case methodology, see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 3–22 (1980). For an application of this methodology to tort law, see Kelley, *Who Decides?*, *supra* note 8.

127. Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

the first[128] and second[129] Restatements and summarized in Learned Hand's *Carroll Towing Company* test.[130] But it seems to us that this is not the meaning that would be conveyed to the jury. This is so for a number of reasons.

None of the foreseeability instructions except that of Louisiana's provision[131] set out the detailed cost-benefit explanation of unreasonable foreseeable risk by Terry, Hand, or the second Restatement. Each instruction identifies foreseeability as the foresight of an ordinary prudent person, and all but Wisconsin's instructions ask the jury to determine, in addition to foreseeable harm from the defendant's act, whether that conduct could reasonably be avoided, or whether the act is one that a reasonably prudent person, in the exercise of ordinary care, would not do.[132] As thus qualified, the foreseeable harm instructions would probably be understood by a jury as one factor a reasonably prudent person would take into account in deciding how to act. The meaning of the negligence standard conveyed to the jury would likely still be the conduct of the reasonably prudent person under the known circumstances. It seems to us that a jury would interpret that standard not as an invitation to engage in cost-benefit analysis, but as an invitation to determine how reasonably careful people in their community would in fact act in light of all the circumstances, including the foreseeable risk of harm to others from the proposed conduct.

We are not sure how a jury would interpret the unreasonable foreseeable risk language in the Wisconsin pattern negligence instructions. In each of the two separate instructions in which the phrase is used, there is reference to a hypothetical person, "a person of ordinary intelligence and prudence"[133] (which can only be used with the consent of both parties), and a "reasonable person."[134] Moreover, each of those hypothetical persons is used to define ordinary care.[135] It seems likely that a jury given either of these instructions would interpret unreasonable foreseeable risk, too, in light of the surrounding context pointing to the ordinary care

128. RESTATEMENT OF THE LAW OF TORTS §§ 291, 292 (1934).
129. RESTATEMENT (SECOND) OF TORTS §§ 291, 292 (1965).
130. United States v. Carroll Towing, Co., 159 F.2d 169 (2d Cir. 1947).
131. La. 3.01 (2001).
132. N.M. 13-1601 (2001).
133. Wis. 1001 (2002).
134. Wis. 1005 (2002).
135. Wis. 1001, 1005 (2002).

exercised by a reasonable person or by persons of ordinary intelligence and prudence. This would, we think, point the jury to ordinary safe practice in the community, not to an independent cost-benefit analysis.

The optional provision in the Louisiana negligence instruction does tell the jury to apply a cost-benefit test,[136] but that optional provision is preceded and followed by mandatory provisions that explain the negligence standard in terms of the conduct of the ordinarily prudent person under the same or similar circumstances.

Of the five descriptive theories about the meaning of the negligence standard, then, only three seem to be left as eligible theories consistent with the pattern jury instructions. The descriptive theory question boils down to this. Do these instructions ask the jury to make a moral judgment about the defendant's conduct, based on the community's prevailing moral values? Do they ask the jury to hypothesize a person endowed with the virtues of prudence, caution, and carefulness and determine in a thought experiment how that virtuous person would act? Or, do they ask the jury to determine whether the defendant wronged the plaintiff by failing to follow the community's safety conventions?

There are good reasons to think these instructions do not ask the jury to pass moral judgment on the defendant's conduct. Each of the recurring critically important phrases in these pattern instructions, *ordinary care* and the conduct of a *reasonably prudent* or a *reasonably careful* person, seem to refer to a preexisting standard. That standard does not seem to be so much a moral as a social standard, based on the actual conduct of one who exercises *ordinary* care for the safety of others. This social, rather than moral, nature can be seen, as well, by focusing on what these instructions do not contain. There is no mention of fault, improper conduct, excuses, good or bad, right or wrong. Except for duty there is none of the language here that we ordinarily associate with moral or ethical judgment. And the language of duty is consistent with the fifth descriptive theory of the negligence standard. If negligence liability is imposed to redress a private wrong, defined by referring to the norms of the community, it seems only natural to characterize that wrong as breach of a duty by the defendant to the plaintiff based on prejudicial, community-defined obligations. In only one limited sense, then, do the negli-

136. La. 3.01 (2001).

gence instructions seem to call on the jury to make a moral judgment based on the community's values. That moral judgment is tightly circumscribed. The instructions seem to call on the jury to determine whether the defendant's conduct, which resulted in harm to the plaintiff, was a private injustice to the plaintiff. So it is only in relation to the community's standard of what conduct the defendant owed to the plaintiff under the circumstances of the case that the jury is called on to make a community moral judgment. That judgment is not a free-floating moral judgment, but a precise determination of whether, in light of the community's preexisting coordination patterns, the plaintiff could reasonably have expected the defendant to have acted differently in order to protect the plaintiff from harm.

A similar answer can be given to Professor Feldman's brilliant virtue-ethics theory of the negligence standard as applied by the jury. Professor Feldman persuasively points out the recurring use of virtue-terms in the pattern jury instructions: *careful*, *prudent* and *reasonable*.[137] But in almost every case these terms are qualified when used to describe the hypothesized person. The instructions talk about the *reasonably* careful or *reasonably* prudent person; they talk of the *ordinarily* careful or *ordinarily* prudent person; they talk about the *ordinary*, prudent person or the *ordinary*, careful person. Moreover, in most instructions the conduct of a hypothesized person is used to elaborate on the standard of *ordinary* care. These recurring, persistent qualifications of the virtue words suggest that the hypothesized person is not used to get the jury to identify what the virtuously prudent, careful or reasonable conduct would be under the circumstances. Instead, the instructions ask the jury to identify what would be ordinary care under the circumstances—the conduct that the plaintiff could reasonably expect of other members of the community who, though not paragons of virtue *simpliciter*, can be expected to act in reasonably careful or reasonably prudent ways. The only virtue this fully endows the hypothesized person with is the virtue of justice: the reasonably careful person exercising ordinary care under the circumstances gives the plaintiff what is her due—the conduct she could reasonably expect of an individual in the defendant's position, consistent with that community's preexisting safety practices, norms, conventions and associated expectations. To make that judgment, sensibly enough, we do not hypothesize for the jury a just person, but define for the jury, in a general way, how a just person would act

137. Feldman, *supra* note 15, at 1446–50.

within a particular set of preexisting social conventions and expectations.

The arguments against the broadly defined moral judgment thesis, as well as the arguments against the virtue-ethics thesis, point in the direction of the fifth explanation for the negligence standard. The focal case negligence instructions use the term *ordinary care* and define ordinary care in terms of the conduct of a reasonably careful or reasonably prudent person. The language points the jury to preexisting standards of conduct that the plaintiff could reasonably expect from the defendant. The broader context of the negligence instruction supports this interpretation as well. These instructions are given to the jury in a case brought by a plaintiff who claims a defendant wronged him. Ordinarily, claims of wrong invoke a standard of right conduct, preexisting the wrongdoer's conduct, which the defendant allegedly breached. The most persuasive explanation of the negligence standard, and the jury's role in applying that standard, identifies the source of that preexisting standard in the safety conventions of the community and the associated expectations of the plaintiff.

CONCLUSION

The analysis of the states' pattern jury instructions explaining the basic negligence standards suggests that pattern instructions are a rich, largely untapped resource for legal scholars. The categorization of the pattern negligence instructions revealed a variety of different kinds of instructions. The most common instructions defined negligence as the failure to exercise ordinary care and further defined ordinary care as the conduct of a reasonably careful or reasonably prudent person. Other formulations of the standard were adopted by other pattern instruction drafters, giving us a wide range—from the conduct of the ordinary person to the conduct of the reasonable person, and various permutations in between. The only formulation that did not show up in any of the pattern instructions was the conduct of the ordinary, reasonable person, the long-time favorite of torts scholars.

We suggested that legal scholars interested in the practical working of the negligence liability system would do well to explore how juries understand the different, basic negligence instructions and how juries apply those different definitions to recurring fact situations.

If a single descriptive theory of negligence can explain the different and various particulars of the states' pattern negligence instructions, the most likely explanation is that the negligence instructions ask the jury to determine whether the defendant breached a preexisting community safety convention intended for the protection of people like the plaintiff. That too would explain why we ask the jury—a cross section of the community—to decide questions of fact in light of community-based negligence standards.

APPENDIX:

BIBLIOGRAPHY OF STATE JURY INSTRUCTIONS FOR NEGLIGENCE

ALABAMA

Title: Alabama Pattern Jury Instructions–Civil.
Author: Alabama Pattern Jury Instructions Committee.
Publication: Lawyers Cooperative Publishing.
Year: 1993, 2000.
Hereinafter cited as: Ala. A.P.J.I. Civ. (2d ed. 1993 & Supp. 2000).

NEGLIGENCE—DEFINITION
Ala. A.P.J.I. Civ. 28.00 (2d ed. 1993 & Supp. 2000)
Negligence is the failure to discharge or perform a legal duty owed to the other party.

NEGLIGENCE AND ORDINARY CARE
Ala. A.P.J.I. Civ. 28.01 (2d ed. 1993 & Supp. 2000)
Negligence means the failure to exercise (reasonable) (ordinary) care; that is, such care as a reasonably prudent person would have exercised under the same or similar circumstances.

Therefore, "negligence" is the failure to do what a reasonably prudent person would have done under the same or similar circumstances, or, the doing of something which a reasonably prudent person would not have done under the same or similar circumstances.

DUTY OWED—NEGLIGENCE AND ORDINARY CARE
Ala. A.P.J.I. Civ. 28.02 (2d ed. 1993 & Supp. 2000)
The duty owed by the defendant to the plaintiff was to exercise reasonable care not to injure or damage the plaintiff; that is, to exercise such care as a reasonably prudent person would have exercised under the same or similar circumstances.

VOLUNTARY INTOXICATION
Ala. A.P.J.I. Civ. 28.14 (2d ed. 1993 & Supp. 2000)
A person who voluntarily becomes intoxicated is required to exercise the same degree of care as is required of a sober person under the same or similar circumstances. It is proper for you to consider whether or not the defendant was intoxicated, together with all other facts and circumstances, in

determining whether or not the defendant was negligent at the time of the occurrence.

SUDDEN EMERGENCY
Ala. A.P.J.I. Civ. 28.15 (2d ed. 1993 & Supp. 2000)

If a person, without fault of his own, is faced with a sudden emergency, he is not to be held to the same correctness of judgment and action as if he had time and opportunity to fully consider the situation, and the fact, if it be a fact, that he does not choose the best or safest way of escaping peril or preventing injury is not necessarily negligence, but the standard of care required in an emergency situation is that care which a reasonably prudent person would have exercised under the same or similar circumstances.

ASSUMPTION OTHERS WILL OBEY LAW
Ala. A.P.J.I. Civ. 28.16 (2d ed. 1993 & Supp. 2000)

Every person has the right to assume that other persons will obey the law; and he has a right to proceed on such assumption until the contrary is clearly evident to him or by the exercise of reasonable care should have been clearly evident to him.

DUTY OWED BY VOLUNTEERS (GOOD SAMARITAN RULE)
Ala. A.P.J.I. Civ. 28.17 (2d ed. 1993 & Supp. 2000)

If you are reasonably satisfied from the evidence that the defendant voluntarily attempted to do anything for the plaintiff as is alleged by the plaintiff (such as assuming to care for the plaintiff's injuries), the defendant owed to the plaintiff the duty to exercise such care as a reasonably prudent person would have exercised under the same or similar circumstances.

NEGLIGENCE—LIABILITY FOR ASSUMED DUTY
Ala. A.P.J.I. Civ. 28.17(a) (2d ed. 1993 & Supp. 2000)

One undertaking to supervise, watch, and care for another, such as a minor, even though gratuitously, binds himself to exercise due care; that is such care as a reasonably prudent person would exercise under the same or similar circumstances, and a negligent failure to discharge this duty renders such person liable for all damages proximately resulting from such negligence.

ACT OF GOD
Ala. A.P.J.I. Civ. 28.18 (2d ed. 1993 & Supp. 2000)

As a matter of defense, it is contended that the injuries (and damages) complained of were caused by an "act of God" and without the fault or negligence of the defendant.

An "act of God" is a cause which no human prudence or power could prevent or avert; and, the defendant would not be liable if, the injuries (and damages) complained of were caused by an "act of God."

The term "act of God" means: An unusual and extraordinary manifestation of the forces of nature that could not under normal conditions have been anticipated or expected; and, it applies only to events in nature so

extraordinary that the history of climatic variations and other conditions in the particular locality would afford no reasonable warning of them.

Manifestations of the forces of nature which may reasonably be expected, whether of frequent or infrequent occurrence, must be taken into consideration by reasonable persons; and,

If the defendant, by the exercise of reasonable foresight and prudence, could have foreseen and guarded against (the flooding, cyclone, windstorm, or other, as the case may be), and the natural consequences thereof, and failed to do so, the defendant would be liable for the injuries (and damages) proximately resulting therefrom, even though the forces of nature were the immediate cause of such injuries (and damages).

In other words, if the defendant was negligent by reason of (his) (her) (its) failure to exercise reasonable foresight and prudence, the defendant would be liable even though the occurrence of nature combined and concurred to proximately cause the injuries (and damages) complained of by the plaintiff.

ALASKA

Title: Alaska Civil Pattern Jury Instructions.
Author: Alaska Supreme Court, Civil Pattern Jury Instructions Committee.
Publication: Alaska Court System.
Year: 1999.
Hereinafter cited as: Alaska P.J.I. Civ. (1999).

NEGLIGENCE DEFINED
Alaska P.J.I. Civ. 3.03A (1999)

I will now define negligence for you. Negligence is the failure to use reasonable care. Reasonable care is that amount of care that a reasonably prudent person would use under similar circumstances. Negligence may consist of doing something which a reasonably prudent person would not do, or it may consist of failing to do something which a reasonably prudent person would do. A reasonably prudent person is not the exceptionally cautious or skillful individual, but a person of reasonable and ordinary carefulness.

In this case, you must decide whether (plaintiff), (name), (defendant), (name), (both plaintiff and defendant) used reasonable care under the circumstances.

ARIZONA

Title: Revised Arizona Jury Instructions–Civil.
Author: State Bar of Arizona.
Publication: State Bar of Arizona.
Year: 1997.

Hereinafter cited as: Ariz. R.A.J.I. Civ. (3d ed. 1997).

DEFINITION OF NEGLIGENCE
Ariz. R.A.J.I. Civ. Fault 1 (3d ed. 1997)

Plaintiff claims that defendant was at fault. Fault is negligence that was a cause of plaintiff's injury. Negligence is the failure to use reasonable care. Negligence may consist of action or inaction. Negligence is the failure to act as a reasonably careful person would act under the circumstances.

ASSUME LAWS OBEYED—DUTY TO OBSERVE
Ariz. R.A.J.I. Civ. Negligence 4 (3d ed. 1997)

A driver is entitled to assume that another motorist will proceed in a lawful manner and obey the laws of the road—unless it should become apparent to that driver, acting as a reasonably careful person, that the other motorist is not going to obey the laws of he road.

All drivers have a continuing duty to make that degree of observation which a reasonably careful person would make under similar circumstances.

NEGLIGENCE OF A CHILD—DUTY OF ADULT TO ANTICIPATE BEHAVIOR OF CHILDREN
Ariz. R.A.J.I. Civ. Negligence 5 (3d ed. 1997)

A child is not to be held to the same standard of care as an adult. A child who does not use the degree of care that is ordinarily exercised by children of the same age, intelligence, knowledge, and experience under the existing circumstances is negligent.

