

**The Standard of Care:
Negligence Per Se; Proving Negligence**

Torts I
Professor Hensel
10/13/09



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Determining the Applicability of Statutes

1. Is the injury within the type of harm that the statute was intended to protect against?


- A. Does the statute's title or words used indicate the harm against which the statute is intended to protect? (narrow approach)**
- B. Is it foreseeable that violation of the statute would result in this type of harm or risk? (broad approach)
[Ask: What makes the prohibited conduct risky in the first place?]**

2. Is the Plaintiff within the class that the statute was intended to protect?

- A. Does the statute's title or words used indicate whom the statute is intended to protect? (narrow approach)**
- B. Is it foreseeable that violation of the statute would harm the plaintiff? (broad approach)**

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3. Is it appropriate to impose tort liability for violation of the statute?




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Applicability of Statute

Perry v. S.N. & S.N.


- * The Third Factor Considered in Adopting a Statutory Standard of Care



- * Factors Relevant in Assessing Public Policy Suitability

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Effect of Statute



Martin v. Herzog


- * Evidentiary Value of Statutory Violation
- * The Role of the Jury

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Statutes: Excuse / Justification

Zeni v. Anderson


- * "Excused" Violations
- * When Excuse is Not Available as a Defense
- * Effect of Compliance with Statute




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Proving Negligence

....or how to establish breach of duty....

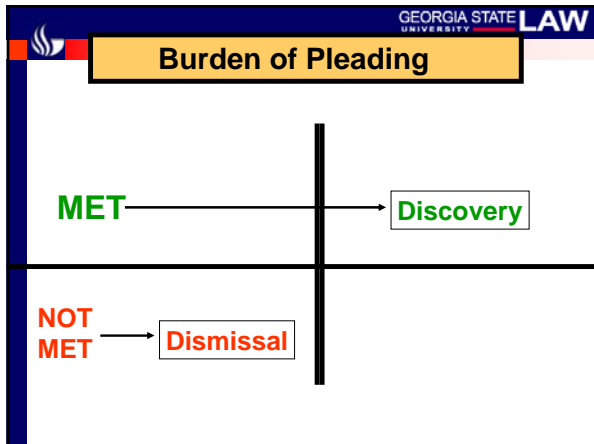


Burdens of Proof



1. Burden of Pleading:
must allege facts that if true would entitle P to relief

Consequence for Failure:
Demurrer; dismissal



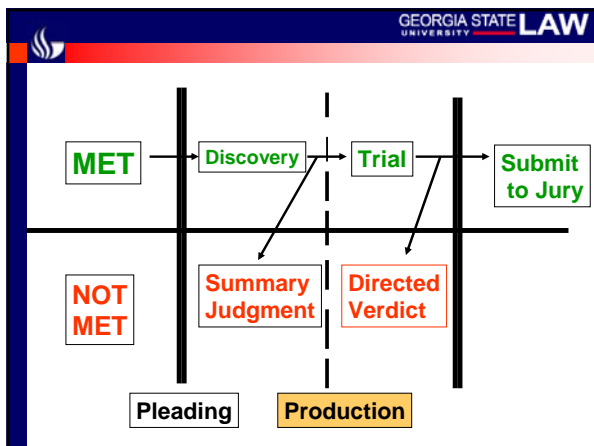
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2. Burden of Production

(Burden of Moving Forward)

Must produce sufficient evidence from which reasonable jurors could find that the elements of P's case were proven by a preponderance of the evidence.

Consequence for Failure:
Summary Judgment or Directed Verdict




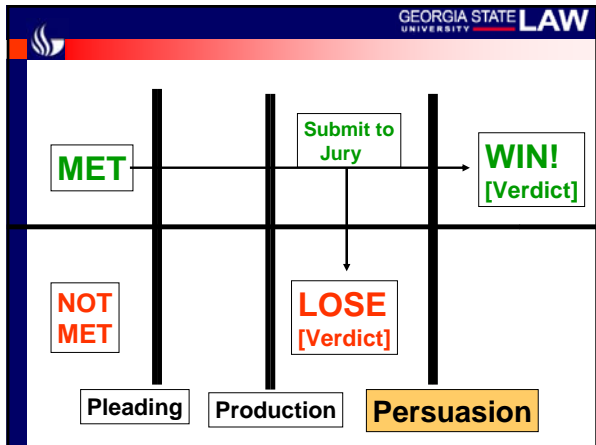
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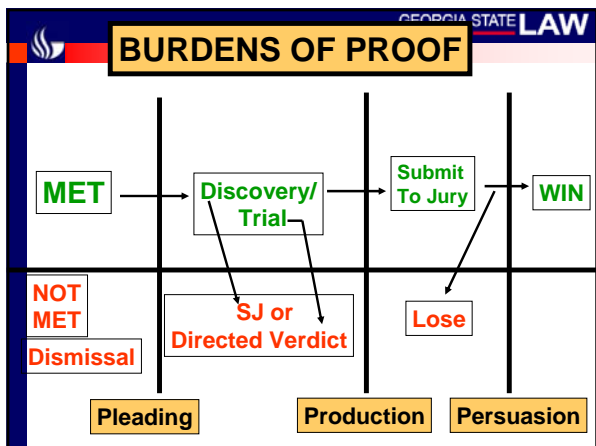
3. Burden of Persuasion:

Must persuade jury by a preponderance of the evidence that D breached duty of care, which caused P's damages.

