**Tagging Guide Based on the US Restatement (Third) of Torts: Liability for Physical and Emotional Harm**

**Structure adopted for the purposes of tagging:**

1. **Duty of Care**
2. Actions causing physical harm
3. Omissions
   1. General rule
   2. Exceptions
4. **Breach of Duty**
5. Qualities of a reasonable person
6. Was the defendant’s conduct negligent

|  | **US Restatement (Third) of Torts: Liability for Physical and Emotional Harm** | **Tagging Guidance** |
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|  | **A. Duty of Care** |  |
|  | 1. **Actions causing physical harm** |  |
|  | **§ 4 Physical Harm**   1. “Physical harm” means the physical impairment of the human body (“bodily harm”) or of real property or tangible personal property (“property damage”). Bodily harm includes physical injury, illness, disease, impairment of bodily function, and death.     **English law:**  Section 38(1) of the Limitation Act 1980: personal injury “*includes any disease and any impairment of a person’s physical or mental condition*”. The law takes a broad approach to what constitutes an impairment. (7-009) | **Tag §4 where there is a dispute as to whether the harm suffered falls under the definition of “physical harm”.** |
|  | **§ 7 Duty**   1. (a) An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm. 2. (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.   **English law:**  Same as §7. The current approach of English law in identifying a duty of care is incremental and conservative. Policy issues can be taken into account in determine the scope of duty. (5-026) | **Tag §7(a) where the issue under discussion concerns whether the defendant(s) had a duty to exercise reasonable care (i.e., where the court discusses the existence of a duty of care). §7(a) should be tagged in all ‘duty’ cases.**  **Tag §7(b) where the discussion considers policy reasons for why a duty might not be deemed to exist.** |
|  | **§ 8 Judge and Jury**   1. (a) When, in light of all the evidence, reasonable minds can differ as to the facts relating to the actor’s conduct, it is the function of the jury to determine those facts. 2. (b) When, in light of all the facts relating to the actor’s conduct, reasonable minds can differ as to whether the conduct lacks reasonable care, it is the function of the jury to make that determination.   **English law:**  **No equivalent in the UK. Cases are decided by the judge.** | **US cases only:**  **Tag §8 where the case concerns some dispute between the judge and jury about the facts of the case relating to (i) the actor’s conduct, or (ii) whether the actor’s conduct lacks reasonable care. It does not seem likely that this will arise at all often, so I suspect that §8 will hardly be tagged.** |
|  | 1. **Omissions** |  |
|  | **(a) General rule** |  |
|  | **§ 37 No Duty of Care with Respect to Risks Not Created by Actor**   1. An actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in §§ [38](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=211209&cite=REST3DTORTSPEHS38&originatingDoc=I82c70b5bdc1611e2ac56d4437d510c12&refType=DA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink))- [44](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=211209&cite=REST3DTORTSPEHS44&originatingDoc=I82c70b5bdc1611e2ac56d4437d510c12&refType=DA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) is applicable.   **English law:**  Like §37, it is a general principle of tort law that there is no general duty to act for the benefit of others. (5-030) | **Tag §37 if the case concerns an omission.**  **§37 sets out the general rule that there is no liability for omissions (i.e., there is no general duty of care to act for the protection of others). Even if the case focuses on one of the exceptions (§§38-44) without explicitly mentioning the general rule, tag this section as well.** |
|  | **(b) Exceptions** |  |
|  | **§ 38 Affirmative Duty Based on Statutory Provisions Imposing Obligations to Protect Another**   1. When a statute requires an actor to act for the protection of another, the court may rely on the statute to decide that an affirmative duty exists and to determine the scope of the duty.   The US position is: where there is no common law duty of care, but there is a relevant statute (which the plaintiffs claim was violated), and the statute is silent as to whether the legislator intended for the statute to form the basis of a civil law claim, §38 operates to allow the courts to use the statute as evidence that an affirmative duty exists and to determine the scope of that duty.  **English law:**  **In contrast to the US position, the English position is:**   * **if there is no common law duty of care, you can ask: was there a breach of statutory duty;** * **the breach of statutory duty rules are wholly separate to the common law negligence doctrine. Therefore, the courts will not use the existence of a statute as reason for imposing a duty of care under common law where previously no such duty existed.**     **In other words, the omissions doctrine will not be displaced simply because the public authority had a statutory duty or power to confer the relevant benefit. (5-061)**  **Under English law, a claim for breach of common law duty is often brought alongside a breach of statutory duty claim. To succeed in a claim for statutory duty, the claimant must show that Parliament intended that the statute give rise to civil liability.** | **US cases:**  **§38 is an exception to the general rule in §37 that there is no liability for omissions.**  **Tag §38 where the court discusses whether an affirmative duty to act exists and relies as part of this discussion on a statute (i.e., a statute that requires an actor to act for the protection of another).**  **English cases:**  **Tag §38 where the claimant makes a claim for breach of statutory duty (whether the case concerns an act or an omission), and the court discusses whether Parliament intended that the statute give rise to civil liability.** |