An adult must anticipate the ordinary behavior of children, and that children might not anticipate the same degree of care for their own safety as adults.

SUDDEN EMERGENCY
Ariz. R.A.J.I. Civ. Negligence 6 (3d ed. 1997)

In determining whether a person acted with reasonable care under the circumstances, you may consider whether such conduct was affected by an emergency.

An "emergency" is defined as a sudden and unexpected encounter with a danger which is either real or reasonably seems to be real. If a person, without negligence on his or her part, encountered such an emergency and acted reasonably to avoid harm to self or others, you may find that the person was not negligent. This is so even though, in hindsight, you feel that under normal conditions some other or better course of conduct could and should have been followed.

ARKANSAS

Title: Arkansas Model Jury Instructions.
Author: Arkansas Supreme Court Committee on Jury Instructions.

Publication: West Group Publishing.
Year: 1999.
Hereinafter cited as: Ark. A.M.I. Civ. (1999).

NEGLIGENCE—DEFINITION
Ark. A.M.I. Civ. 301 (1999)

When I use the word "negligence" in these Instructions I mean the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence in this case. [It is for you to decide how a reasonably careful person would act under those circumstances.] [To constitute negligence an act must be one from which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause him not to do the act, or to do it in a more careful manner.]

ORDINARY CARE—DEFINITION
Ark. A.M.I. Civ. 303 (1999)

A failure to exercise ordinary care is negligence. When I use the words "ordinary care," I mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence in this case. It is for you to decide how a reasonably careful person would act under those circumstances.

DUTY TO USE ORDINARY CARE
Ark. A.M.I. Civ. 305 (1999)

A. It was the duty of _____ (defendant), before and at the time of the occurrence, to use ordinary care for the safety of [_____] [and] [his property] [the property of _____].

B. It was the duty of [all] [both] persons involved in the occurrence to use ordinary care for their own safety and the safety of [others] [and their property] [the property of others].

C. It was the duty of both _____ and _____ to use ordinary care for their own safety and the safety of [others] [and their property] [the property of others].

CALIFORNIA

Title: Civil Jury Instructions.
Author: The Committee on Standard Jury Instructions, Civil, of the Superior Court of Los Angeles County, California.
Publication: West Group Publishing.
Year: 1994, 2002.
Hereinafter cited as: Cal. B.A.J.I. Civ. (8th ed. 1994 & Supp. 2002).

NEGLIGENCE AND ORDINARY CARE—DEFINITIONS
Cal. B.A.J.I. Civ. 3.10 (8th ed. 1994 & Supp. 2002)

Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence.

It is the failure to use ordinary or reasonable care.

Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence.

[You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence.]

A TEST FOR DETERMINING THE QUESTION OF NEGLIGENCE
Cal. B.A.J.I. Civ. 3.11 (8th ed. 1994 & Supp. 2002)

One test that is helpful in determining whether or not a person was negligent is to ask and answer the question whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, [he] [or] [she] would have foreseen or anticipated that someone might have been injured by or as a result of [his] [or] [her] action or inaction. If the answer to that question is "yes," and if the action or inaction reasonably could have been avoided, then not to avoid it would be negligence.

AMOUNT OF CAUTION VARIES
Cal. B.A.J.I. Civ. 3.12 (8th ed. 1994 & Supp. 2002)

The amount of caution required of a person in the exercise of ordinary care depends upon the conditions that are apparent or that should be apparent to a reasonably prudent person under circumstances similar to those shown by the evidence.

RIGHT TO ASSUME OTHERS' GOOD CONDUCT
Cal. B.A.J.I. Civ. 3.13 (8th ed. 1994 & Supp. 2002)

Every person who is exercising ordinary care, has a right to assume that every other person will perform [his][her] duty [and obey the law], and in the absence of reasonable cause for thinking otherwise, it is not negligence for such a person to fail to anticipate an accident which can occur only as a result of a violation of [law] [or] [duty] by another person.

RIGHT TO ASSUME OTHERS' NORMAL FACULTIES
Cal. B.A.J.I. Civ. 3.14 (8th ed. 1994 & Supp. 2002)

A person who is exercising ordinary care has a right to assume that other persons are ordinarily intelligent and possessed of normal sight and hearing, in the absence of reasonable cause for thinking otherwise.

EVIDENCE OF CUSTOM IN RELATION TO ORDINARY CARE
Cal. B.A.J.I. Civ. 3.16 (8th ed. 1994 & Supp. 2002)

Evidence as to whether a person conformed or did not conform to a custom that had grown up in a given locality or business is relevant and ought to be considered, but is not necessarily controlling on the issue whether such person was negligent. That issue must be determined by the standard of care that I have stated to you.

CARE REQUIRED FOR SAFETY OF MINOR
Cal. B.A.J.I. Civ. 3.38 (8th ed. 1994 & Supp. 2002)

Ordinarily it is necessary to exercise greater caution for the protection and safety of a young child than for an adult person who possesses normal physical and mental faculties. One dealing with children must anticipate their ordinary behavior. The fact that children usually do not exercise the same degree of prudence for their own safety as adults, or that they often are thoughtless and impulsive, imposes a duty to exercise a proportional vigilance and caution on those dealing with children, and from whose conduct injury to a child might result.

SPECIFIC APPLICATION OF DUTY IN DANGEROUS ACTIVITY
Cal. B.A.J.I. Civ. 3.41 (8th ed. 1994 & Supp. 2002)

Because of the great danger involved in the _____, a person of ordinary prudence will exercise extreme caution when engaged in such an activity.

DUTY OF ONE IN IMMINENT PERIL
Cal. B.A.J.I. Civ. 4.40 (8th ed. 1994 & Supp. 2002)

A person who, without negligence on [his] [her] part, is suddenly and unexpectedly confronted with peril arising from either the actual presence of, or the appearance of, imminent danger to [himself] [herself] or to others, is not expected nor required to use the same judgment and prudence that is required in the exercise of ordinary care in calmer and more deliberate moments. [His] [Her] duty is to exercise the care that an ordinarily prudent person would exercise in the same situation. If at that moment [he] [she] does what appears to [him] [her] to be the best thing to do, and if [his] [her] choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, [he] [she] does all the law requires of [him] [her]. This is true even though in the light of after-events, it should appear that a different course would have been better and safer.

COLORADO

Title: Colorado Jury Instructions–Civil.
Author: Colorado Supreme Court Committee on Civil Jury Instructions.
Publication: West Group Publishing.
Year: 1999, 2000.

Hereinafter cited as: Colo. J.I. Civ. (4th ed. 1999 & Supp. 2000).

ELEMENTS OF LIABILITY—NO NEGLIGENCE OF PLAINTIFF
Colo. J.I. Civ. 9.1 (4th ed. 1999 & Supp. 2000)

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on (his) (her) claim of negligence, you must find that all of the following have been proved by a preponderance of the evidence:

1. The plaintiff had (injuries) (damages) (losses);
2. The defendant was negligent; and
3. The defendant's negligence was a cause of the plaintiff's (injuries) (damages) (losses).

If you find that any one or more of these *(number)* statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these *(number)* statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of *[insert any affirmative defense that would be a complete defense to plaintiff's claim]*).

If you find that (this affirmative defense) (any one or more of these affirmative defenses) (has) (have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense) (none of these affirmative defenses) (has not) (have) been proved, then your verdict must be for the plaintiff.

NEGLIGENCE—DEFINED (INCLUDING COMPARATIVE NEGLIGENCE CASES)
Colo. J.I. Civ. 9.4 (4th ed. 1999 & Supp. 2000)

Negligence means a failure to do an act which a reasonably careful person would do, or the doing of an act which a reasonably careful person would not do, under the same or similar circumstances to protect (oneself or) others from (bodily injury) (death) (property damage) *(insert any other appropriate description, e.g., "financial loss")*.

(Negligence may also mean assumption of risk. A person assumes the risk of injury or damage if the person voluntarily or unreasonably exposes him or herself to such injury or damage with knowledge or appreciation of the danger and risk involved.)

NEGLIGENCE—DEFINED—INHERENTLY DANGEROUS ACTIVITIES
Colo. J.I. Civ. 9.5 (4th ed. 1999 & Supp. 2000)

One carrying on an inherently dangerous activity such as the *(insert an appropriate description, e.g., "transmission of electricity")* must exercise the highest possible degree of skill, care, caution, diligence and foresight with regard to that activity, according to the best technical, mechanical and scientific knowledge and methods which are practical and available at the time of the claimed conduct which caused the claimed injury. The failure to do so is negligence.

REASONABLE CARE—DEFINED
Colo. J.I. Civ. 9.6 (4th ed. 1999 & Supp. 2000)
Reasonable care is that degree of care which a reasonably careful person would use under the same or similar circumstances.

VOLUNTEER—DUTY OF CARE
Colo. J.I. Civ. 9.8 (4th ed. 1999 & Supp. 2000)
One who voluntarily assumes the care of an (injured) (ill) person is under a duty to act as a reasonably careful person would under the same or similar circumstances.

SUDDEN EMERGENCY
Colo. J.I. Civ. 9.10 (4th ed. 1999 & Supp. 2000)
A person who, through no fault of his or her own, is placed in a sudden emergency, is not chargeable with negligence if the person exercises that degree of care which a reasonably careful person would have exercised under the same or similar circumstances.

UNAVOIDABLE ACCIDENT
Colo. J.I. Civ. 9.11 (4th ed. 1999 & Supp. 2000)
No instruction to be given.

HAPPENING OF ACCIDENT NOT PRESUMPTIVE NEGLIGENCE
Colo. J.I. Civ. 9.12 (4th ed. 1999 & Supp. 2000)
The occurrence of an accident does not raise any presumption of negligence on the part of either the plaintiff or the defendant.

CONNECTICUT

Title: Civil Jury Instructions.
Author: State of Connecticut Judicial Branch.
Publication: State of Connecticut Judicial Branch.
Year: 1998, 2000.
Hereinafter cited as: Conn. C.J.I. Civ. (1998).

NEGLIGENCE-DEFINITION
Conn. C.J.I. Civ. 2-1 (1998)
Negligence is the violation of a legal duty which one person owes to another to care for the safety of that person or that person's property.

DISTINCTION BETWEEN STATUTORY AND COMMON LAW NEGLIGENCE
Conn. C.J.I. Civ. 2-2 (1998)
There are, for purposes of this case, two kinds of negligence: statutory negligence and common law negligence. Statutory negligence is the failure to conform one's conduct to a duty imposed by the legislature through the

enactment of a statute. Common law negligence is a violation of the duty to use reasonable care under the circumstances. A violation of either of these duties is negligence.

COMMON LAW NEGLIGENCE DEFINED
Conn. C.J.I. Civ. 2-3 (1998)

Common law negligence is the failure to use reasonable care under the circumstances. Reasonable care is the care that a reasonably prudent person would use in the same circumstances.

REASONABLE CARE
Conn. C.J.I. Civ. 2-4 (1998)

In determining the care that a reasonably prudent person would use in the same circumstances, you should consider all of the circumstances which were known or should have been known to the defendant at the time of the conduct in question. Whether care is reasonable depends upon the dangers that a reasonable person would perceive in those circumstances. It is common sense that the more dangerous the circumstances, the greater the care that ought to be exercised.

STANDARD OF CARE OF OTHERS IN RELATION TO CHILDREN
Conn. C.J.I. Civ. 2-6 (1998)

A person is required to use greater care where the presence of children may be reasonably expected. The question is whether a reasonably prudent person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the same general nature as that which occurred here was likely to result. In answering this question, you may take into account the tendency of children to disregard dangerous conditions.

DUTY-FORESEEABILITY
Conn. C.J.I. Civ. 2-7 (1998)

A duty to use care exists when a reasonable person, knowing what the defendant here either knew or should have known at the time of the challenged conduct, would foresee that harm of the same general nature as that which occurred here was likely to result from that conduct. If harm of the same general nature as that which occurred here was foreseeable, it does not matter if the manner in which the harm that actually occurred was unusual, bizarre or unforeseeable.

RIGHT TO ASSUME THAT OTHERS WILL OBEY THE LAW
Conn. C.J.I. Civ. 2-25 (1998)

In determining that [sic] is reasonable care under all of the circumstances, the conduct of the [defendant] should be judged from the viewpoint of the reasonably prudent person. A driver of an automobile is entitled to assume that other drivers will obey the law. The driver may thus assume

that other drivers will obey all statutes governing the operation of motor vehicles in this state and that they will use the care that a reasonably prudent person would use in the same circumstances. The driver is allowed to make this assumption until he knows or in the exercise of reasonable care should know that the assumption has become unwarranted.

SUDDEN EMERGENCY

Conn. C.J.I. Civ. 2-28 (2000)

As previously stated, negligence is the failure to exercise reasonable care under all of the circumstances presented. One of the circumstances for you to consider in this case is whether a sudden emergency situation existed. The existence of a sudden emergency is a factor to be considered in the evaluation of whether the defendant acted as a reasonable person under the circumstances. An individual, choosing a course of action in an emergency, is required to exercise the care of an ordinarily prudent person acting in such an emergency.

You are to consider the evidence in this case to determine whether an emergency situation existed. If you find that an emergency existed which was not caused by the conduct of the defendant and that, as a result of the emergency, the defendant chose a course of action which a reasonable person would have done under the circumstances, then the defendant's conduct would not be negligent. However, if you find that plaintiff's injuries resulted from the conduct of the defendant and that either an emergency did not exist, or the emergency situation was caused by the defendant's own conduct, or that the defendant, in the face of an emergency failed to act as a reasonable person would have done under the circumstances, then the defendant would be negligent.

UNAVOIDABLE ACCIDENT

Conn. C.J.I. Civ. 2-45 (1998)

The defendant claims that any injury suffered by the plaintiff was the result of an unusual or unexpected event, and was not the result of either party's negligence. If you find that the alleged injuries and/or losses in question did not result from either the defendant's or plaintiff's negligence, but were caused solely by some other happening, then the defendant is not liable to the plaintiff.

DELAWARE

Title: Delaware Superior Court Civil Pattern Jury Instructions.
Author: Superior Court of Delaware.
Publication: Superior Court of Delaware.
Year: 2000.
Hereinafter cited as: Del. P.J.I. Civ. (2000).

GENERAL NEGLIGENCE—NEGLIGENCE DEFINED
Del. P.J.I. Civ. 5.1 (2000)

This case involves claims of negligence. Negligence is the lack of ordinary care; that is, the absence of the kind of care a reasonably prudent and careful person would exercise in similar circumstances. That standard is your guide. If a person's conduct in a given circumstance doesn't measure up to the conduct of an ordinarily prudent and careful person, then that person was negligent. On the other hand, if the person's conduct does measure up to the conduct of a reasonably prudent and careful person, the person wasn't negligent.

[Add the following sentence if not using Jury Instr. No. 4.4, "Negligence is Never Presumed."] The mere fact that an accident occurred isn't enough to establish negligence.

GENERAL NEGLIGENCE—NO DUTY TO ANTICIPATE NEGLIGENCE
Del. P.J.I. Civ. 5.3 (2000)

Nobody is required to anticipate someone else's negligence. [__A driver / A person__] is allowed to assume that another [__driver / person__] will not act negligently until [he/she] knows or should know that the other person is acting or is about to act negligently. Therefore, a [__driver / person__] is required to act reasonably and prudently under the circumstances of the particular situation.