Consequence for Failure:
Verdict for Defendant








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TYPES OF EVIDENCE:
(e.g., how to satisfy evidentiary burdens)

A. Direct

B. Circumstantial



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The SLIP & FALL Cases



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**The Standard of Care:
Res Ipsa Loquitur**

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Negligence Per Se Review:

Q#1: Is the statute appropriate to import as the standard of care?

- Type of Harm
- Class of People
- Public Policy Considerations

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Q#2: Is the statute violated?

Yes: Proceed to Q#3
No: Fall Back on RP analysis

Q#3: Is the violation excused?

Yes: Fall Back on RP analysis
No: Proceed to Q#4

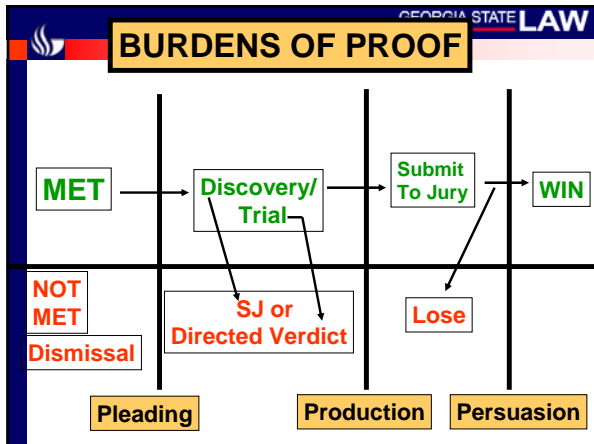
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Q#4: Is this an “evidence of negligence” jurisdiction?

--- Yes = RP analysis


Is this a “negligence per se” jurisdiction?

Yes = Breach of duty established.
(but evaluate RP as well in case you are wrong)



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Res Ipsa Loquitur



Byrne v. Boadle

- * Evidence Presented by P
- * Elements Needed to Invoke Res Ipsa Loquitur
- * Effect of Invocation
- * Policy Concerns

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RIL: The Role of Experts

McDougal v. Perry

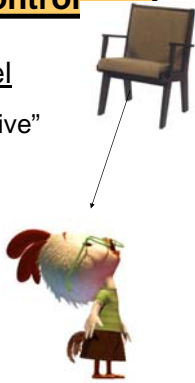


- * The Role of Common Knowledge
- * The Need for Expert Testimony
- * Policy Considerations

RIL: "Exclusive" Control

Larson v. St. Francis Hotel

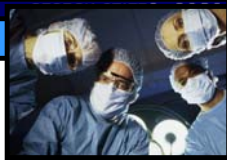
- * When Control is "Exclusive"
- * Restatement's Position
- * Policy Rationales



RIL: Multiple Defendants

Ybarra v. Spangard

- * The "Unconscious Patient" Problem
- * Defendants' Ability to Avoid Liability
- * Policy Considerations
- * Application of Res Ipsa Loquitur to Multiple Defendants

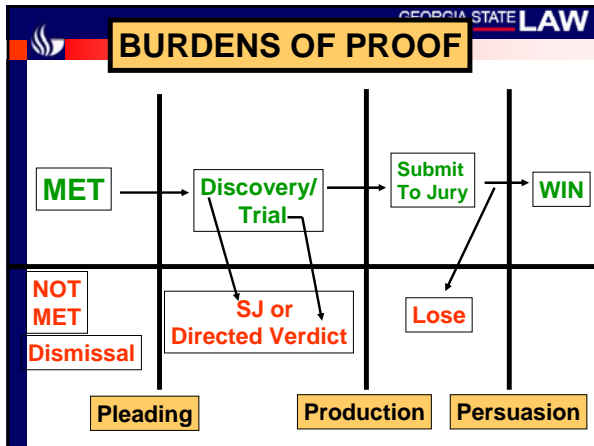


RIL: Evidentiary Value

Sullivan v. Crabtree

- * The Procedural Impact of RIL





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RIL: Evidentiary Value

Sullivan v. Crabtree

- * The Procedural Impact of RIL
- * Defendant's Need to Put on Evidence

An aerial photograph showing a road accident scene. A white car is visible on the road, surrounded by debris and a large amount of water or mud, possibly from a nearby stream or road construction site.