|  | **§ 39 Duty Based on Prior Conduct Creating a Risk of Physical Harm**   1. When an actor’s prior conduct, even though not tortious, creates a continuing risk of physical harm of a type characteristic of the conduct, the actor has a duty to exercise reasonable care to prevent or minimize the harm.   **English law:**  Like under §39, a defendant who, with or without wrongdoing, creates a source of danger comes under a duty of care to take reasonable steps to safeguard others against it. (5-039)  For example, if the defendant’s car breaks down on the highway the defendant must take steps to prevent it from endangering traffic. | **§39 is an exception to the general rule in §37 that there is no liability for omissions.**  **Tag §39 where the discussion concerns whether the defendant should be held to have a duty of care even though the act complained of was an omission, because the defendant, through some prior conduct, created a continuing risk of physical harm, which the defendant should then have taken steps to reduce.**  **E.g., if the defendant’s car broke down, and the defendant did not take steps to remove it from the highway.** |
|  | **§ 40 Duty Based on Special Relationship with Another**   1. (a) An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship. 2. (b) Special relationships giving rise to the duty provided in Subsection (a) include: 3. (1) a common carrier with its passengers, 4. (2) an innkeeper with its guests, 5. (3) a business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises, 6. (4) an employer with its employees who, while at work, are: 7. (a) in imminent danger; or 8. (b) injured or ill and thereby rendered helpless, 9. (5) a school with its students, 10. (6) a landlord with its tenants, and 11. (7) a custodian with those in its custody, if: 12. (a) the custodian is required by law to take custody or voluntarily takes custody of the other; and 13. (b) the custodian has a superior ability to protect the other.     **English law:**  Like §40, a duty to act may be imposed where the claimant is under the care or control of the defendant and is incapable of protecting himself. (5-035)   * + Thus, claims have succeeded against schools for failing to safeguard pupils from injury and against the police and hospitals for failing to protect mentally disturbed persons in their custody from self-inflicted harm.   Similarly, a duty to act may be imposed on the defendant if he benefits or stands to benefit from his relationship with the claimant. (5-036)   * + Thus, an employer must not only take proper steps to secure safety in the workplace but must look after a worker who is injured or falls ill at work even if the employer is not responsible for the emergency.   + The same rule applies in relation to carriers with regard to their passengers. | **§40 is an exception to the general rule in §37 that there is no liability for omissions.**  **Tag §40 where the discussion concerns whether the defendant should be held to have a duty of care even though the act complained of was an omission, because the defendant is in a special relationship with the claimant. See e.g., the examples given in §40(b).** |
|  | **§ 41 Duty to Third Parties Based on Special Relationship with Person Posing Risks**   1. (a) An actor in a special relationship with another owes a duty of reasonable care to third parties with regard to risks posed by the other that arise within the scope of the relationship. 2. (b) Special relationships giving rise to the duty provided in Subsection (a) include: 3. (1) a parent with dependent children, 4. (2) a custodian with those in its custody, 5. (3) an employer with employees when the employment facilitates the employee’s causing harm to third parties, and 6. (4) a mental-health professional with patients.     **English law:**  Like §41, a relationship between the defendant and the person who harmed the claimant may lead to liability.(5-037)   * + A school authority was liable for letting a small child out of school in circumstances where it was foreseeable that he would cause an accident in which a driver was killed trying to avoid him.   Where the defendant has control over both the claimant and the immediate wrongdoer (for example, in a case where there is an assault on a prisoner by fellow inmates) the case for the imposition of a positive duty of care is particularly strong. | **§41 is an exception to the general rule in §37 that there is no liability for omissions.**  **Tag §41 where the discussion concerns whether the defendant should be held to have a duty of care even though the act complained of was an omission, because the defendant is in a special relationship with a third party which poses risks to the claimant. See e.g., the examples given in §41(b).** |