GENERAL NEGLIGENCE—NO DUTY TO ANTICIPATE NEGLIGENCE
Del. P.J.I. Civ. 5.4 (2000)

Negligence is never presumed. It must be proved by a preponderance of the evidence before [plaintiff's name] is entitled to recover. No presumption that [defendant's name] was negligent arises from the mere fact that an accident occurred.

FLORIDA

Title: Florida Standard Jury Instructions in Civil Cases.
Author: Supreme Court Committee on Standard Jury Instructions in Civil Cases.
Publication: Lexis Law Publishing.
Year: 2001.
Hereinafter cited as: Fla. S.J.I. Civ. (2001).

NEGLIGENCE
Fla. S.J.I. Civ. 4.1 (2001)

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing

to do something that a reasonably careful person would do under like circumstances.

COMMENT

1. *No inference of negligence from mere fact of accident.* The committee recommends that no charge be given to the effect that "negligence may not be inferred from the mere happening of an accident alone" [*Belden v. Lynch*, 126 So. 2d 578, 581 (2d D.C.A. Fla. 1961)]. Such a charge is argumentative and negative.
2. *Unavoidable accident.* The committee recommends that no charge be given on the subject of "unavoidable accident," this being a more appropriate subject for argument by counsel.
3. *Presumption of reasonable care.* The committee recommends that no charge be given to the effect that one is presumed to have exercised reasonable care for his own safety or for the safety of others. See Comment on charge 4.3.

SUDDEN EMERGENCY
Fla. S.J.I. Civ. 4.8 (2001)

COMMENT

The committee recommends that no charge be given on the subject of sudden emergency. In the circumstances of an emergency, as in "ordinary circumstances," the applicable standard of care is reasonable care under the circumstances.

GEORGIA

Title: Suggested Pattern Jury Instructions.
Author: Council of Superior Court Judges of Georgia.
Publication: Carl Vinson Institute of Government, The University of Georgia.
Year: 1991, 1997.
Hereinafter cited as: Ga. P.J.I. Civ. (3d ed. 1991 & Supp. 1997).

ORDINARY NEGLIGENCE (ORDINARY DILIGENCE); SLIGHT NEGLIGENCE (EXTRAORDINARY DILIGENCE); GROSS NEGLIGENCE (SLIGHT DILIGENCE); CHILDREN, DUE CARE BY
Ga. P.J.I. Civ. 23(C) (3d ed. 1991 & Supp. 1997)

1. Ordinary Negligence (Ordinary Diligence)

Ordinary negligence means simply the absence of or the failure to use that degree of care which is exercised by ordinary careful persons under the same or similar circumstances.

2. Slight Negligence (Extraordinary Diligence)

In general, extraordinary diligence or care is that extreme care and caution which very careful and thoughtful persons use under the same or similar circumstances. (Applied to the preservation of property, extraordinary diligence or care means that extreme care and caution which very careful

and thoughtful persons use in securing and preserving their own property.) The absence of such extraordinary diligence is termed slight negligence.

3. Gross Negligence (Slight Diligence)

In general, slight diligence or care is that degree of care which person of common sense, however inattentive they may be, use under the same or similar circumstances. (Applied to the preservation of property, slight diligence or care means that degree of care which persons of common sense, however inattentive they might be, take of their own property. The absence of slight care is termed gross negligence.

4. Children, Due Care by

The term "due care," when used in reference to a child of tender years, is such care as the child's mental and physical capabilities enable the child to exercise in the actual circumstances of the occasion and situation under investigation.

EMERGENCY

Ga. P.J.I. Civ. 23(M) (3d ed. 1991 & Supp. 1997)

One who is confronted with a sudden emergency which was not created by one's own fault, and is without sufficient time to determine accurately and with certainty the best thing to be done, is not held to the same accuracy of judgment as would be required of that person if he/she had more time for deliberation. The requirement is that the person act with ordinary care under all particular facts and circumstances surrounding the situation.

HAWAII

Title: Hawaii Civil Jury Instructions.
Author: Supreme Court of the State of Hawaii.
Publication: Hawaii State Judiciary.
Year: 1999.
Hereinafter cited as: Haw. C.J.I. Civ. (1999).

NEGLIGENCE DEFINED

Haw. C.J.I. Civ. 6.1 (1999)

Negligence is doing something which a reasonable person would not do or failing to do something which a reasonable person would do. It is the failure to use that care which a reasonable person would use to avoid injury to himself, herself, or other people or damage to property.

In deciding whether a person was negligent, you must consider what was done or not done under the circumstances as shown by the evidence in this case.

FORESEEABILITY

Haw. C.J.I. Civ. 6.2 (1999)

In determining whether a person was negligent, it may help to ask whether a reasonable person in the same situation would have foreseen or anticipated that injury or damage could result from that person's action or

inaction. If such a result would be foreseeable by a reasonable person and if the conduct reasonably could be avoided, then not to avoid it would be negligence.

IDAHO

Title: Idaho Jury Instructions.
Author: Idaho Pattern Jury Instruction Committee.
Publication: Idaho Law Foundation.
Year: 1982, 1988.
Hereinafter cited as: Idaho I.D.J.I. Civ. (1982 or 1988).

DUTY TO USE ORDINARY CARE
Idaho I.D.J.I. Civ. 200 (1988)

It was the duty of the defendant [both parties], before and at the time of the occurrence, to use ordinary care for the safety of the plaintiff [both themselves and each other] [and] [the plaintiff's property] [both their own and each other's property].

NEGLIGENCE–DEFINITION
Idaho I.D.J.I. Civ. 210 (1988)

When I use the word "negligence" in these instructions, I mean the failure to use ordinary care in the management of one's property or person. The words "ordinary care" mean [sic] the care a reasonably careful person would use under circumstances similar to those shown by the evidence. Negligence may thus consist of the failure to do something which a reasonably careful person would do, or the doing of something a reasonably careful person would not do, under circumstances similar to those shown by the evidence. [The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.]

PRESUMPTION OF DUE CARE
Idaho I.D.J.I. Civ. 214 (1982)

This law presumes that_____, in his conduct at the time of and immediately preceding the accident, was exercising ordinary care. This presumption is a form of evidence. It will support a finding in accord with the presumption where there is no proof to the contrary.

FACT OF ACCIDENT ALONE
Idaho I.D.J.I. Civ. 217 (1982)

The Committee recommends that no instruction that negligence may not be presumed from the fact of an accident alone be given.

CARE COMMENSURATE WITH HAZARDS
Idaho I.D.J.I. Civ. 218 (1988)

The Committee recommends that no general instructions relating the amount of care to the hazards of the situation be given.

ASSUMPTION AS TO CONDUCT OF OTHERS
Idaho I.D.J.I. Civ. 219 (1988)

The Committee recommends that no instruction to the effect that a person has a right to anticipate due care or obedience to the law on the part of others be given.

UNAVOIDABLE ACCIDENT
Idaho I.D.J.I. Civ. 233 (1988)

The Committee recommends that no unavoidable accident instruction be given.

ILLINOIS

Title: Illinois Civil Pattern Jury Instructions.
Author: Illinois Supreme Court Committee on Jury Instructions in Civil Cases.
Publication: West Group Publishing.
Year: 2000.
Hereinafter cited as: Ill. P.J.I. Civ. (2000).

PRELIMINARY CAUTIONARY INSTRUCTIONS
Ill. P.J.I. Civ. 1.01 (2000)

[1] The law regarding this case is contained in the instructions I will give to you. You must consider the Court's instructions as a whole, not picking out some instructions and disregarding others.

[2] It is your duty to resolve this case by determining the facts and following the law given in the instructions. Your verdict must not be based upon speculation, prejudice, or sympathy. [Each party, whether a _____ or (i.e., corporation, partnership, etc.) an individual, should receive your same fair consideration.]

[3] You will decide what facts have been proven. Facts may be proven by evidence or reasonable inferences drawn from the evidence. Evidence consists of the testimony of witnesses and of exhibits admitted by the court. You should consider all the evidence without regard to which party produced it. You may use common sense gained from your experiences in life in evaluating what you see and hear during trial.

[4] You are the only judges of the credibility of the witnesses. You will decide the weight to be given to the testimony of each of them. In evaluating the credibility of a witness you may consider that witness' ability and opportunity to observe, memory, manner, interest, bias, qualifications, experience, and any previous inconsistent statement or act by the witness concerning an issue important to the case.

[5] An opening statement is what an attorney expects the evidence will be. A closing argument is given at the conclusion of the case and is a summary of what an attorney contends the evidence has shown. If any statement or argument of an attorney is not supported by the law or the evidence you should disregard that statement.

NEGLIGENCE—ADULT—DEFINITION
Ill. P.J.I. Civ. 10.01 (2000)

When I use the word negligence in these instructions, I mean the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

ORDINARY CARE—ADULT—DEFINITION
Ill. P.J.I. Civ. 10.02 (2000)

When I use the words "ordinary care," I mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

DUTY TO USE ORDINARY CARE—ADULT DEFENDANT
Ill. P.J.I. Civ. 10.04 (2000)

It was the duty of the defendant, before and at the time of the occurrence, to use ordinary care for the safety of [the plaintiff] [and] [the plaintiff's property]. That means it was the duty of the defendant to be free from negligence.

CARE REQUIRED FOR SAFETY OF CHILD
Ill. P.J.I. Civ. 10.07 (2000)

The Committee recommends that no instruction on the care required for the safety of a child be given.

INTOXICATION AS NEGLIGENCE
Ill. P.J.I. Civ. 12.01 (2000)

Whether or not a person involved in the occurrence was intoxicated at the time is a proper question for the jury to consider together with other facts and circumstances in evidence in determining whether or not he was [negligent] [or] [contributorily negligent]. Intoxication is no excuse for failure to act as a reasonably careful person would act. An intoxicated person is held to the same standard of care as a sober person.

DUTY OF ONE IN IMMINENT PERIL AND RESPONSIBILITY OF THE PERSON CAUSING THE PERILOUS SITUATION
Ill. P.J.I. Civ. 12.02 (2000)

The Committee recommends that no instruction either on the duty of one in imminent peril or the responsibility of the person causing the perilous situation be given.

ISSUES MADE BY THE PLEADINGS—NEGLIGENCE—ONE OR MORE DEFENDANTS
Ill. P.J.I. Civ. 20.01 (2000)

[1] The plaintiff claims that he was injured and sustained damage, and that the defendant[s] [was] [were] negligent in one or more of the following respects:
[Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to the negligence of the defendants which have not been withdrawn or ruled out by the court and are supported by the evidence. If there is more than one defendant and the allegations of negligence are different as between them, use a form such as:
"Defendant C, in _____." e.g., failing to keep a proper lookout.
"Defendant D, in _____."]

[2] The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

[3] The defendant [Defendant C] [denies that he did any of the things claimed by the plaintiff,] denies that he was negligent [in doing any of the things claimed by the plaintiff] [and denies that any claimed act or omission on the part of the defendant was a proximate cause of the plaintiff's claimed injuries].

[4] The defendant[s] claim[s] that the plaintiff was contributorily negligent [in one or more of the following respects:] [Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's contributory negligence which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[5] The defendant[s] further claim[s] that one or more of the foregoing was [a] [the sole] proximate cause of the plaintiff's injuries.

[6] The plaintiff [denies that he did any of the things claimed by defendant(s),] denies that he was negligent [in doing any of the things claimed by defendant(s),] [to the extent claimed by defendant(s),] [and denies that any claimed act or omission on his part was a proximate cause of his claimed injuries].

[7] The defendant [Defendant C] also sets up the following affirmative defenses:
Defendant [Defendant C] claims [here set forth in simple form without undue emphasis or repetition those affirmative defenses (except contributory negligence) in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence].

[8] The plaintiff denies that [summarize affirmative defense].

[9] The defendant[s] further den[ies] [y] that the plaintiff was injured or sustained damages [to the extent claimed].

INSTRUCTION ON USE OF VERDICT FORMS—NEGLIGENCE ONLY—SINGLE PLAINTIFF AND DEFENDANT—CAUSES OF ACTION ACCRUING PRIOR TO 11/25/86

Ill. P.J.I. Civ. 45.01 (2000)

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations. Your verdict must be unanimous. Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate form of verdict

and return it into court. Your verdict must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

If you find for [plaintiff's name] and against [defendant's name] and if you further find that [plaintiff's name] was not contributorily negligent, then you should use Verdict Form _____.

If you find for [plaintiff's name] and against [defendant's name] and if you further find that [plaintiff's name]'s injury was proximately caused by a combination of [defendant's name]'s negligence and [plaintiff's name]'s contributory negligence, then you should use Verdict Form _____.

If you find for [plaintiff's name] and against [defendant's name], then you should use Verdict Form _____.

INDIANA

Title: Indiana Pattern Jury Instructions–Civil.
Author: Indiana Judges Association.
Publication: Lexis Law Publishing.
Year: 1989, 2001.
Hereinafter cited as: Ind. P.J.I. Civ. (2d ed.1989 & Supp. 2001).

NEGLIGENCE—DEFINITION
Ind. P.J.I. Civ. 5.01 (2d ed. 1989 & Supp. 2001)

Negligence is the failure to do what a reasonably careful and prudent person would do under the same or similar circumstances or the doing of something that a reasonably careful and prudent person would not do under the same or similar circumstances. In other words, negligence is the failure to exercise reasonable or ordinary care.

REASONABLE OR ORDINARY CARE—DEFINITION
Ind. P.J.I. Civ. 5.03 (2d ed. 1989 & Supp. 2001)

Reasonable or ordinary care is such care as a reasonably careful and ordinarily prudent person would exercise under the same or similar circumstances.

INTOXICATION AS NEGLIGENCE
Ind. P.J.I. Civ. 5.31 (2d ed. 1989 & Supp. 2001)

The law holds an intoxicated person to the same standard of care as a sober person. Intoxication is not an excuse for failure to act as a reasonably careful person would act.

SUDDEN EMERGENCY
Ind. P.J.I. Civ. 5.33 (2d ed. 1989 & Supp. 2001)

A person confronted with a sudden emergency, not of [her][his] own making and without sufficient time to deliberate, is not held to the same accuracy of judgment as one who had time to deliberate. Accordingly, the person is not negligent if [she][he] exercises such care as an ordinarily prudent person would exercise when confronted with a similar emergency.

If you find from the evidence that a sudden emergency confronted the [plaintiff/defendant] and that [she][he] responded as an ordinarily prudent person would have when faced with the same or similar emergency, then you may not find the [plaintiff/defendant] negligent.

MERE ACCIDENT
Ind. P.J.I. Civ. 5.37 (2d ed. 1989 & Supp. 2001)
The Committee recommends that no "mere accident" or "unavoidable accident" instruction be given in either traditional negligence actions or suits involving comparative fault claims.

IOWA

Title: Iowa Civil Jury Instructions.
Author: Iowa State Bar Association's Board of Governors.
Publication: West Group Publishing.
Year: 1987, 2001.
Hereinafter cited as: Iowa C.J.I. Civ. (1987 & Supp. 2001).

ORDINARY CARE - COMMON LAW NEGLIGENCE DEFINED
Iowa C.J.I. Civ. 700.2 (1987 & Supp. 2001)
"Negligence" means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. Negligence is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

ACCIDENT DOES NOT CONSTITUTE OR RAISE PRESUMPTION OF NEGLIGENCE
Iowa C.J.I. Civ. 700.8 (1987 & Supp. 2001)
The mere fact an accident occurred or a party was injured does not mean a party was [negligent] [at fault].

