
102.11 NEGLIGENCE ISSUE—DEFINITION OF COMMON LAW NEGLIGENCE.

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]¹ A person's failure to use ordinary care is negligence.²

¹ *Pinyan v. Settle*, 263 N.C. 578, 582, 139 S.E.2d 863, 866 (1965); *Barnes v. Caulbourne*, 240 N.C. 721, 725, 83 S.E.2d 898, 901 (1954).

² “The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence.” *Williamson v. Clay*, 243 N.C. 337, 343, 90 S.E.2d 727, 731 (1956), quoting *Council v. Dickerson's, Inc.*, 233 N.C. 472, 474, 64 S.E.2d 551, 553 (1951). *But see Stacy v. Jedco Const., Inc.*, 119 N.C. App. 115, 120, 457 S.E.2d 875, 879 (1995) (citing 57A Am. Jur.2d *Negligence* § 954 (1989) (now 57B Am. Jur.2d *Negligence* § 863 (2018) for the general principle that “one who is so insane or devoid of intelligence as to be totally unable to apprehend danger and avoid exposure to it is not a responsible human agency and cannot be guilty of contributory negligence.”) As contributory negligence is merely primary negligence committed by the plaintiff, see *Meinck v. City of Gastonia*, ___ N.C. App. ___, ___, 798 S.E.2d 417, 423 (2017), this general principle as to contributory negligence applies to primary negligence as well.

However, a different rule applies where the person whose conduct is in question has diminished mental faculties not amounting to insanity or total incompetence. *Stacy*, 119 N.C. App. at 120, 457 S.E.2d at 879. Rather than being held to the objective reasonable person standard, such a person is “held only to the exercise of such care as ... a person of like mental capacity under similar circumstances.” *Id.* The burden is on the person claiming the lack of mental capacity to show that a “specific ‘diminished mental capacity’” rendered him unable to perceive and avoid a particular harm. *Proffitt v. Gosnell*, ___ N.C. App. ___, ___, 809 S.E.2d 200, 208 (2017).