|  | **§ 42 Duty Based on Undertaking**   1. An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if: 2. (a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or 3. (b) the person to whom the services are rendered or another relies on the actor’s exercising reasonable care in the undertaking.     **English law:**  **§§42, 43 and 44 of the Restatement would all be dealt with by the English tort law doctrine of ‘assumption of responsibility’.**  **Specifically, under English law, a court will consider whether a defendant has voluntarily assumed responsibility for the claimant (or a group of persons of which the claimant is a member). Whether the defendant has assumed responsibility for the claimant’s interests depends on the full circumstances of the case (see Comparison Table for details).**  **For these purposes, we will use the structure of §42, 43 and 44 to categorise the cases.** | **§42 is an exception to the general rule in §37 that there is no liability for omissions.**  **Tag §41 where the discussion concerns whether the defendant should be held to have a duty of care even though the act complained of was an omission, because the defendant undertook to render services which will reduce the risk of harm to another. In English cases, the defendant is termed to have “assumed responsibility” in these cases.**  **§41 can be distinguished from §44, which should be tagged when the defendant has taken charge of another who was imperilled or helpless.** |
|  | **§ 43 Duty to Third Parties Based on Undertaking to Another**   1. An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to which a third person is exposed has a duty of reasonable care to the third person in conducting the undertaking if: 2. (a) the failure to exercise reasonable care increases the risk of harm beyond that which existed without the undertaking, 3. (b) the actor has undertaken to perform a duty owed by the other to the third person, or 4. (c) the person to whom the services are rendered, the third party, or another relies on the actor’s exercising reasonable care in the undertaking.   **This Section parallels §42 but extends to third parties the duty that is owed. This section differs from §42 because section (b) omits any requirement of reliance or of increased risk**  **Illustration:**   * 1. Rick pilots a small plane with his spouse, Steve. He detects smoke in the cockpit. He radios Pleasant Flying Services to determine if firefighting equipment is available. Upon being told that it is, Rick informs Pleasant that he is going to land at the airport because of a suspected fire and will need emergency firefighting equipment. Sheila, an employee of Pleasant, negligently omits to do something, which results in the firefighting equipment not reaching Rick and Steve in time. After Rick lands, a fire breaks out that burns Steve. **Pleasant owes a duty of reasonable care to Steve** (as well as Rick) based on its undertaking to provide firefighting equipment and on Rick’s reliance on Pleasant’s undertaking. (p 637)   **English law:**  **See comment #10 above.**  **§43 is slightly different to English law. Under English law, the defendant must have assumed responsibility for the claimant or a group of persons of which the claimant is a member, as opposed to some third party, or to the world at large. (5-044) However, based on the comments to the US Restatement, the English law does not appear to be substantively dissimilar from §43. Accordingly, tag §43 in English cases where the issue in dispute is precisely who the defendant had assumed responsibility for (i.e., was it the claimant, a group of persons of which the claimant is a member, some third party, or the world at large).** | **§43 is an exception to the general rule in §37 that there is no liability for omissions.**  **Tag §43 where the discussion concerns whether the defendant should be held to have a duty of care even though the act complained of was an omission, because the defendant undertook to render services which will reduce the risk of harm to which a third person is exposed.**  **For English cases, this issue will likely arise in the context of a dispute as to precisely who the defendant had assumed responsibility for (i.e., was it the claimant, a group of persons of which the claimant is a member, some third party, or the world at large).** |
|  | **§ 44 Duty to Another Based on Taking Charge of the Other**   1. (a) An actor who, despite no duty to do so, takes charge of another who reasonably appears to be: 2. (1) imperiled; and 3. (2) helpless or unable to protect himself or herself 4. has a duty to exercise reasonable care while the other is within the actor’s charge. 5. (b) An actor who discontinues aid or protection is subject to a duty of reasonable care to refrain from putting the other in a worse position than existed before the actor took charge of the other and, if the other reasonably appears to be in imminent peril of serious physical harm at the time of termination, to exercise reasonable care with regard to the peril before terminating the rescue.   **English law:**  **See comment #10 above.** | **§44 is an exception to the general rule in §37 that there is no liability for omissions.**  **Tag §44 where the discussion concerns whether the defendant should be held to have a duty of care even though the act complained of was an omission, because the defendant took charge of another who was imperilled or helpless. In such cases, the defendant has to exercise reasonable care in granting the aid.**  **Under English law, the defendant would still have been said to have “assumed responsibility” in these cases. However, in this case, there is no ‘reliance’ on the assumption by the person who is helped (because they may not be in a position to have relied on the assumption).** |