KANSAS

Title: Pattern Instructions for Kansas.
Author: Kansas Judicial Council, Committee on Pattern Jury Instructions.
Publication: Lawyers Cooperative Publishing.
Year: 1997, 2001.
Hereinafter cited as: Kan. P.I.K. Civ. (3d ed. 1997 & Supp. 2001).

NEGLIGENCE—DEFINED
Kan. P.I.K. Civ. 103.1 (3d ed. 1997 & Supp. 2001)
Negligence is the lack of ordinary care. It is the failure of a person to do something that an ordinary person would do, or the act of a person in doing

something that an ordinary person would not do, measured by all the circumstances then existing.

KENTUCKY

Title: Kentucky Instructions to Juries.
Author: John S. Palmore & Ronald W. Eades.
Publication: Anderson Publishing Co.
Year: 1989, 2001.
Hereinafter cited as: Ky. I.J. Civ. (4th ed. 1989 & Supp. 2001).

ORDINARY CARE; ADULTS GENERALLY
Ky. I.J. Civ. 14.01 (4th ed. 1989 & Supp. 2001)

"Ordinary care" means such care as the jury would expect an ordinarily prudent person to exercise under similar circumstances.

SAME; ADULTS, WITH EVIDENCE OF INTOXICATION
Ky. I.J. Civ. 14.02 (4th ed. 1989 & Supp. 2001)

"Ordinary care" means such care as the jury would expect an ordinarily prudent person, if sober, to exercise under similar circumstances.

SAME; CONDUCT OF BUSINESS
Ky. I.J. Civ. 14.04 (4th ed. 1989 & Supp. 2001)

"Ordinary care" as applied to D means such care as the jury would expect an ordinarily prudent person engaged in the same type of business to exercise under similar circumstances.

LOUISIANA

Title: Louisiana Civil Law Treatise, Vol. 18: Civil Jury Instructions.
Author: H. Alston Johnson, III.
Publication: West Group Publishing.
Year: 1994, 2001.
Hereinafter cited as: La. J.I. Civ. (1994 & Supp. 2001).

NEGLIGENCE—GENERAL COMPOSITE CHARGE IN ORDINARY CASE
La. J.I. Civ. 3.01 (1994 & Supp. 2001)

The law applicable to plaintiff's claim depends upon the nature of that claim. This is a suit seeking damages for injury caused by the act of another. Under our Civil Code such an act is called an offense or quasi-offense and the suit is generally known as a tort suit. The basic law in Louisiana in this type of suit is found in Article 2315 of our Civil Code:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

The word "fault" in that article is a key word. While the Civil Code does not further define the word, it may perhaps best be explained by saying

that it signifies that conduct which a person should not have engaged in that is, that he has acted as he should not have acted, or that he has failed to do something that he should have done. It is thus conduct below the standard which the law applies to his activities.

It should be immediately obvious to you that the standard which we apply to the defendant's conduct will vary according to the activity which he is engaged in, and the circumstances surrounding that activity. As you are well aware, in our complex society, persons are engaged in all kinds of activities, and understandably, different standards may apply to those activities. Those standards may be set down by the legislature as statutes, or by local officials as ordinances, or even by the courts themselves in instances in which the law does not make a specific provision for the activity. In a few minutes I will tell you the standards which apply to the defendant's conduct in this particular suit, and you must accept the standards as I give them to you. It will then be one of your tasks to determine if the plaintiff has proved by a preponderance of the evidence that the defendant has fallen below the standard which the law expects of him in this particular instance. To put it briefly, you will have to determine if the plaintiff has proved that the defendant has engaged in substandard conduct and is thus, in legal terms, "at fault." In this particular case, the plaintiff alleges that the defendant has committed the kind of fault which the law calls "negligence."

But this is only one of the elements of plaintiff's case, and I have previously told you that, in order to be successful, the plaintiff must establish all the essential elements of his case. The other elements are the following:

(1) that the injury the plaintiff suffered was, in fact, caused by the conduct of the defendant; and

(2) that there was actual damage to the plaintiff's person or his property.

As to the requirement that plaintiff's injury be caused by defendant's conduct, I do not mean that the law recognizes only one cause of any injury, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things may operate at the same time, either independently or together, to cause injury or damage. You should resolve this question by deciding whether plaintiff would probably not have suffered the claimed injuries in the absence of defendant's conduct. If plaintiff probably *would* have suffered those injuries regardless of what the defendant did, then you must conclude that the injuries were not caused by the defendant, and render a verdict for that defendant. If, on the other hand, plaintiff probably would *not* have suffered the claimed injuries in the absence of defendant's conduct, then you must conclude that defendant's conduct did play a part in plaintiff's injury and you must proceed to the next element.

The second element of the plaintiff's case which you must consider is whether the defendant's conduct was below the standard applicable to his activities.

In this case, the basic standard applicable is a requirement that the defendant exercise that degree of care which we might reasonably expect from an ordinarily prudent person under the same or similar circumstances.

You will see that this is a relative term: the care which we reasonably expect from any ordinarily prudent person will vary according to the circumstances facing him. Notice also that the conduct we set up as a standard is not that of the extraordinarily cautious individual or the exceptionally skillful one, but that of a person of ordinary prudence. While unusual caution or skill is to be admired and encouraged, the law does not demand it as a standard of care in this case.

[Optional paragraphs or sentence in brackets.]

[The ordinarily prudent person will avoid creating an unreasonable risk of harm. In determining whether the defendant breached this standard, and created an unreasonable risk of harm, you may weigh the likelihood that someone might have been injured and the seriousness of that injury against the importance to society of what the defendant was doing and the advisability of the way in which he was doing it, under the circumstances.]

[In addition to this general standard, the following specific statutes are applicable to the defendant's conduct:]

[Read those statutes which are found to be applicable.]

The ordinarily prudent person will normally obey the statutes which apply to his conduct, but in exceptional circumstances, even a violation of the statute may be reasonable. You must consider, in the light of all the circumstances, whether an ordinarily prudent person in defendant's position would be reasonable in violating the statute. If so, then the violation is not sub-standard conduct. But if not, the violation is unreasonable, and therefore below the standard of care to which we hold the defendant in this case.

[*Insert here any special-duty instructions.*]

In summary, in order to find the defendant's conduct sub-standard, you must find that as an ordinarily prudent person under all the circumstances surrounding his conduct, the defendant should have reasonably foreseen that as a result of his conduct, some such injury as the plaintiff suffered would occur, and you must find also that he failed to exercise reasonable care to avoid the injury. [You may find it helpful to phrase your inquiry this way: "How would an ordinarily prudent person have acted or what precautions would he have taken if faced with similar conditions or circumstances?"]

MAINE

Title: Maine Jury Instruction Manual.
Author: Donald G. Alexander.
Publication: Lexis Law Publishing.
Year: 2001.
Hereinafter cited as: Me. M.J.I. Civ. (4th ed. 2001).

NEGLIGENCE: ELEMENTS. INSTRUCTION
Me. M.J.I. Civ. 7-61 (4th ed. 2001)

In order to prove negligence, the plaintiff must prove by a preponderance of the evidence: first, that the defendant was negligent, and second, that

the defendant's negligence was a [proximate] cause of the plaintiff's injury and consequent damages.

Negligence is doing something that an ordinary, careful person would not do, or failure to do something that an ordinary, careful person would do in the same situation. It is, in other words, the failure to use ordinary care under the circumstances considering all the evidence in the case.

EMERGENCY SITUATION

Me. M.J.I. Civ. 7-32 (4th ed. 2001)

The issue of negligence is considered differently if you find that an emergency situation occurred.

A person confronted by an emergency he did not cause is not to be held to the same degree of care as an ordinary person with time to consider his actions. The test which you must apply is whether or not the person confronted by an emergency he did not cause behaved as a reasonably prudent person would have when confronted by the same or similar circumstances.

MARYLAND

Title: Maryland Civil Pattern Jury Instructions.
Author: Maryland State Bar Association, Inc., Standing Commission on Pattern Jury Instructions.
Publication: Maryland Institute for Continuing Professional Education of Lawyers, Inc.
Year: 1993, 2001.
Hereinafter cited as: Md. M.P.J.I. Civ. (3d ed. 1993 & Supp. 2001).

DEFINITION

Md. M.P.J.I. Civ. 19:1 (3d ed. 1993 & Supp. 2001)

Negligence is doing something that a person using ordinary care would not do, or not doing something that a person using ordinary care would do. Ordinary care means that caution, attention or skill a reasonable person would use under similar circumstances.

FORESEEABLE CIRCUMSTANCES

Md. M.P.J.I. Civ. 19:3 (3d ed. 1993 & Supp. 2001)

A reasonable person changes conduct according to the circumstances and the danger that is known or should be known. Therefore, if the foreseeable danger increases, a reasonable person acts more carefully.

MASSACHUSETTS

Title: Massachusetts Jury Instructions–Civil.
Author: John M. Greaney, et al.
Publication: Lexis Law Publishing.
Year: 1997, 1999.
Hereinafter cited as: Mass. J.I. Civ. (1997 & Supp. 1999).

DUTY OF CARE—GENERAL PRINCIPLES
Mass. J.I. Civ. 3.1 (1997 & Supp. 1999)

In this case, we are dealing with that area of the civil law known as the law of negligence. It is a broad area of the law, and it has many applications. Speaking generally, however, (and for the moment I am only speaking generally), negligence means the failure to exercise that degree of care that the ordinarily reasonable, cautious, prudent individual would have exercised under all the facts and circumstances existing in some particular situation. More simply stated, negligence is the failure to exercise that degree of care that a reasonable person would exercise under the circumstances.

Negligence may be doing something that the ordinarily reasonable, cautious, prudent person would not have done under all the facts and circumstances existing at a particular time and place. It may also be the failure to do something that the ordinarily reasonable, cautious, prudent person would have done under all the facts and circumstances existing at a particular time and place.

You will notice that the standard is not the conduct of the mot careful person or of the least careful person, but rather the conduct of an ordinarily reasonable, cautious, prudent person, faced with the same situation and under the same circumstances as the person whose conduct is being considered.

When it is alleged, as it had been in this case, that a person has been negligent, it becomes the duty of the jury to determine on the basis of the evidence just what was the conduct of that person, and having done that, to measure that conduct against the conduct of the ordinarily reasonable, cautious, prudent person faced with the same facts and circumstances. If the conduct of that person conforms to what would have been the conduct of the ordinarily reasonable, cautious, prudent person faced with the same facts and circumstances, then the jury should find that the person had not been negligent. If, on the other hand, that person either did something that the ordinarily reasonable, cautious, prudent person would not have done, or failed to do something that the ordinarily reasonable, cautious, prudent person would have done, then the jury would be warranted in finding that the person had been negligent.

MICHIGAN

Title: Michigan Standard Jury Instructions–Civil.
Author: Michigan Supreme Court Committee on Standard Jury Instructions.
Publication: The Institute for Continuing Legal Education.
Year: 1981, 2001.
Hereinafter cited as: Mich. S.J.I. Civ. (2d ed.1981 & Supp. 2001).

NEGLIGENCE OF ADULT—DEFINITION
Mich. S.J.I. Civ. 10.02 (2d ed. 1981 & Supp. 2001)

Negligence is the failure to use ordinary care. Ordinary care means the care a reasonably careful person would use. Therefore, by "negligence," I mean the failure to do something that a reasonably careful person would do, or the doing of something that a reasonably careful person would not do, under the circumstances that you find existed in this case.

The law does not say what a reasonably careful person using ordinary care would or would not do under such circumstances. That is for you to decide.

DUTY TO USE ORDINARY CARE—ADULT DEFENDANT
Mich. S.J.I. Civ. 10.05 (2d ed. 1981 & Supp. 2001)

It was the duty of the defendant, in connection with this occurrence, to use ordinary care for the safety of [*the plaintiff / and / plaintiff's property*].

CONDUCT REQUIRED FOR SAFETY OF CHILD
Mich. S.J.I. Civ. 10.07 (2d ed. 1981 & Supp. 2001)

The law recognizes that children act upon childish instincts and impulses. If you find the defendant knew or should have known that a child or children were or were likely to be in the vicinity, then the defendant is required to exercise greater vigilance and this is a circumstance to be considered by you in determining whether reasonable care was used by the defendant.

MINNESOTA

Title: Minnesota Jury Instruction Guides–Civil.
Author: Civil Jury Instruction Committee.
Publication: West Group Publishing.
Year: 1999.
Hereinafter cited as: Minn. J.I.G. Civ. (4th ed. 1999).

NEGLIGENCE AND REASONABLE CARE—BASIC DEFINITION
Minn. J.I.G. Civ. 25.10 (4th ed. 1999)

Definition of "reasonable care:"
Reasonable care is the same care a reasonable person would use in the same or similar circumstances.

Definition of "negligence"
Negligence is the failure to use reasonable care.
Ask yourself what a reasonable person would have done in these circumstances.

Negligence occurs when a person:
Does something a reasonable person would not do; or
Fails to do something a reasonable person would do.

RIGHT TO ASSUME ANOTHER'S GOOD CONDUCT
Minn. J.I.G. Civ. 26.10 (4th ed. 1999)

Right to assume reasonable care.

A person is entitled to assume that others will use reasonable care.
A person is also entitled to assume that others will obey the law.
However, a person is only entitled to assume that others will use reasonable care or will obey the law until it reasonably appears that they will not.

EVIDENCE OF CUSTOM
Minn. J.I.G. Civ. 26.15 (4th ed. 1999)

Evidence of standards or custom:

Evidence of standards or custom is not conclusive. It is just one piece of evidence.

1. You may consider an industrial (or professional) standard to decide whether reasonable care was used.
2. You may consider what is usually done or customary in this industry (or profession) to decide whether reasonable care was used.

Consider this evidence along with all the other evidence when you decide if reasonable care was used.

CARE REQUIRED BY AN INTOXICATED PERSON
Minn. J.I.G. Civ. 26.25 (4th ed. 1999)

If a person was intoxicated, that does not necessarily prove he or she was negligent. However, an intoxicated person is required to use the same care required of a sober person.

REASONABLE CARE IN AN EMERGENCY—EMERGENCY RULE
Minn. J.I.G. Civ. 26.35 (4th ed. 1999)

If there was an emergency that a person did not cause, that person is not negligent if he or she acted in a way a reasonable person would have acted. In deciding if he or she acted reasonably consider:

1. The circumstances of the emergency; and
2. What the person did or did not do.

FACT OF ACCIDENT ALONE—NO INFERENCE OF NEGLIGENCE
Minn. J.I.G. Civ. 25.55 (4th ed. 1999)

The fact that a (collision) (accident) has happened does not by itself mean that someone was (negligent) (at fault).

MISSISSIPPI

Title: Mississippi Model Jury Instructions.
Author: Mississippi Judicial College.
Publication: West Group Publishing.
Year: 2001.
Hereinafter cited as: Miss. M.J.I. Civ. (2001).

DEFINITION
Miss. M.J.I. Civ. 15:1 (2001)

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like or similar circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like or similar circumstances, or in failing to do something that a reasonably careful person would do under like or similar circumstances.

FACTORS RELIEVING LIABILITY—ACTS OF GOD
Miss. M.J.I. Civ. 15:7 (2001)

If you find from a preponderance of the evidence in this case that plaintiff's injury was due directly and exclusively to natural causes, without human intervention, which could not have been prevented by the exercise of reasonable care and foresight, the occurrence is an act of God for which the defendant is not liable.

NO INFERENCE FROM OCCURRENCE OF ACCIDENT
Miss. M.J.I. Civ. 15:14 (2001)

As a general rule, the mere fact that an _____ [*accident or injury*] has occurred is not, of itself, evidence of negligence on the part of anyone.

OTHER PARTY'S CONDUCT
Miss. M.J.I. Civ. 15:15 (2001)

In determining whether the _____ [*plaintiff or defendant*] may assume that the _____ [*defendant or plaintiff*] would exercise ordinary care and _____ [*state act*], you should consider whether a reasonably prudent person would assume that the _____ [*defendant or plaintiff*] would _____ [*state act*] under the circumstances then and there existing.

DUTY OF VOLUNTEERS
Miss. M.J.I. Civ. 15:16 (2001)

Absent some special relationship, a person is under no legal obligation to come to the aid of another in danger but one who voluntarily undertakes to aid another must use reasonable care and prudence in giving such aid.

If you find from a preponderance of the evidence in this case that:

1. Defendant volunteered to assist plaintiff; and
2. Defendant failed to use reasonable care by _____ [*describe alleged act*]; and
3. Defendant's failure to use reasonable care was the sole proximate cause or proximate contributing cause of plaintiff's injuries;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to prove any one of the above elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

MISSOURI

Title: Missouri Approved Jury Instructions.
Author: Missouri Supreme Court Committee on Civil Jury Instructions.
Publication: West Group Publishing.
Year: 1996, 2001.
Hereinafter cited as: Mo. A.J.I. Civ. (5th ed. 1996 & Supp. 2001).

HIGHEST DEGREE OF CARE—DEFINITION
Mo. A.J.I. Civ. 11.01 (5th ed. 1996 & Supp. 2001)

The phrase "highest degree of care" as used in this [these] instruction[s] means that degree of care that a very careful and prudent person would use under the same or similar circumstances.

NEGLIGENCE OF ADULT—DEFINITION
Mo. A.J.I. Civ. 11.02 (5th ed. 1996 & Supp. 2001)

I. The term negligent or negligence as used in this [these] instruction[s] means the failure to use that degree of care that an ordinarily careful person would use under the same or similar circumstances.

II. The term "negligent" or "negligence" as used in this [these] instruction[s] means the failure to use that degree of care that a very careful person would use under the same or similar circumstances.

ORDINARY CARE—DEFINITION
Mo. A.J.I. Civ. 11.05 (5th ed. 1996 & Supp. 2001)

The phrase "ordinary care" as used in this [these] instruction[s] means that degree of care that an ordinarily careful person would use under the same or similar circumstances.

NEGLIGENCE AND ORDINARY CARE COMBINED—DEFINITIONS
Mo. A.J.I. Civ. 11.07 (5th ed. 1996 & Supp. 2001)

The term "negligent" or "negligence" as used in this [these] instruction[s] means the failure to use ordinary care. The phrase "ordinary care" means that degree of care that an ordinarily careful person would use under the same or similar circumstances.

MONTANA

Title: Montana Pattern Jury Instructions–Civil.
Author: Montana Pattern Jury Instruction Committee.
Publication: State Bar of Montana.
Year: 1987, 2001.
Hereinafter cited as: Mont. P.J.I. Civ. (1987 & Supp. 2001).

NEGLIGENCE DEFINED
Mont. P.J.I. Civ. 2.00 (1987 & Supp. 2001)

Every person is responsible for injury to the person [or property] of another, caused by his [or her] negligence.

Negligence is the failure to use reasonable care. Negligence may consist of action or inaction. A person is negligent if he fails to act as an ordinarily careful person would act under the circumstances.

ASSUMPTION LAW IS OBEYED
Mont. P.J.I. Civ. 2.04 (1987 & Supp. 2001)

Every person has a right to assume that every other person will act with reasonable care. In the absence of a reason to think otherwise, it is not negligent for a person to fail to anticipate an injury which can result only from another's violation of the law or failure to use reasonable care.

NEBRASKA

Title: Nebraska Jury Instructions
Author: Nebraska Supreme Court Committees on Civil and Criminal Procedure.
Publication: West Group Publishing.
Year: 2001.
Hereinafter cited as: Neb. N.J.I. Civ. (2d ed. 2001).

DEFINITION OF NEGLIGENCE
Neb. N.J.I. Civ. 3.02 (2d ed. 2001)

Negligence is doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances.

NEVADA

Title: Nevada Pattern Jury Instructions–Civil.
Author: State Bar of Nevada.
Publication: Lexis Law Publishing (Michie).
Year: 1986.
Hereinafter cited as: Nev. J.I. Civ. (1986).

NEGLIGENCE AND ORDINARY CARE—DEFINITIONS
Nev. J.I. Civ. 4.03 (1986)

Negligence is the failure to exercise that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances.

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others.

[You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, not the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is

to be admired and encouraged, the law does not demand it as a general standard of conduct.]

RIGHT TO ASSUME OTHERS WILL EXERCISE DUE CARE
Nev. J.I. Civ. 4.09 (1986)

A person who, himself, is exercising ordinary care has a right to assume that every other person will perform his duty under the law; and in the absence of reasonable cause for thinking otherwise, it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another.

DUTY OF ONE IN IMMINENT PERIL
Nev. J.I. Civ. 4.14 (1986)

A person who, without negligence on his part, is suddenly and unexpectedly confronted with peril arising from either the actual presence of, or the appearance of, imminent danger to himself or to others, is not expected and not required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments. His duty is to exercise only the care that an ordinarily prudent person would exercise in the same situation. If at that moment he does what appears to him to be the best thing to do, and if his choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, he does all the law requires of him; although in the light of afterevents, it should appear that a different course would have been better and safer.

CONSENT OF PATIENT: WHEN IMPLIED PURSUANT TO NRS 41A.120
Nev. J.I. Civ. 6.9 (1986)

NRS 41A.120 sets forth one set of circumstances under which a patient will be deemed to have impliedly consented to a medical or surgical procedure. Such consent is to be implied where:

1. Pursuant to competent medical judgment the proposed medical or surgical procedure is reasonably necessary and any delay in performing such procedure could reasonably be expected to result in death, disfigurement, impairment of faculties, or serious bodily harm; and
2. A person authorized to consent is not readily available.

NEW HAMPSHIRE

Title: New Hampshire Civil Jury Instructions.
Author: Walter L. Murphy & Daniel C. Pope.
Publication: Lexis Law Publishing.
Year: 1994, 2001.
Hereinafter cited as: N.H. J.I. Civ. (1994 & Supp. 2001).

LEGAL FAULT: NEGLIGENCE AND CAUSATION (GENERAL NEGLIGENCE CASES), NEGLIGENCE
N.H. J.I. Civ. 6.1 (1994 & Supp. 2001)

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under the same or similar circumstances.

The failure to use reasonable care may take the form of action or inaction. That is, negligence may consist of either: doing something that an ordinary, prudent person would not do under the same or similar circumstances; or, failing to do something that an ordinary, prudent person would do under the same or similar circumstances.

[Foreseeability instruction to be used only if appropriate to the case]: The duty to use reasonable care arises from the risk to others which could be reasonably foreseen. Thus, a person may not be found negligent if he or she could not reasonably foresee that his/her conduct would result in an injury to another, or if his/her conduct was reasonable in light of the anticipated risks. Also bear in mind that a person has no duty to anticipate the careless conduct of another.

FORESEEABILITY
N.H. J.I. Civ. 6.3 (1994 & Supp. 2001)

The duty to use reasonable care arises from the risk to others which could be reasonably foreseen. Thus, a person may not be found negligent if he or she could not reasonably foresee that his/her conduct would result in an injury to another, or if his/her conduct was reasonable in light of the anticipated risks. Also bear in mind that a person has no duty to anticipate the careless conduct of another.

VOLUNTEER—DUTY OF CARE
N.H. J.I. Civ. 6.6 (1994 & Supp. 2001)

Even if you find that the actions complained of were volunteered, it is the legal obligation of one who volunteers to use reasonable care.

INTOXICATION AS AFFECTING NEGLIGENCE
N.H. J.I. Civ. 6.7 (1994 & Supp. 2001)

Intoxication doesn't excuse a person's obligation to exercise due care. Even if you find a person was intoxicated, he/she is held to the same standard of care as a sober person, and his/her intoxication does not excuse his/her conduct he/she otherwise fails to exercise reasonable care.

SUDDEN EMERGENCY
N.H. J.I. Civ. 6.9 (1994 & Supp. 2001)

A sudden emergency is an event that calls for action without time for the deliberate and thoughtful exercise of judgment.

If you find from the evidence that a party was confronted with a sudden emergency not created by him/her and that he/she acted as a reasonably careful person under those circumstances, that party has not violated the standard of due care.

INSTINCTIVE ACTION
N.H. J.I. Civ. 6.10 (1994 & Supp. 2001)

If the person is faced with a situation, created through no fault of his/her own, which leaves him/her absolutely no time for thought, so that he/she must act instinctively or by pure reflex, he/she may not be held legally at fault for his/her actions.

NO DUTY TO ANTICIPATE NEGLIGENCE
N.H. J.I. Civ. 6.16 (1994 & Supp. 2001)

A person has no duty to anticipate the careless conduct of another.

NEW MEXICO

Title: New Mexico Civil Jury Instructions.
Author: New Mexico Supreme Court.
Publication: Lexis Law Publishing (Michie).
Year: 2001.
Hereinafter cited as: N.M. U.J.I. Civ. (2001).

DUTY TO USE ORDINARY CARE
N.M. U.J.I. Civ. 13-604 (2001)

Every person has a duty to exercise ordinary care for the safety of the person and the property of others.

[Every person also has a duty to exercise ordinary care for the person's own safety and the safety of [his] [her] property.]

NEGLIGENCE (OF ALL PERSONS); DEFINITIONS
N.M. U.J.I. Civ. 13-1601 (2001)

The term "negligence" may relate either to an act or a failure to act.

An act, to be "negligence," must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to [himself] [herself] or to another and which such a person, in the exercise of ordinary care, would not do.

A failure to act, to be "negligence," must be a failure to do an act which one is under a duty to do and which a reasonably prudent person, in the exercise or ordinary care, would do in order to prevent injury to [himself] [herself] or to another.

ORDINARY CARE
N.M. U.J.I. Civ. 13-1603 (2001)

"Ordinary care" is that care which a reasonably prudent person would use in the conduct of that person's own affairs. What constitutes ordinary care varies with the nature of what is being done.

As the risk of danger that should reasonably be foreseen increases, the amount of care required also increases. In deciding whether ordinary care

has been used, the conduct in question must be considered in the light of all the surrounding circumstances.

DUTY TO USE ORDINARY CARE
N.M. U.J.I. Civ. 13-1604 (2001)

Every person has a duty to exercise ordinary care for the safety of the person and the property of others.

[Every person also has a duty to exercise ordinary care for the person's own safety and the safety of [his] [her property.]

ACCIDENT ALONE NOT NEGLIGENCE
N.M. U.J.I. Civ. 13-1616 (2001)

The mere happening of an accident is not evidence that any person was negligent. Neither the fact that damages are claimed due the accident nor the fact that this lawsuit was filed is evidence of any negligence on the part of any person.

NEW YORK

Title: New York Pattern Jury Instructions.
Author: Committee on Pattern Jury Instructions Association of Supreme Court Justices.
Publication: West Group Publishing.
Year: 2000.
Hereinafter cited as: N.Y. P.J.I. Civ. (3d ed. 2000).

COMMON LAW STANDARD OF CARE—NEGLIGENCE DEFINED—GENERALLY
N.Y. P.J.I. Civ. 2:10 (3d ed. 2000)

Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances. Negligence may arise from doing an act that a reasonably prudent would not have done under the same circumstances, or, on the other hand, from failing to do an act that a reasonably prudent person would have done under the same circumstances.

COMMON LAW STANDARD OF CARE—NEGLIGENCE DEFINED—WHERE PLAINTIFF UNDER DISABILITY
N.Y. P.J.I. Civ. 2:11 (3d ed. 2000)

There is evidence in this case that [*state nature of plaintiff's disability*]. If you find that plaintiff was under a disability that limited (her, his) ability to protect (herself, himself) from injury and that defendant knew, or by the use of reasonable care, should have known of that disability, then reasonable care on defendant's part required that (she, he) use such care as would be required for plaintiff's safety, in view of plaintiff's disability. Bear in mind, however, that until defendant knew of plaintiff's disability or, by the use of reasonable care, should have known of it, defendant was entitled to assume

that plaintiff was not disabled and would be able to use due care for (her, his) own safety and would do so.

COMMON LAW STANDARD OF CARE—FORESEEABILITY—GENERALLY
N.Y. P.J.I. Civ. 2:12 (3d ed. 2000)

Negligence requires both a reasonably foreseeable danger of injury to another and conduct that is unreasonable in proportion to that danger. A person is only responsible for the results of his or her conduct if the risk of injury is reasonably foreseeable. The exact occurrence or exact injury does not have to be foreseeable; but injury as a result of negligent conduct must be not merely possible, but be probable.

There is negligence if a reasonably prudent person could foresee injury as a result of his or her conduct, and acted unreasonably in the light of what could be foreseen. On the other hand, there is no negligence if a reasonably prudent person could not have foreseen any injury as a result of his or her conduct, or acted reasonably in the light of what could have been foreseen.

[The charge should be related to the particular facts of the case. It is recommended that this charge follow P.J.I. 2:10 where appropriate.]

COMMON LAW STANDARD OF CARE—EMERGENCY SITUATION
N.Y. P.J.I. Civ. 2:14 (3d ed. 2000)

A person faced with an emergency and who acts without opportunity to consider the alternatives is not negligent if (he, she) acts as a reasonably prudent person would act in the same emergency, even if it later appears that (he, she) did not make the safest choice or exercise the best judgment. A mistake in judgment or wrong choice of action is not negligence if the person is required to act quickly because of danger. This rule applies where a person is faced with a sudden condition, which could not have been reasonably anticipated, provided that the person did not cause or contribute to the emergency by (his, her) own negligence.

If you find that (defendant, plaintiff) was faced with an emergency and that (his, her) response to the emergency was that of a reasonably prudent person, then you will conclude that (defendant, plaintiff) was not negligent. If, however, you find that the situation facing (defendant, plaintiff) was not sudden, or should reasonably have been foreseen, or was created or contributed to by (defendant's, plaintiff's) own negligence, or that the (defendant's, plaintiff's) conduct in response to the emergency was not that of a reasonably prudent person, then you may find that (defendant, plaintiff) was negligent.

COMMON LAW STANDARD OF CARE—CUSTOMARY BUSINESS PRACTICES
N.Y. P.J.I. Civ. 2:16 (3d ed. 2000)

You have heard evidence of the general customs and practice of others who are in the same business or trade as that of defendant. This evidence is to be considered by you in determining whether the conduct of defendant

was reasonable under the circumstances. Defendant's conduct is not to be considered unreasonable simply because someone else may have used a better or safer practice. On the other hand, a general custom, use, or practice by those in the same business or trade may be considered some evidence of what constituted reasonable conduct in that trade or business.

You must first decide, from the evidence presented in this case, whether there is a general custom or practice in defendant's trade or business. If you find that there is a custom or practice, you may take that general custom or practice into account in considering the care used by defendant in this case. However, a general custom or practice is not the only test; what you must decide is whether, taking all the facts and circumstances into account, defendant acted with reasonable care.