|  | **B. Breach of Duty** |  |
|  | “*Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do*.” (6-001)  **First**, it is necessary to ascertain the qualities of the reasonable person. This is a question of law.  **Secondly**, it must be asked whether the defendant took less care than the reasonable person, given the qualities attributed to him, would have taken in the circumstances. This is a question of fact. | **Note that when deciding how a reasonable *claimant* would act for the purposes of deciding whether the claimant was guilty of contributory negligence, the courts would also look to the sections of the Restatement below (i.e., §§9-12, 3, 13-19). The tagging sheet therefore includes a section headed ‘Contributory Negligence’, where the following sections can be tagged as they apply to the *claimant*.** |
|  | 1. **Qualities of a reasonable person** |  |
|  | **English law:** He is not the average person. Thus, whereas even the most careful person will on occasion act sub-standardly, the reasonable person takes reasonable care day in, day out. (6-005) The reasonable person is placed into the shoes of the defendant at the time of the alleged breach of duty. Thus, if the defendant is a motorist, it is asked whether the defendant’s conduct fell below the standard of the reasonable motorist, etc. (6-006)  *NB: The US Restatement does not include the wording, but it is likely that the US position is the same.* | **§§9-12 concern particular things that the court can take into account in deciding the qualities that the ‘reasonable person’ should be taken to have in the circumstances. Tag those which apply to the discussion in the case.** |
|  | **§ 9 Emergency**   1. If an actor is confronted with an unexpected emergency requiring rapid response, this is a circumstance to be taken into account in determining whether the actor’s resulting conduct is that of the reasonably careful person.     **English law:**  Same as §9, based on common law principles and the Social Action, Responsibility and Heroism Act 2015. | **Tag §9 if the courts, in deciding whether the defendant behaved like a reasonably careful person, consider whether the defendant was confronted by an unexpected emergency.** |
|  | **§ 10 Children**   1. (a) A child’s conduct is negligent if it does not conform to that of a reasonably careful person of the same age, intelligence, and experience, except as provided in Subsection (b) or (c). 2. (b) A child less than five years of age is incapable of negligence. 3. (c) The special rule in Subsection (a) does not apply when the child is engaging in a dangerous activity that is characteristically undertaken by adults.     **English law:**  Although the English law takes a different approach where the defendant is a child (e.g., re §10(a), the English courts would not take into account the child’s ‘intelligence and experience’, they would only consider their age), the differences are immaterial for the purposes of the tagging exercise. | **Tag §10(a) if the court, in deciding whether the defendant behaved like a reasonably careful person, considers whether the defendant was a child.**  **Tag §10(b) if the court discusses whether the child is so young that he/she is incapable of exercising any care (in the US, the age of 5 year is explicitly given; under English law, no age is specified). It is unlikely that this will arise for the US cases, since this issue is unlikely to go to appeal.**  **Tag §10(c) if the court considers a case where the child was engaged in a dangerous adult activity, like driving.** |
|  | **§ 11 Disability**   1. (a) The conduct of an actor with a physicaldisability is negligent only if the conduct does not conform to that of a reasonably careful person with the same disability. 2. (b) The conduct of an actor during a period of sudden incapacitation or loss of consciousness resulting from physical illness is negligent only if the sudden incapacitation or loss of consciousness was reasonably foreseeable to the actor. 3. (c) An actor’s mental or emotional disability is not considered in determining whether conduct is negligent, unless the actor is a child.     **English law:**  Although the English law appears to take a slightly different approach to physical disability, the differences are immaterial for the purposes of the tagging exercise. | **Tag §11(a) if, in deciding whether the defendant behaved like a reasonably careful person, the court considers whether the defendant had a physical disability.**  **Tag §11(b) if the case concerns a defendant that commits a negligent act during a period of sudden incapacitation or loss of consciousness resulting from physical illness.**  **Tag §11(c) if there is a discussion as to whether the person’s disability is actually physical or mental, since only the former attracts the rule in §11(a).** |