COMMON LAW STANDARD OF CARE—CARE REQUIRED OF PERSONS UNDER DISABILITY—INTOXICATED PERSON
N.Y. P.J.I. Civ. 2:20 (3d ed. 2000)

One who has disabled (himself, herself) by reason of intoxication is held to the same standard of care that is required of a sober person. An intoxicated person is one whose use of (an alcoholic beverage, drug) has impaired (his, her) judgment and ability to act. It is a question of fact for you to determine whether or not the defendant was intoxicated. If you find that defendant was intoxicated, or that defendant's judgment and ability to act were impaired by reason of intoxication, that fact may be considered by you in determining whether or not the defendant used the care of a reasonably prudent, sober person under the circumstances.

COMMON LAW STANDARD OF CARE—VOLUNTARILY ASSUMED DUTY
N.Y. P.J.I. Civ. 2:24 (3d ed. 2000)

Defendant AB had no duty to come to CD's assistance. But once AB voluntarily came to the assistance of CD, the law imposed on AB the duty of using reasonable care in giving assistance and the duty to continue to do so if it would appear to a reasonable person that discontinuing assistance would expose CD to a new danger or a return to the same or a similar danger.

Reasonable care means the care that a reasonably prudent person would have used under the same circumstances. If you find that AB acted reasonably in giving assistance, or that discontinuing the assistance under the circumstances of this case did not expose CD to a new danger or return CD to the same or a similar danger you must find AB free from fault. If you find that AB did not act reasonably in giving assistance, or that discontinuing assistance exposed CD to a new danger, or the same or a similar danger, you must find AB at fault, provided that you also find that AB's acts were a substantial factor in bringing about the injury to CD.

NORTH CAROLINA

Title: North Carolina Pattern Jury Instructions for Civil Cases.

Author: North Carolina Conference of Superior Court Judges, Committee on Pattern Jury Instructions.
Publication: North Carolina Conference of Superior Court Judges.
Year: 1983, 1994.
Hereinafter cited as: N.C. P.I. Civ. (1994).

NEGLIGENCE ISSUE—BURDEN OF PROOF
N.C. P.I. Civ. 102.10 (1994)

This (state number) issue reads:
"Was the plaintiff [injured] [damaged] by the negligence of the defendant?"
On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, that the defendant was negligent and that such negligence was a proximate cause of the plaintiff's [injury] [damage].

NEGLIGENCE ISSUE—DEFINITION OF COMMON LAW NEGLIGENCE
N.C. P.I. Civ. 102.11 (1994)

Negligence refers to a person's failure to follow a duty of conduct imposed by law. Every person is under a duty to use ordinary care to protect himself and others from [injury] [damage]. Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect himself and others from [injury] [damage]. A person's failure to use ordinary care is negligence.

ACT OF GOD
N.C. P.I. Civ. 102.22 (1983)

The defendant contends that the plaintiff's [injury] [damage], (*describe the injury or damage*), was caused by an Act of God, and that the defendant is therefore not liable for such [injury] [damage].

An "Act of God" is an event caused solely by natural forces, without any intervention from the acts of men. Such an event must not only be caused by natural forces alone, but must also be so extraordinary that neither the history of the weather nor any other natural force where the event took place, gave any reasonable warning that such an event might happen. It is not enough that the event is rare or unusual, but it must be so far outside the range of normal experience that a person of ordinary care would not have anticipated or guarded against such an event.

The law provides that if the sole proximate cause of the plaintiff's [injury] [damage] is an Act of God, the plaintiff may recover nothing for that [injury] [damage]. If, however, negligence of the defendant was a proximate cause of the plaintiff's [injury] [damage], even if an Act of God joined with such negligence of the defendant in proximately causing the injury, then the defendant would be liable for that [injury] [damage].

The burden is on the plaintiff to prove that the defendant was negligent, and that such negligence was a proximate cause of the plaintiff's [injury] [damage], either alone or together with an Act of God.

PROXIMATE CAUSE—ACT OF GOD
N.C. P.I. Civ. 102.26 (1994)

An Act of God occurs only by violence of nature without the interference of any human. It is a natural event resulting from physical causes alone.

Where the sole proximate cause of a person's [injury] [damage] is an Act of God, that person may not recover anything for his [injury] [damage]. Where an Act of God joins with the negligent act of another in proximately causing a person's (injury] [damage], that person may recover for his [injury] [damage].

CONTENTIONS OF NEGLIGENCE
N.C. P.I. Civ. 102.35 (1994)

In this case, the plaintiff contends, and the defendant denies, that the defendant was negligent in one or more of the following ways:
(*Read all contentions of negligence supported by the evidence.*)

The plaintiff further contends, and the defendant denies, that the defendant's negligence was a proximate cause of the plaintiff's [injury] [damage].

I instruct you that negligence is not to be presumed from the mere fact of [injury] [damage].
(*Give law as to each contention of negligence included above.*)

OHIO

Title: Ohio Jury Instructions.
Author: Ohio Jury Instructions Committee of the Ohio Judicial Conference.
Publication: Anderson Publishing Company.
Year: 2001.
Hereinafter cited as: Ohio J.I. Civ. (2001).

NEGLIGENCE AND ORDINARY CARE
Ohio J.I. Civ. 7.10 (2001)

1. NEGLIGENCE. What is negligence? Negligence is a failure to use ordinary care. Every person is required to use ordinary care to avoid injuring another person or another's property.

2. ORDINARY CARE. Ordinary care is the care that a reasonably (cautious) (careful) (prudent) person would use under the same or similar circumstances.

3. STATUTORY. A person may be required by law to do something or not to do something. Failure to do what is required by law is negligence, as is doing something the law prohibits.

4. ADDITIONAL—GREATER DANGER. The amount of care increases in proportion to the danger which reasonably should be foreseen. Ordinary care is a relative term. The test, though, is still ordinary care under the circumstances.

5. FORESEEABILITY. 1 O.J.I. 7.13.

CUSTOM AND USAGE
Ohio J.I. Civ. 7.11 (2001)

1. CUSTOM. Since the act (activity) of the defendant(s) involves a matter not within common knowledge, evidence was introduced as to what the defendant and others customarily do under the circumstances.

2. WEIGHT OF CUSTOM. Evidence of customary (methods) (conduct) of others similarly situated is not a test of negligence. You may consider the degree to which such methods have been customarily used and accepted if the defendant had knowledge of them. If there is a commonly accepted custom or usage which the defendant knew or should have known, you may consider this along with all other facts and circumstances in the case in deciding whether ordinary care was used by the defendant.

3. DEFENDANT—NO KNOWLEDGE OF DISABILITY. The existence of plaintiff's (disability) (infirmity) does not increase the duty of the defendant in the exercise of ordinary care unless you find that such (disability) (infirmity) was known to the defendant, or unless you find that in the use of ordinary care the defendant knew or should have known of the (disability) (infirmity) of the plaintiff.

4. WITH NOTICE OF DISABILITY. If you find that the defendant (knew) (in the exercise of ordinary care should have known) that the plaintiff had a (disability) (infirmity), then such knowledge or the extent of notice of the (disability) (infirmity) is one of the circumstances to be considered in deciding whether the defendant used the same amount of care that a reasonably (cautious) (careful) (prudent) person would use toward such a (disabled) (infirm) person under the same or similar circumstances.

FORESEEABILITY
Ohio J.I. Civ. 7.13 (2001)

1. GENERAL. In deciding whether ordinary care was used, you will consider whether the defendant (either party) ought to have foreseen under the circumstances that the natural and probable result of an act or failure to act would cause some (injury) (damage).

2. TEST. The test for foreseeability is not whether he (they) should have foreseen the (injury) (damage) (precisely) (exactly) as it happened to the specific (person) (property). The test is whether under all the circumstances a reasonably (cautious) (careful) (prudent) person would have anticipated that (injury) (damage) was likely to result to (someone) (something) from the act or failure to act.

3. CONCLUSION. If (defendant) (plaintiff) (either party), by the use of ordinary care, should have foreseen some (injury) (damage) and should not have acted, or if (he) (they) did act, should have taken precautions to avoid the result, then the performance of the act or the failure to take such precautions is negligence.

4. Remote cause or condition omitted.

5. Blasting omitted.

ORDINARY CARE UNDER DANGEROUS CIRCUMSTANCES
Ohio J.I. Civ. 7.15 (2001)

1. The defendant distributes and sells (gas) (electricity) for domestic and commercial purposes. (Gas) (Electricity) is an inherently dangerous substance. The defendant in the use of ordinary care must use an amount of care that is proportionate to the danger. (It) (He) must use such care as reasonably careful and skilled persons, engaged in the same business, would use under the same or similar circumstances to (install) (inspect) (maintain) (control) its equipment that conveys (gas) (electricity) in large quantities (and to keep such equipment in a reasonably safe condition). A failure to use this degree of care constitutes negligence.

CARE IN SUDDEN EMERGENCY
Ohio J.I. Civ. 7.17 (2001)

1. The defendant is required to prove by the greater weight of the evidence that he was confronted by a sudden or unexpected emergency, that the claimed emergency was not the result of any (fault) (negligence) of the defendant, or any circumstance under his control, and that (he) (the defendant) exercised such care as a reasonably (cautious) (careful) (prudent) person would exercise under the same or similar circumstances.

SUDDEN EMERGENCY–LEGAL EXCUSE
Ohio J.I. Civ. 7.18 (2001)

1. GENERAL. The defendant claims that although he did violate a statute (in crossing to the left of the center line), this action was not negligence because he was faced with a sudden emergency.

2. ISSUE OF SUDDEN EMERGENCY. An operator of a motor vehicle who (fails to comply with a safety statute) (crosses to the left of the center line) is excused from such failure to comply with the statute, and he avoids the legal effect of negligence arising therefrom by establishing by the greater weight of the evidence that, without fault on his part and because of circumstances over which he had no control, he was confronted by a sudden and unforeseeable emergency which made compliance with such statute impossible. If you find that these conditions existed, the defendant is excused from a violation of such statute.

INTOXICATION
Ohio J.I. Civ. 7.19 (2001)

1. If you should find that the (defendant) (plaintiff) was under the influence of (alcohol) (drug of abuse), such fact would not necessarily make him negligent. However, every person is required to use ordinary care at all times. Being under the influence of _____ is not an excuse for a failure to fully perform this or any other duty. If you find that the (defendant) (plaintiff) was under the influence of (alcohol) (drug of abuse) at the time (of the collision), you will consider that fact along with the evidence to decide whether he used ordinary care under the circumstances.

2. If you find that the (defendant) (plaintiff) did use the (degree) (amount) of care that a reasonably (cautious) (careful) (prudent) and sober person would have used under the same or similar circumstances, then it would not matter if he was under the influence of _____. On the other hand, if you find that he did not use that amount of ordinary care then he was negligent.

ACT OF GOD

Ohio J.I. Civ. 7.27 (2001)

1. ACT OF GOD. A defendant cannot be held responsible for (any injury) (damages) caused solely by an act of God. An act of God is any event that is caused by natural forces beyond human control, such as earthquake, violent storm, lightning or flood, and that could not be reasonably anticipated or guarded against.

2. CONDUCT DURING DISASTER. (Modify 1 O.J.I. 7.17 or 7.18 for conduct during an emergency.)

3. SOLE CAUSE. A defendant cannot escape responsibility for (any injury) (damages) unless it was proximately caused solely by an act of God. If the (injury) (damages) (was) (were) proximately caused by the negligence of the defendant combined with an act of God, the defendant is responsible.

4. SEVERAL CAUSES. (Modify 1 O.J.I. 11.10 § 3 to explain the combination of negligence and act of god.)

5. BURDEN. The burden of proving that the (injury) (damages) (was) (were) caused by an act of God which could not have been reasonably anticipated and which was the sole proximate cause of the damage rests upon the defendant.

6. CONCLUSION. If you find that the defendant was negligent and that his negligence, either alone or in combination with an act of God, proximately contributed to cause plaintiff's (damage) (injury), then your verdict must be for the plaintiff. If you fail to find that the defendant was negligent, or if you fail to find that his negligence, if any, was a proximate cause, or if you find that circumstances constituting an act of God were the sole proximate cause of plaintiff's (damage) (injury), then your verdict must be for the defendant.

NEGLIGENCE—GENERAL PRESUMPTIONS MAY ASSUME THAT OTHERS WILL OBEY THE LAW

Ohio J.I. Civ. 7.30(3) (2001)

Every (person) (driver) has the right to assume, in the absence of notice or knowledge to the contrary, that others on the highway will (observe the law) (use ordinary care).

OKLAHOMA

Title: Oklahoma Uniform Jury Instructions.
Author: Oklahoma Supreme Court for Uniform Civil Jury Instructions.
Publication: West Group Publishing.

Year: 1993, 2002.
Hereinafter cited as: Okla. U.J.I. Civ. (1993 2d ed. & Supp. 2002).

NEGLIGENCE—DEFINED
Okla. U.J.I. Civ. 9.2 (2d ed. 1993 & Supp. 2002)

"Negligence" is the failure to exercise ordinary care to avoid injury to another's person or property. "Ordinary care" is the care which a reasonably careful person would use under the same or similar circumstances. The law does not say how a reasonable careful person would act under those circumstances. That is for you to decide. Thus, under the facts in evidence in this case, if a party failed to do something which a reasonably careful person would do, or did something which a reasonably careful person would not do, such party would be negligent.

ORDINARY CARE—DEFINED
Okla. U.J.I. Civ. 9.3 (2d ed. 1993 & Supp. 2002)

Ordinary care is the care which a reasonably careful person would use under the same or similar circumstances.

VOLUNTEER—DUTY OF CARE
Okla. U.J.I. Civ. 9.5 (2d ed. 1993 & Supp. 2002)

One who voluntarily assumes the care of another who is not capable of caring for [himself/herself] is under a duty to act as a reasonably careful person would under similar circumstances.

OREGON

Title: Uniform Civil Jury Instructions.
Author: Oregon State Bar.
Publication: Oregon State Bar Continuing Legal Education.
Year: 1993.
Hereinafter cited as: Or. U.C.J.I. Civ. (1993).

NEGLIGENCE AND CAUSATION
Or. U.C.J.I. Civ. 20.01 (1993)

The law assumes that all persons have obeyed the law and have been free from negligence. Accordingly, the mere fact that an accident occurred or that a party sustained injury or damage is no indication of negligence on the part of anyone.

To recover, the plaintiff must prove by a preponderance of the evidence that the defendant was negligent in at least one respect charged in the plaintiff's complaint which was a cause of damage to the plaintiff. [Similarly, for the defendant to prevail on the defendant's claims of contributory negligence, the defendant must prove by a preponderance of the evidence that the plaintiff was negligent in at least on respect charged in the defendant's answer which was a cause of any damage to the plaintiff.]

COMMON-LAW NEGLIGENCE
Or. U.C.J.I. Civ. 20.04 (1993)

In general, it is the duty of every person in our society to use reasonable care to avoid damage that would be reasonably anticipated.

Reasonable care is that care that persons or ordinary prudence exercise in the management of their own affairs to avoid injury to themselves or others.

Common-law negligence, therefore, is the doing of some act that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do under the same or similar circumstances.

The care exercised should be in keeping with dangers, apparent or reasonably foreseeable at the time and place in question, and not in the light of the resulting sequence of events or hindsight.

RIGHT TO ASSUME LAW OBEYED
Or. U.C.J.I. Civ. 20.06 (1993)

Every person has a right to assume that others will obey the law, unless and until that person knows or in the exercise of reasonable care would know otherwise.

FORESEEABILITY
Or. U.C.J.I. Civ. 20.07 (1993)

A person is liable only for the reasonably foreseeable consequences of his or her actions. There are two things that must be foreseeable. First, the plaintiff must be within the general class of persons that one reasonably would anticipate might be threatened by the defendant's conduct. Second, the harm suffered must be within the general class of harms that one reasonably would anticipate might result from the defendant's conduct.

EMERGENCY
Or. U.C.J.I. Civ. 20.08 (1993)

People who are suddenly placed in a position of peril through no negligence of their own, and who are compelled to act without opportunity for reflection, are not negligent if they make such a choice as a reasonably careful person placed in such a position might make, even though they do not make the wisest choice.

INTOXICATION
Or. U.C.J.I. Civ. 22.01 (1993)

The care required of a person who has become intoxicated is the same as that required of one who is sober. Failure by a person to use that same degree of care which an ordinarily prudent sober person would use under the same circumstances would constitute negligence.

PENNSYLVANIA

Title: Pennsylvania Suggested Standard Jury Instructions.
Author: The Civil Instructions Subcommittee of the Pennsylvania Supreme Court Committee for Proposed Standard Jury Instructions.
Publication: The Pennsylvania Bar Institute.
Year: 1981, 1997, 1999.
Hereinafter cited as: Pa. S.J.I. Civ. (1981 & 3d Supp. 1997 & Supp. 1999).

NEGLIGENCE—DEFINITION
Pa. S.J.I. Civ. 3.01 (1981 & 3d Supp. 1997 & Supp. 1999)

The legal term negligence, otherwise known as carelessness, is the absence of ordinary care which a reasonably prudent person would exercise in the circumstances here presented. Negligent conduct may consist either of an actor or an omission to act when there is a duty to do so. In other words, negligence is the failure to do something which a careful person would not do, in light of all the surrounding circumstances established by the evidence in this case. It is for you to determine how a reasonably careful person would act in those circumstances.

ORDINARY CARE—DEFINITION
Pa. S.J.I. Civ. 3.02 (1981 & 3d Supp. 1997 & Supp. 1999)

Ordinary care is the care a reasonably careful person would use under the circumstances presented in this case. It is the duty of every person to use ordinary care not only for his own safety and the protection of his property, but also to avoid injury to others. What constitutes ordinary care varies according to the particular circumstances and conditions existing then and there. The amount of care required by the law must be in keeping with the degree of danger involved.

DUTY OF CARE (Inherently Dangerous Instrumentality)
Pa. S.J.I. Civ. 3.16 (1981 & 3d Supp. 1997 & Supp. 1999)

Anyone who provides, supplies, or used an inherently dangerous instrumentality, such as the (high voltage electric current) (acids, corrosives, explosives) (provided) (supplied) (used) by the defendant in this case, is required by law to use the highest degree of care practicable to avoid injury to everyone who may be lawfully in the area of such activity.

SUDDEN EMERGENCY
Pa. S.J.I. Civ. 3.18 (1981 & 3d Supp. 1997 & Supp. 1999)

The defendant claims that he was confronted with a "sudden emergency," and the burden of proving this defense is on the defendant. He is required to show that, suddenly and without warning, he was confronted with a dangerous situation he did not create and which required immediate evasive action.

A defendant faced with a sudden emergency is still required to respond reasonably. The reasonableness of his response must be determined in light of the circumstances and the time the defendant had to react and not whether he could have responded differently if he had more time to think.

If you find that there was no emergency or that the emergency was created by the defendant, then the defendant has not met his burden of proof.

If you find that the defendant has proven that he was confronted with a sudden emergency not of his own making, you must determine whether the defendant's response to that emergency was reasonable under the circumstances. If you find that the defendant's response was reasonable under the circumstances, your verdict must be for the defendant.

[The plaintiff claims that the defendant responded recklessly and the burden of proving recklessness is on the plaintiff. Give 3.17 (Civ.) Reckless Conduct charge. If you find that the defendant's response was reckless, your verdict must be for the plaintiff. That is because contributory negligence is not a defense to recklessness.]

RHODE ISLAND

Title: Model Civil Jury Instructions for Rhode Island.
Author: Rhode Island Bar Association; Superior Court Bench/Bar Committee.
Publication: Rhode Island Bar Association.
Year: 1998.
Hereinafter cited as: R.I. M.J.I. Civ. (1998).

ELEMENTS OF NEGLIGENCE
R.I. M.J.I. Civ. 1001 (1998)

In a negligence action the plaintiff must establish that the defendant owed a duty of care to the plaintiff, that the defendant breached this duty of care and that the defendant's breach of that duty was a proximate cause of the harm or injury about which the plaintiff complains. The question of whether the defendant owes a duty of care to the plaintiff is a question for the Court. I am instructing you that under circumstances of this case, the defendant owed a duty to plaintiff to [describe specific duty]. The question for the jury in this case is whether the defendant breached that duty and whether that breach was a proximate cause of the plaintiff's injuries.

ORDINARY PRUDENT PERSON
R.I. M.J.I. Civ. 1003 (1998)

The standard by which conduct is to be measured in determining whether due care has been exercised under the circumstances is that of an ordinary prudent person. In other words, what would an ordinary, prudent person do under like or similar circumstances?

SUDDEN EMERGENCIES
R.I. M.J.I. Civ. 1305 (1998)

(a) In this case [plaintiff/defendant] alleges he/she was faced with a "sudden emergency" to explain why he/she acted the way he/she did just before the accident. A sudden emergency is a situation or circumstance which calls for immediate action. A sudden emergency is a situation that could not have been anticipated by an ordinarily careful person. When a person is faced with a sudden emergency not brought about by his/her own conduct and the person is required by the emergency to act without sufficient time to determine the best course of action, [plaintiff/defendant] is not held to the same standard of judgment as would be required if he/she had time to deliberate.

(b) When a person is faced with a sudden emergency, he/she must act reasonably in considering the emergency circumstance but the exigent or emergency nature of the circumstance becomes a factor which you may consider in determining whether [plaintiff/defendant] acted with ordinary care under the circumstances which confronted him/her.

(c) A person can claim a sudden emergency existed only if you find that [plaintiff/defendant] could not have reasonably foreseen the occurrence of the emergency. A person whose own negligence created or contributed to the emergency cannot say it was a sudden emergency.

(d) If a person without fault of his/her own is faced with a sudden emergency, he/she is not held to the same correctness of judgment and action as if he/she had time and opportunity to fully consider the situation. If you find that [plaintiff/defendant] was confronted with a sudden emergency, the fact that he/she did not choose the best or safest way of escaping the danger does not mean that the person's conduct constituted negligence. The standard of care required in an emergency situation is that care which a reasonably prudent person would have exercised when placed in a similar situation.

(e) If you find that [plaintiff/defendant] was faced with a sudden emergency on [date of incident] and you find that [plaintiff/defendant] acted as a reasonably prudent person would when confronted with the emergency situation, then you must render a verdict for [plaintiff/defendant].

SOUTH CAROLINA

Title: Ervin's South Carolina Requests to Charge—Civil.
Author: Tom J. Ervin.
Publication: West Group Publishing.
Year: 1994, 1995.
Hereinafter cited as: S.C. P.J.I. Civ. (1994 & Supp. 1995).

ELEMENTS
S.C. P.J.I. Civ. 23-8 (1994 & Supp. 1995)

Negligence means that a person did not use the same amount of care that a person of ordinary reason and prudence would exercise in the same circumstances. The word "careless" means the same thing.

To prevail in a cause of action against a defendant for negligence, the plaintiff must prove three essential elements by the greater weight or preponderance of the evidence.

First, he must show that the defendant was negligent, that is, that he did not use the same amount of care that a person ordinarily would have exercised in the same circumstances then existing.

Second, the plaintiff must prove that he was personally injured.

Third, he must prove that the defendant's negligence was a proximate cause of the plaintiff's injuries.

UNAVOIDABLE ACCIDENT DEFENSE
S.C. P.J.I. Civ. 23-19 (1994 & Supp. 1995)

An injury [or death] may be caused by an unforeseen mishap that is not caused by or contributed to by the negligent conduct of any person or persons. Such a mishap is called an "unavoidable accident" and any loss or injury that results from it—no matter how grievous—must be allowed to remain where it has fallen. There can be no recovery of damages from an unavoidable accident.

To be an unavoidable accident, the event must be one that was unforeseen by the person injured by its occurrence. The standard is not necessarily the intelligence or foresight of the average person—an event is unexpected if it is not expected by the person who suffers it, even though every person of common sense who knew the circumstances would think it certain to happen.

The burden is upon the plaintiff to show that the injuries he complains of were not the result of an unavoidable accident. The mere fact that an accident happened, standing alone, does not permit you to assume that someone had to have caused it.

SOUTH DAKOTA

Title: South Dakota Pattern Jury Instructions.
Author: The State Bar of South Dakota.
Publication: The State Bar of South Dakota.
Year: 1995, 1997, 1999, 2000.
Hereinafter cited as: S.D. P.J.I. (1995 & rev. 1997, 1999, 2000).

IMPEACHMENT—PRIOR INCONSISTENT STATEMENT OR CONDUCT
S.D. P.J.I. Civ. 3-01 (1995 & rev. 1999)

The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness (made a statement or acted in a manner) inconsistent with the witness's testimony in this case on a matter material to the issues. Evidence of this kind may be considered by you in connection with all the other facts and circumstances in evidence in deciding the weight to be given to the testimony of that witness.

IMPEACHMENT—PROOF OF CONVICTION OF CRIME
S.D. P.J.I. Civ. 3-02 (1995 & rev. 1999)

The credibility of a witness may be attacked by introducing evidence that the witness has been convicted of a crime. You may consider evidence of this kind in connection with all the other evidence presented in deciding the weight to be given to the testimony of that witness.

NEGLIGENCE DEFINITION
S.D. P.J.I. Civ. 10-01 (1995 & rev. 1997)

Negligence is the failure to use reasonable care. It is the doing of something which a reasonable person would not do, or the failure to do something which a reasonable person would do, under facts similar to those shown by the evidence. The law does not say how a reasonable person would act under facts similar to those shown by evidence. That is for you to decide.

UNAVOIDABLE ACCIDENT
S.D. P.J.I. Civ. 12-01 (1995 & rev. 2000)

No instruction recommended.

SUDDEN EMERGENCY
S.D. P.J.I. Civ. 12-03 (1995 & rev. 2000)

When a person is confronted with a sudden emergency, the person has a duty to exercise reasonable care under the circumstances. The defendant is not relieved of liability because of a sudden emergency unless, based on the facts, you find:

(1) That the defendant was confronted with a sudden and unexpected danger;
(2) That defendant's own negligence did not bring about the dangerous situation;
(3) That the defendant had at least two courses of action available after perceiving the dangerous situation; and
(4) That the defendant's choice of action after confronting the danger was a choice which a person exercising reasonable care would have taken under similar circumstances, even though it may later develop that some other choice would have been better.

RIGHT TO ASSUME OTHER'S GOOD CONDUCT
S.D. P.J.I. Civ. 12-06 (1995)

A person who is exercising ordinary care has a right to assume that others will perform their duty and obey the law. Unless there is a reasonable cause for thinking otherwise, people can assume that they are not exposed to danger from another person's violation of the law or duty of care.

TENNESSEE

Title: Tennessee Pattern Jury Instructions–Civil.
Author: Tennessee Judicial Conference; Committee on Pattern Jury Instructions.
Publication: West Group Publishing.
Year: 1997, 2000.
Hereinafter cited as: Tenn. T.P.I Civ. (3d ed. 1997 & Supp. 2000).

DEFINITION OF NEGLIGENCE
Tenn. T.P.I. Civ. 3.05 (3d ed. 1997 & Supp. 2000)

Negligence is the failure to use ordinary or reasonable care. It is either doing something that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do, under all of the circumstances in this case.

A person may assume that every other person will use reasonable care, unless a reasonably careful person has cause for thinking otherwise.

RIGHT TO ASSUME OTHER'S NORMAL FACULTIES
Tenn. T.P.I Civ. 3.06 (3d ed. 1997 & Supp. 2000)

In the absence of reasonable cause for thinking otherwise, a person who is using ordinary care has a right to assume that other persons are ordinarily intelligent and possess normal sight and hearing.

SUDDEN EMERGENCY
Tenn. T.P.I Civ. 3.08 (3d ed. 1997 & Supp. 2000)

A person who is faced with a sudden or unexpected emergency that calls for immediate action is not expected to use the same accuracy of judgment as a person acting under normal circumstances who has time to think and reflect before acting. A person faced with a sudden emergency is required to act as a reasonably careful person placed in a similar position. A sudden emergency will not excuse the actions of a person whose own negligence created the emergency.

If you find there was a sudden emergency that was not caused by any fault of the person whose actions you are judging, you must consider this factor in determining and comparing fault.

INTOXICATION AS NEGLIGENCE
Tenn. T.P.I Civ. 4.11 (3d ed. 1997 & Supp. 2000)

An intoxicated person is held to the same standard of reasonable care as a sober person. Intoxication is not an excuse for the failure to act as a reasonably careful person.

In determining whether or not a person was negligent, you should consider whether or not that person was intoxicated at the time of the occurrence together with all other evidence.

[A person who has become voluntarily intoxicated is required to use the same care as that of a sober person.]

HIGH DUTY OF CARE IN DANGEROUS ACTIVITY
Tenn. T.P.I Civ. 4.21 (3d ed. 1997 & Supp. 2000)

Because of the great danger involved in (Describe activity) a reasonably careful person will use extreme caution in that activity.

VOLUNTEERS
Tenn. T.P.I Civ. 4.30 (3d ed. 1997 & Supp. 2000)

There is no automatic duty to help a person in danger. If someone having no special duty voluntarily undertakes to aid another person, there is no responsibility for resulting damages unless the aid is rendered in such a manner that it would be considered gross negligence. Negligence is a failure to use ordinary care. Gross negligence includes not only the failure to exercise ordinary care but also a conscious disregard for the rights and safety of others or a callous indifference to the consequences of one's actions or failure to act.

UTAH

Title: Model Utah Jury Instructions–Civil.
Author: Utah State Bar Model Jury Instructions Committee.
Publication: Lexis Law Publishing (Michie).
Year: 1993.
Hereinafter cited as: Utah M.U.J.I. Civ. (1993).

RIGHT TO RECOVER FOR NEGLIGENT CONDUCT
Utah M.U.J.I. Civ. 3.2 (1993)

A person has a duty to use reasonable care to avoid injuring other people or property. "Negligence" simply means the failure to use reasonable care. Reasonable care does not require extraordinary caution or exceptional skill. Reasonable care is what an ordinary, prudent person uses in similar situations.

The amount of care that is considered "reasonable" depends on the situation. You must decide what a prudent person with similar knowledge would do in a similar situation. Negligence may arise in acting or in failing to act.

A party whose injuries or damages are caused by another party's negligent conduct may recover compensation from the negligent party for those injuries or damages.

FAULT/NEGLIGENCE NOT IMPLIED FROM INJURY ALONE
Utah M.U.J.I. Civ. 3.3 (1993)

The mere fact that an accident or injury occurred does not support a conclusion that the defendant or any other party was at fault or was negligent.

UNAVOIDABLE ACCIDENT
Utah M.U.J.I. Civ. 3.4 (1993)

The law recognizes that on rare occasions unavoidable accidents occur. An unavoidable accident is one that arises from an unknown or unforeseen cause, for which neither party is responsible.

AMOUNT OF CARE REQUIRED VARIES WITH CONDITIONS
Utah M.U.J.I. Civ. 3.6 (1993)

The amount of care that is considered "reasonable" depends on the situation. Some situations require more caution because a person of ordinary prudence would understand that more danger is involved. In other situations, less care is expected, such as when the risk of danger is lower or when the situation happens so suddenly that a person of ordinary prudence would not appreciate the danger.