|  | **§ 12 Knowledge and Skills**   1. If an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person.   **English law:**  Although the English law appears to take a slightly different approach to a defendants’ knowledge and skills, the differences are immaterial for the purposes of the tagging exercise. | **Tag §12 if, in deciding whether the defendant behaved like a reasonably careful person, the court considers the defendant’s particular skills or knowledge (or lack thereof).** |
|  | 1. **Was the defendant's conduct negligent** |  |
|  | **§ 3 Negligence**   1. A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person’s conduct lacks reasonable care are the foreseeable likelihood that the person’s conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.     **English law:**  Substantively the same as §3. | **Tag §3 where the issue under discussion concerns whether the defendant(s) breached their duty to exercise reasonable care. This section should be tagged in all ‘breach’ cases.** |
|  | **§ 13 Custom**   1. (a) An actor’s compliance with the custom of the community, or of others in like circumstances, is evidence that the actor’s conduct is not negligent but does not preclude a finding of negligence. 2. (b) An actor’s departure from the custom of the community, or of others in like circumstances, in a way that increases risk is evidence of the actor’s negligence but does not require a finding of negligence.   **English law:**  Substantively the same as §13. | **Tag §13(a) where, in deciding whether the defendant’s conduct was negligent, the court discusses whether the defendant complied with the custom of the community.**  **Tag §13(b) where, in deciding whether the defendant’s conduct was negligent, the court discusses whether the defendant departed from the custom of the community.** |
|  | **§ 14 Statutory Violations as Negligence Per Se**   1. An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.   **Comment:**  Negligence per se applies only when the accident that injures the plaintiff is the type of accident that the statute seeks to avert. To invoke negligence per se, a party must show that the plaintiff was within the class of persons the legislature was endeavoring to protect. Where the negligence per se doctrine does not apply because the person harmed is not one of the relevant class of victims, the defendant’s violation of the regulation may nonetheless be admissible as evidence of negligence. (p 164)  **English law:**  **There is no such rule as §14 in English law; namely, there is no such rule that a statute violation can form the basis for a negligence finding *per se*. At most, a statutory violation can form *evidence* that the *reasonableness standard has not been met*.**  **The English view is that liability for breach of statutory duty is a wholly separate tort superimposed on the tort of negligence. (8-003)**  Thus, where the statute imposes strict liability it is possible for the defendant to be acquitted of negligence but still held liable for breach of the statute. Conversely, the defendant may have fulfilled his statutory duty but nevertheless be liable for negligence because the statute is not inconsistent with a common law duty broader in extent. (8-003)  **As mentioned above (#6, §38), a claimant can bring parallel claims for breach of common law duty of care and breach of statutory duty. You were told to tag §38 where, following a claim for breach of statutory duty, the court discusses whether the statute gave rise to civil liability. You should tag §14 where the court decides that it *was* Parliament’s intention for the statute to give rise to civil liability, and the court goes on to discuss whether the defendant was actually guilty of a breach of statutory duty.** | **US cases only:**  **Tag §14 where, in deciding whether the defendant’s conduct was negligent, the court discusses whether the defendant has violated a statutory duty.**  **English cases:**  **Tag §14 where, in the context of a claim for a breach of statutory duty, the court discusses whether the defendant actually breached that statutory duty. The court will consider, for instance, whether the duty was owed to the claimant, the scope of the duty, the fact that the injury must be of a kind which the statute was intended to prevent, the content of the obligation, etc.** |
|  | **§ 15 Excused Violations**   1. An actor’s violation of a statute is excused and not negligence if: 2. (a) the violation is reasonable in light of the actor’s childhood, physical disability, or physical incapacitation; 3. (b) the actor exercises reasonable care in attempting to comply with the statute; 4. (c) the actor neither knows nor should know of the factual circumstances that render the statute applicable; 5. (d) the actor’s violation of the statute is due to the confusing way in which the requirements of the statute are presented to the public; or 6. (e) the actor’s compliance with the statute would involve a greater risk of physical harm to the actor or to others than noncompliance.   **Comment:**  Negligence per se is a doctrine that has always been applied only to “unexcused” statutory violations. It is essential, then, to elaborate the relevant categories of excuses. The excuses recognized by this Section temper what would otherwise be the severity of negligence per se and also reintroduce a significant role for jury assessments in negligence per se cases. (p 176)  **English law:**  **There is no equivalent of §15 in English law, because there is no ‘negligence per se’ doctrine under English law.** | **US cases only:**  **§15 sets out the exceptions to §14. Therefore, tag §15 where the court discusses whether the defendant’s violation of a statute was ‘excusable’ or not. Tag the relevant subsection(s) of §15 that comes under discussion.** |
|  | **§ 16 Statutory Compliance**   1. (a) An actor’s compliance with a pertinent statute, while evidence of nonnegligence, does not preclude a finding that the actor is negligent under [§ 3](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=211209&cite=REST3DTORTSPEHS3&originatingDoc=I82c70b1cdc1611e2ac56d4437d510c12&refType=DA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) for failing to adopt precautions in addition to those mandated by the statute. 2. (b) If an actor’s adoption of a precaution would require the actor to violate a statute, the actor cannot be found negligent for failing to adopt that precaution.   **English law:**  The English law seems to follow §16(a), in that compliance with a statutory duty does not preclude a finding of negligence under common law.  **However, there does not appear to be an equivalent of §16(b) in English law.** | **US and English cases:**  **Tag §16(a) where, in deciding whether the defendant’s conduct was negligent, the court discusses whether the defendant has complied with statutory duty.**  **US cases only:**  **§16(b) is an exception to §16(a). Tag §16(b) where, in deciding whether the defendant’s conduct was negligent, the court considers whether adopting precautions extraneous to a statutory duty would in itself violate a statute.** |
|  | **§ 17 Res Ipsa Loquitur**   1. The factfinder may infer that the defendant has been negligent when the accident causing the plaintiff’s harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member.     **English law:**  It is also open for a claimant to rely on the doctrine of res ipsa loquitur to show negligence. | **Tag §17 if, in considering whether the defendant’s conduct was negligent, the court considers the doctrine of res ipsa loquitur.** |
|  | **§ 18 Negligent Failure to Warn**   1. (a) A defendant whose conduct creates a risk of physical or emotional harm can fail to exercise reasonable care by failing to warn of the danger if: 2. (1) the defendant knows or has reason to know: (a) of that risk; and (b) that those encountering the risk will be unaware of it; and 3. (2) a warning might be effective in reducing the risk of harm. 4. (b) Even if the defendant adequately warns of the risk that the defendant’s conduct creates, the defendant can fail to exercise reasonable care by failing to adopt further precautions to protect against the risk if it is foreseeable that despite the warning some risk of harm remains.     **English law:**  Based on the English common law principles, it appears that the English law would follow §18 of the US Restatement. | **Tag §18(a) if the court discusses whether the defendant’s failure to warn was a breach of duty to exercise reasonable care.**  **Tag 18(b) where, though the defendant has adequately warned of the relevant risks, the court considers whether the defendant should have adopted further precautions to protect against those risks.** |
|  | **§ 19 Conduct That Is Negligent Because of the Prospect of Improper Conduct by the Plaintiff or a Third** **Party**   1. The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party.     **Comment:**  §19 differs from §41, because §41 concerns cases where the defendant’s omissionwas instrumental in a third party causing some harm, whereas §19 concerns cases where the defendant’s act was instrumental in a third party causing some harm.  **Illustration:**     * Judy loans her car for the evening to her friend, Grant, who needs the car for social purposes. Judy knows that Grant’s driver’s license was suspended a month previously on account of repeated instances of reckless driving. In the course of the evening, Grant drives the car negligently, and injures Eugene, a pedestrian. A jury can find that Judy was negligent in loaning or entrusting her car to Grant.   **English law:**  English law can also find a defendant guilty of negligence in such cases. | **Tag §19 where,**  **in deciding whether the defendant’s conduct was negligent, the court discusses whether the defendant’s act permitted the improper conduct of the claimant or a third party.**  **Note that if the defendant’s conduct permits the improper conduct of a claimant, the claimant may nonetheless be guilty of contributory negligence.**  **§19 differs from §41, because §41 concerns cases where the defendant’s omissionwas instrumental in a third party causing some harm, whereas §19 concerns cases where the defendant’s act was instrumental in a third party causing some harm.** |