AMOUNT OF CAUTION REQUIRED WHEN CHILDREN ARE INVOLVED
Utah M.U.J.I. Civ. 3.7 (1993)

A person must exercise greater care for the protection of young children than for adults. To satisfy this higher standard of care, a person is expected to foresee and guard against the ordinary, impulsive behavior of children.

AMOUNT OF CAUTION REQUIRED FOR DANGEROUS ACTIVITIES
Utah M.U.J.I. Civ. 3.8 (1993)

Because of the greater danger involved, those who are engaged in [describe activity] are held to a higher-than-ordinary standard of care and must exercise extra caution for the protection of themselves and others. The greater the danger, the greater the care that must be used.

ROLE OF CUSTOM IN JUDGING BEHAVIOR
Utah M.U.J.I. Civ. 3.10 (1993)

When deciding whether a person is negligent, you may consider customs of behavior, such as local customs, business customs or industry customs. However, following a custom does not necessarily mean a person exercised ordinary care. It is merely a factor you may consider. A custom or standard may be negligent in and of itself.

RIGHT TO ASSUME PROPER CONDUCT OF OTHERS
Utah M.U.J.I. Civ. 3.12 (1993)

A reasonably careful person may assume that other people (1) are reasonably intelligent, (2) have normal sight and hearing, and (3) will obey the law and be reasonably careful. However, a reasonably careful person will not ignore obvious risks created by other persons.

VERMONT

Title: Vermont Jury Instructions.
Author: Tom Dinse.

Publication: Lexis Law Publishing (Michie).
Year: 1993.
Hereinafter cited as: Vt. P.J.I. Civ. (1993).

NEGLIGENCE—GENERAL
Vt. P.J.I. Civ. 7.17 (1993)

In his (*her*) complaint, (*plaintiff*) alleges that the injuries which he (*she*) suffered were caused by the negligence of (*defendant*). (*Plaintiff*) alleges that (*defendant*) is liable for negligence on the following theories: (*Review theories of negligence*). I will instruct you on each of these theories in turn.

I instruct you that in order to prove that (*defendant*) was negligent on any of these theories, (*plaintiff*) must prove by a preponderance of the evidence of each of the following four elements:

1. that (*defendant*) owed (*plaintiff*) a duty;
2. that (defendant) breached that duty;
3. that (*plaintiff*) suffered injuries; and
4. that (*defendant's*) breach of its duty was a proximate cause of (*plaintiff's*) injuries.

The first element of negligence, as I have stated, is duty. Duty, as it is understood in the law, means a legal obligation to do or not do some act, depending on the particular circumstances of the case. Your first task as the jury will be to determine whether (*plaintiff*) has shown, by a preponderance of the evidence, that (*defendant*) owed him (*her*) a duty. (*Option*: I instruct you as a matter of law that (*defendant*) had a duty to plaintiff to (*explain duty*).

The second element is breach. In considering whether a breach has occurred, you must look at the evidence and determine if (*defendant*) or its employees or agents adhered to the duty as imposed by law.

The third element is injury. I instruct you as a matter of law that (*plaintiff*) suffered injuries in this case.

The last element, proximate cause, is often the most difficult to explain. In order to find (*defendant*) liable for the injuries to (*plaintiff*), you must conclude that (*defendant's*) negligence was a proximate cause of (*plaintiff's*) injuries.

A legal or proximate cause of an injury means that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury without which the result would not have occurred. An injury or damages is proximately caused by an act or a failure to act whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

You should keep in mind that the law does not recognize just one proximate cause of an injury or damage, consisting of only one factor or the conduct of only one person. On the contrary, many factors or things may operate independently to cause injury or damage, and *each* may be a proximate or legal cause of some or all of an injury.

NEGLIGENCE—DUTY OF CARE PROPORTIONATE TO FORESEEABLE RISKS
Vt. P.J.I. Civ. 7.19 (1993)

Duty, as I have used it in these instructions, means a legal obligation to do or not do some act, depending on the particular circumstances of the case.

Keep in mind that under Vermont law, the duty of due care increases proportionately with the foreseeable risks of the operations involved. Thus, as the risk of harm increases to (*plaintiff*), (*defendant's*) duty of due care to prevent injury is correspondingly increased.

SUDDEN EMERGENCY DOCTRINE
Vt. P.J.I. Civ. 7.33 (1993)

As part of his (*her*) defense in this case, (*defendant*) claims that his (*her*) actions were taken in response to a sudden emergency. If you find by a preponderance of the evidence that (*defendant*) was confronted with a sudden peril, then you may consider that fact in determining whether (*defendant's*) conduct was negligent.

As the Vermont Supreme Court has stated this doctrine,

> [w]hen one is confronted with a sudden peril through no fault of his own, he is not held to the exercise of the same degree of care as when he has time for reflection, for the law recognizes that a prudent man so brought face to face with an unexpected danger may fail to use the best judgment, may omit some precaution he could have taken or may not choose the best available method of meeting the dangers of the situation. Under such circumstances, he is not negligent if he does what a prudent man would or might have done.

(*Example*) As applied to the instant case, you may find that the sudden and forceful application of his brakes and the turning to the left by (*defendant*) was a prudent action for him to take when faced with the sudden peril or emergency even though you may feel that perhaps, it might have been better, upon reflection, to have turned to the right and not applied the brakes so forcefully.

VIRGINIA

Title: Virginia Model Jury Instructions–Civil.
Author: Model Jury Instructions Committee.
Publication: Lexis Law Publishing (Michie).
Year: 1998, 2001.
Hereinafter cited as: Va. M.J.I. Civ. (1998 repl. ed. & Supp. 2001).

DEFINITION OF NEGLIGENCE
Va. M.J.I. Civ. 4.000 (1998 repl. ed. & Supp. 2001)

Negligence is the failure to use ordinary care. Ordinary care is the care a reasonable person would have used under the circumstances of this case.

FACT OF ACCIDENT IS NOT PROOF OF NEGLIGENCE
Va. M.J.I. Civ. 4.015 (1998 repl. ed.)

The fact that there was an accident and that the plaintiff was injured does not, of itself, entitle the plaintiff to recover.

UNAVOIDABLE ACCIDENT
Va. M.J.I. Civ. 4.018 (1998 repl. ed. & Supp. 2001)

An unavoidable accident is one which ordinary care and diligence could not have prevented or one which occurred in the absence of negligence by any party to this action.

SUDDEN EMERGENCY
Va. M.J.I. Civ. 7.000 (1998 repl. ed. & Supp. 2001)

The defendant [plaintiff] contends that he was confronted with a sudden emergency. A sudden emergency is an event or a combination of circumstances that calls for immediate action without giving time for the deliberate exercise of judgment.

If you believe from the evidence that the defendant [plaintiff], without negligence on his part, was confronted with a sudden emergency and acted as a reasonable person would have acted under the circumstances of this case, he was not negligent [contributorily negligent].

WASHINGTON

Title: Washington Pattern Jury Instruction–Civil.
Author: Washington Supreme Court Committee on Jury Instructions.
Publication: West Group Publishing.
Year: 1989.
Hereinafter cited as: Wash. W.P.I. Civ. (1989).

NEGLIGENCE—ADULT—DEFINITION
Wash. W.P.I. Civ. 10.01 (1989)

Negligence is the failure to exercise ordinary care. It is the doing of some act which a reasonably careful person would not do under the same or similar circumstances or the failure to do something which a reasonably careful person would have done under the same or similar circumstances.

ORDINARY CARE—ADULT—DEFINITION
Wash. W.P.I. Civ. 10.02 (1989)

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances

DUTY TO USE ORDINARY CARE—ADULT—DEFENDANT
Wash. W.P.I. Civ. 10.04 (1989)

(The Committee recommends that no instruction be given on the "duty of an adult defendant to use ordinary care.")

VOLUNTARY INTOXICATION
Wash. W.P.I. Civ. 12.01 (1989)

A person who becomes intoxicated voluntarily is held to the same standard of care as one who is not so affected. [Whether a person is intoxicated at the time of an occurrence may be considered by the jury, together with all the other facts and circumstances, in determining whether that person was negligent.]

DUTY OF ONE CONFRONTED BY AN EMERGENCY
Wash. W.P.I. Civ. 12.02 (1989)

A person who is suddenly confronted by an emergency through no negligence of his or her own and who is compelled to decide instantly how to avoid injury and who makes such a choice as a reasonably careful person placed in such a position might make, is not negligent even though it is not the wisest choice.

UNAVOIDABLE ACCIDENT
Wash. W.P.I. Civ. 12.03 (1989)

(The Committee recommends that no instruction be given on "unavoidable accident.")

RIGHT TO ASSUME OTHERS WILL OBEY LAW
Wash W.P.I. Civ. 12.07 (1989)

Every person has the right to assume that others will use ordinary care [and comply with the law], and a person has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary.

WISCONSIN

Title: Wisconsin Jury Instructions–Civil.
Author: Wisconsin Civil Jury Instruction Committee for Wisconsin Judicial Conference.
Publication: University of Wisconsin Extension, Department of Law.
Year: 1989, 1992, 1995, 1999, 2002.
Hereinafter cited as: Wis. J.I. Civ. (1989, 1992, 1994, or 1999 ed. & Supp. 2002).

UNAVOIDABLE ACCIDENT
Wis. J.I. Civ. 1000 (1989 & Supp. 2002)

The committee believes that no instruction is needed on this subject since, in most cases, there is some evidence of negligence as to a party, or else it is clear that the party is not negligent.

NEGLIGENCE: FAULT: ULTIMATE FACT VERDICT
Wis. J.I. Civ. 1001 (1992 & Supp. 2002)

Questions 1 and 2 of the verdict inquire whether the parties to the collision were at fault. "Fault," as used here, involves two elements—negligence and cause. To establish legal fault, the conduct under

consideration must be negligent, and it must be a cause of the injury and damages.

"Negligence" means a failure to exercise ordinary care. "Ordinary care" is that degree of care which the great mass of mankind, or the ordinarily prudent man, exercises under like or similar circumstances. A person fails to exercise ordinary care—or in other words, is negligent—when, without intending to do harm, the person does an act or omits to take a precaution under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such act or omission will subject the person or property of another to an unreasonable risk of harm.

In addition to this general definition of negligence, there are rules of law, as well as statutes enacted by the legislature, for the safe operation of motor vehicles, violation of which establishes negligence.

(Here add appropriate instructions on specific kinds of negligence.)

In considering "cause" as an element of fault, you will consider it from the standpoint of relationship of cause and effect between the negligence of either or both parties, if found by you, and the collision and the resulting injuries and damages. There may be more than one cause of a collision. The negligence of one person alone might produce it, or the acts or omissions of two or more persons might jointly produce it. Before such relationship of cause and effect can be found to exist, it must appear that the negligence under consideration was a substantial factor in producing the collision and the resulting damages. That is to say, that the negligence was a factor actually operating and which had a substantial effect in producing the collision and the results.

Before you can find either party at fault, you must be satisfied to a reasonable certainty by the greater weight of the credible evidence, first, that the party was negligent, as that term has been defined for you, and, second, that such negligence was a cause acting as a substantial factor in producing the collision and the natural results thereof. If you can be so satisfied by that degree of proof that either or both parties were at fault, then you will so find—otherwise not.

After determining whether these parties were or were not at fault, under the instructions I have given you, you will consider and determine what percentage of the fault of each, if found, contributed to the collision and the natural results thereof. Total fault is based on 100%. If you find only one party at fault, then of course, that person's contribution to the collision and the results would be 100%. If you find both parties at fault, then you will consider the fault of each party, weigh its contribution in producing the collision and the results, and fix it in such a percentage of the total fault which is, by the greater weight of the credible evidence to a reasonable certainty, proved to be attributable to the person named in the question.

Questions 1 and 2 are to be answered in terms of percentages if the party inquired about is found to be at fault, as that term has been defined to you. The burden of proof on either question is upon the party who claims another is at fault. Such burden is to satisfy you to a reasonable certainty by the greater weight of the evidence that fault exists and contributed in a specified percentage to the collision and the natural results thereof.

NEGLIGENCE: DEFINED
Wis. J.I. Civ. 1005 (1999 & Supp. 2002)

A person is negligent when (he)(she) fails to exercise ordinary care. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.

(In addition to this general definition of negligence, there are other safety statutes enacted by the legislature, a violation of which is negligence as that term is used in the verdict and these instructions.)

NEGLIGENCE: EVIDENCE OF CUSTOM AND USAGE
Wis. J.I. Civ. 1019 (1995 & Supp. 2002)

Evidence has been received as to the (practice in the community) (custom in the trade or work operation) (practice in the industry) with respect to (e.g., the use of 2 x 4's for rafters) (installations of 3/8" plywood for subflooring) (standing on running board to guide truck backing into shale pit). You should consider this evidence in determining whether (defendant) acted with ordinary care. This evidence of practice is not conclusive as to what meets the required standard for ordinary care or reasonable safety. What is generally done by persons engaged in a similar activity has some bearing on what an ordinarily prudent person would do under the same or like circumstances. Custom, however, cannot overcome the requirement of reasonable safety and ordinary care. A practice which is obviously unreasonable and dangerous cannot excuse a person from responsibility for carelessness. On the other hand, a custom or practice which has a good safety record under similar conditions could aid you in determining whether (defendant) was negligent.

NEGLIGENCE: UNDER SPECIAL CIRCUMSTANCES
Wis. J.I. Civ. 1020 (1989 & Supp. 2002)

[While the rule never changes that a (person) (motor vehicle driver) (pedestrian) must exercise ordinary care, the degree of care or diligence which a person must exercise to come up to the standard of ordinary care varies with the circumstances naturally calculated to affect or increase the hazard of collision or injury. The greater the danger which is or may be apparent to an ordinarily prudent person under the circumstances existing, the greater must be the degree of care which must be used to guard against such danger.]

[The ordinary care which the law requires varies with the circumstances naturally calculated to affect or increase the hazard of injury or collision. (Under some circumstances, ordinary care may be a high degree of caution; whereas, under other circumstances, a slight degree of caution may be ordinary care.) The greater the danger which is or may be apparent to an ordinary prudent person under the circumstances existing, the greater must be the degree of care which must be used to guard against such danger.]

WYOMING

Title: Wyoming Civil Pattern Jury Instructions.
Author: Wyoming State Bar.
Publication: Wyoming State Bar.
Year: 1993.
Hereinafter cited as: Wyo. P.J.I. Civ. (1993).

NEGLIGENCE AND ORDINARY CARE DEFINED
Wyo. P.J.I. Civ. 3.02 (1993)

When the word negligence is used in these instructions, it means the failure to use ordinary care. Ordinary care means the degree of care which should reasonably be expected of the ordinary careful person under the same or similar circumstances. The law does not say how such an ordinary careful person would act. That is for you to decide.

CUSTOM
Wyo. P.J.I. Civ. 3.08 (1993)

In determining whether anyone was or was not negligent, you may consider any evidence of any custom of a profession in conducting its operations. However, the standard of care is not fixed by custom, as custom cannot overcome the requirements of reasonable safety and ordinary care. The standard is always ordinary care and the presence or absence of custom does not alter that standard. What others do is some evidence of what should be done, but is not conclusive evidence, and is never a substitute for ordinary care. An operational practice, although long indulged in, but which does not afford reasonable protection to those engaged in that operation, does not relieve from liability those responsible if it results in negligently causing injury or damage.